

April 2021

CJEU's ruling on the VAT rate applicable to the sales of meals ready for immediate consumption

On 22 April 2021, the Court of Justice of the European Union pronounced itself as to whether the sale, in various ways, of ready-to-eat dishes and meals, falls within the category of 'restaurant and catering services' or whether it should be qualified as a supply of goods (i.e. prepared meals and dishes), and, consequently, whether – in view of the laws in force in Poland till 30 June 2020 – it was subject to the VAT rate of 8 or 5 percent.

CJEU's ruling confirmed that in order to make a distinction between service provision and supply of goods, the predominant element of a transaction must be determined on the basis of the consumer's point of view. Where the end customer chooses not to benefit from the resources made available by the seller to accompany the consumption of the food supplied, it must be concluded that no support services accompany the supply of that food, and the 5 percent VAT rate should be applied.

Supply of ready-to-eat dishes or a catering service?

The case at hand related to a company selling ready-to-eat meals and dishes. The meals and dishes were prepared on the premises and could be served hot or cold and were either consumed on the premises or taken away by the customers. The products were sold either inside the restaurant, from the restaurant's outdoor counters or inside shopping centres in designated restaurant

areas. Consumers could take their meals away or choose to consume them in a designated shopping centre area or on the restaurant's premises.

The company treated this kind of sales as a supply of goods, in this case being ready-to-eat meals and dishes, to which it applied a reduced 5 percent VAT rate. However, as a result of a tax audit carried out, tax authorities stated that the company's activities should be classified as 'catering services', subject to the VAT rate of 8 percent.

Request for a preliminary ruling

As a result of the appeal lodged by the company, the case was brought before the Regional Administrative Court in Gliwice, which upheld the tax authorities' decision. The RAC's judgment was contested by the company and eventually brought before the Supreme Administrative Court, which decided to ask CJEU for a preliminary ruling.

The inquiry made by the court was whether the concept of a 'restaurant service' covers the sale of prepared dishes in a situation where the seller makes available to the buyer the infrastructure which enables him or her to consume the purchased meal on the premises, however there is no specialized waiter service, the ordering process is simplified and partly automated, and the customer's ability to customize the order is limited. Additionally, the SAC asked whether the way in which the dishes are prepared and the fact that the client has the opportunity to use the infrastructure which enables him

or her to consume the purchased meal should be decisive in determining the dominant element of the activities.

CJEU's ruling

In CJEU's opinion, in the case of a complex transaction, consisting of a series of closely linked elements and acts which objectively form a single inseparable economic transaction, in order to determine whether that transaction is to be classified as a supply of goods or services, account must be taken of all the circumstances in which that transaction takes place in order to ascertain its characteristic and predominant elements. According to the Court, the predominant element must be determined from the point of view of the average consumer and having regard, in the context of an overall assessment, to the importance of the elements of the supply of services compared to those of a supply of goods.

The Court has held that restaurant transactions are characterized by a bundle of elements and acts, of which the provision of food is only one component. Yet, when the supply of food is accompanied only by the provision of rudimentary facilities, allowing only a limited number of customers to consume on the premises, which requires only negligible human intervention, those elements constitute only 'minimal support services' which are not such as to alter the predominant character of the main service, namely that of a supply of goods.

For classifying sale of food as a restaurant service, factors such as the presence of waiters, the existence of a service consisting, in particular, in the transmission of orders to the kitchen, the subsequent presentation of the dishes and their service to the customers at the table, the existence of enclosed rooms at an appropriate temperature specially dedicated to the consumption of food, or the presence of cloakrooms and toilets and the provision of crockery, furniture and cutlery, must be taken into account. The application of those criteria must be combined with consideration of the consumer's choice to benefit from services related to the supply of food or drink, which will be presumed on the basis

of the method of sale of the meal for immediate consumption. Where the consumer chooses not to benefit from the material and human resources made available, those resources are not decisive for them. Therefore, in that case, it must be concluded that no support services accompany the supply of food or drink and that the transaction in question must be qualified as a supply of goods.

Consequences

In the CJEU's ruling it was confirmed that if for the consumer the predominant element of the transaction consisted in purchasing a meal and not consuming it using the infrastructure or the material and human resources made available

by the supplier, in view of the laws in force in Poland till 30 June 2020, the transaction should be classified as a supply of goods covered by a reduced VAT rate of 5 percent, applicable to ready-to-eat meals and dishes.

The ruling resolves a long-standing dispute between the Polish catering industry and the tax authorities regarding VAT taxation of the sale of ready-to-eat meals and dishes.

If you would like to learn more about the issues discussed, please do not hesitate to contact us.

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