
ANALYSIS OF CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN MATTERS CONCERNING THE DEDUCTION OF VALUED ADDED TAX IN THE EUROPEAN UNION

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Annotation: Since the adoption of the system of value added tax in 1960's and 1970's by states forming European Communities, the right of deduction of input tax has formed a fundamental part of the mechanism of value added tax. Despite its apparent simplicity this right raises many questions and is a subject of various interpretations by taxpayers as well as by tax authorities of the Member States. From this reason, deduction of input tax has been an issue often resolved by the Court of Justice of the European Union, whose decisions have been shaping the legislation on VAT to a significant extent. Therefore, studying the case law of ECJ in this area is of great importance for academics as well as for legal practitioners and despite the vast amount of its decisions concerning the right of deduction, exploring the correct interpretation of this right can be considered to be a never-ending story.

Keywords: value added tax, right of deduction, abuse of the right of deduction, proportional deduction, chargeable event, chargeability of VAT, case law of ECJ concerning the right of deduction of input VAT.

INTRODUCTION

Value added tax is a major source of revenue for Member States of the European Union, and its importance is still growing.¹ Since the adoption of the *Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources 70/243/ECSC, EEC, Euratom*, the percentage of the national revenue coming from collected value added tax has become a so-called third source of financing the budget of

¹ The proportion of VAT on gross domestic product of Member States increased between the years 1995 and 2007 from 6,8 % to 8,0 %. Široký, J.: *Daně v Evropské unii*. Praha: Linde, 2010, p. 119.

European Communities (EU)² and therefore VAT is also a major source of funding the activities of the European Union itself.

However, VAT as a type of indirect turnover tax at the same time constitutes a potential barrier for the creation of the internal market. Therefore VAT legislation has been subject to frequent harmonization efforts of the European Communities, respectively the European Union since its first introduction by *Council Directive 67/227/EEC on the harmonization of the laws of Member States concerning turnover taxes*.³ Despite achieving a high degree of harmonization of VAT at EU level, the interpretation of the Directives (particularly the groundbreaking *Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment*, which was replaced by *Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax*) is an issue, which must still often be resolved by the Court of Justice of the European Union, whose preliminary rulings actually shape the VAT legislation.

In Slovakia the value added tax belongs to one of the most important sources of revenue for the state budget, as indicated by an economic analysis prepared by the Institute of Financial Policy of the Ministry of Finance of Slovak Republic in March 2012. This analysis, however, also points to the fact that in recent years the growth of VAT revenue has not corresponded to the increase of the macroeconomic base, which may possibly be, despite the absence of a comprehensive analysis in this area, attributed to an increase of tax evasion.⁴

For all the above reasons, adequate attention should be paid to the legislation concerning VAT, in particular to the provisions that can be exploited for illegal reduction of the tax burden and thus VAT revenue to the state budget, and hence to the EU budget. Legal institute, which is easily abused and often used for tax evasion, constitutes an inherent feature of VAT and that is the right of deduction of input tax.

THE GENERAL LEGAL FRAMEWORK OF THE RIGHT OF DEDUCTION

² However, only since 1979 has this revenue been paid to the budget of European Communities (EU). Široký, J.: *Daně v Evropské unii*. Praha: Linde, 2010, p. 36.

³ The aim of the directive was to replace a cumulative turnover tax that had been applied by EU Member States (except for France, which had been applying VAT since 1954) by value added tax. A cumulative turnover tax as a multi-stage tax led to multiple taxation of the entire price of the same goods, and that resulted in different tax burdens borne by the same goods. The system of a cumulative turnover tax was therefore not suitable for the development of international trade. The VAT system is in terms of international transactions neutral and therefore better suits the needs of the internal market. Široký, J.: *Daně v Evropské unii*. Praha: Linde, 2010, p. 117.

⁴ Novýsedlák, V. – Palkovičová, J.: *Odhad straty príjmov z dane z pridanej hodnoty*. Ekonomická analýza 25. Inštitút finančnej politiky. Ministerstvo financií SR, March 2012, p. 1.

The right of deduction of input tax is an essential element of the system of value added tax, which prevents the accumulation of VAT imposed in the economic chain, which goods are going through. Starting with the production of certain goods, VAT is charged and collected at each stage of the chain, that is – at any resale of the goods until it is sold to the ultimate consumer. However, the right of deduction allows individual businesses to deduct from their tax liability (output VAT) VAT charged by its suppliers (input VAT). For this reason, the impact of VAT for VAT taxable persons entitled to deduct the input VAT, is (usually) neutral (*C 15/81 Gaston Schul, Bakcsi C-415/98, C-323/99 Fischer und Brandenstein*).⁵

The right of deduction is governed by *Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax* (hereinafter referred to as 'the VAT Directive') in Title X in Articles 162 to 192, which were transposed into the Slovak statute *zákon č. 222/2004 Z.z. o dani z pridanej hodnoty* (statute no. 222/2004 on the value added tax, hereinafter referred to as "the VAT Act") by provisions § 49 to §55. The exercise of the right of deduction is subject to certain conditions which must be cumulatively met. These conditions can be divided into personal, material and formal.

Personal criterion can be derived from provision § 49 of the VAT Act, which provides that a *taxpayer*, who is a person registered for VAT according to § 4-6 of the VAT Act, has the right to deduct an input tax in respect of goods or services.⁶ An occasional supply of a new means of transport from Slovakia to another Member State forms an exception to this rule and in that case *any person* (including a non-business individual) selling a new means of transport to another Member State is entitled to deduct VAT.⁷ For this purpose, the person is a taxable person, although he/she does not acquire the status of a taxpayer.⁸

Material condition of the right of deduction is laid down in the provision § 49 sec. 1 of the VAT Act (and in a similar provision of Art. 167 of the VAT Directive), which states that the right of deduction shall arise at the time the deductible tax becomes chargeable. Thus, in

⁵ Berger, W. – Kindl, C. – Wakounig, M.: *Směrnice ES o dani s přidané hodnoty*. Praha: 1. VOX - Nakladatelství, 2010, p. 469.

⁶ A taxable person registered under § 7 and 7a of the VAT Act is not referred to as a taxpayer and therefore this person is under Slovak law not entitled to a deduction, although he/she is obliged to pay VAT.

⁷ Provision § 52 of the VAT Act. In this case, the deduction is governed by a special regime - the seller does not deduct the sum equal to the difference between the input VAT paid on the purchase of the means of transport and the output VAT collected when it is sold to another Member State, because the output VAT is not charged to the price of a new vehicle which is being sold into another Member State (output VAT "does not exist" in this case) and the buyer pays VAT in his/her Member State according to the rate set by the law of the Member State of the buyer.

⁸ Provision § 3 sec. 5 of the VAT Act.

the absence of a chargeable event, the right of deduction cannot arise, because that provision of the Act binds the date of a rise of the right of deduction to the date when the tax becomes chargeable.⁹ The chargeable event, however, may not necessarily always occur on the part of the person claiming the tax deduction, but can occur either on the part of the *supplier* of goods or services, who charges VAT to the price of goods (services) and is obliged to pay it to the state (regardless of whether he received it from the buyer of the goods or recipient of the services, since generally VAT becomes chargeable on the day of the supply of goods or services and not at the time of payment of the price of goods or services and regardless of the date of issuing the invoice),¹⁰ or may occur on the part of the *recipient* of goods (services) in cases when the tax liability is transferred from the supplier to the recipient and the recipient must carry out so-called „self-taxation“ (in Slovak „samozdanenie“, e. g. in cases of intra-Community acquisition of goods) in accordance with the provision § 69 sec. 2 and 3, 6, 7, 9 to 12 of the VAT Act.¹¹ The relation between the chargeability of the deductible tax and the right of deduction is in more detail set in provision to § 49 paragraph. 2 points a) to d) of the VAT Act.

In connection with determining the time when the right of deduction arises, it is necessary to mention so-called “*oddanenie*” enshrined in the provision of § 55 sec. 2 and sec. 3 of the VAT Act, under which, subject to other conditions related to the deduction generally, the tax attributable to the assets acquired by a taxable person before the day of registration for VAT, or before the date the taxable person becomes a taxpayer, may also be deducted (in case of stocks in its entirety and in case of depreciable or non-depreciable assets only if the property was not included in the tax expenditure under the Act No. 595/2003 on Income Tax (zákon č. 595/2003 Z. z. o dani z príjmov), respectively in case of depreciation the tax is reduced by the proportion corresponding to the tax depreciation) and that is even if the property exists in a modified form (e.g. it is built-in, processed), if it is included in the taxable

⁹ Under Art. 66 of the VAT Directive, Member States may depart from this principle and can make the right to deduct VAT dependent upon the time when the payment is actually received. Slovak VAT Act, however, took the "principle established entitlements", which also applies to the time at which the obligation to pay tax on the part of the provider of goods or services arises. (Article 63 of the VAT Directive). Berger, W. – Kindl, C. – Wakounig, M.: *Směrnice ES o dani s přidané hodnoty*. Praha: 1. VOX - Nakladatelství, 2010, p. 470.

Under the provisions of § 19 sec. 1 and sec. 2, sec. 4 of the VAT Act VAT is chargeable when goods or services are supplied, however, if the payment is received before the delivery of goods or services, the tax is chargeable at the time of the date of receipt of the payment. Provisions § 19 to 21 contain different exceptions from this basic principle of determining they chargeable event, for example in cases of supply of goods through vending machines, in cases of sending or transporting goods to a third country, in cases of the acquisition of goods from another member state, of in cases of importation of goods and the like.

¹⁰Provisions § 19 to 21 of the VAT Act.

¹¹ It should be added that the right of deduction arises also in cases of payment of duty to the customs authority when goods are imported. Provision § 49 sec. 2 d) of the VAT Act.

business property after the VAT registration. Therefore, the taxpayer does not have the right of deduction if he sold the property before the day of registration. The same applies to the person who submitted an application for late registration.¹²

Another material criterion which must be fulfilled in order to realize the right of deduction is the condition of using the goods or services, for which a taxpayer claims a deduction, *for the supply of goods and services as a taxpayer*, i.e. for *the performance of economic activity*, respectively *business*. This applies even if the goods and services are used for doing business abroad, should the tax be deductible if the activities were carried out in Slovakia.¹³ If the taxpayer uses *the depreciable* property, in case of which he wants to deduct the tax, *also for other purposes than business purposes*, for example for his personal use or needs of his employees, he can decide whether to exercise the right to deduct only proportionately (then the portion of deducted input tax corresponds to the proportion of use of goods for business purposes) or whether to opt for a more complicated procedure and exercise the right to deduct in full, in which case under provision § 8 sec. 3 and § 9 sec. 2 of the VAT Act the use of the property for non-business purposes is considered to be a supply of goods or services for consideration, from which the taxpayer has to pay VAT on a regular basis, although it is provided free of charge (e.g. to employees).¹⁴ The exception to the right of full deduction for acquired depreciated assets used for other purposes than business purposes forms from January 1, 2011 *tangible fixed assets* in accordance with § 54 sec. 2 subsec. b) and c) of the VAT Act (e.g. a building, an apartment, commercial premises), in case of which the taxpayer may deduct only the proportion of the tax corresponding to the scope of use of the property for business activities and cannot opt for a full deduction.¹⁵ Similarly, even in case of use of received services or property, which is *not amortized*, also for other than business purposes, the taxpayer has a right only to a proportional deduction. Special arrangements apply to deduction of tax in case of the purchase of fuel - if the taxpayer can demonstrate that the motor vehicle is used only for business purposes, he may apply full deduction; but if he cannot prove that, he may apply tax deduction only up to a maximum lump expenses pursuant to Act No. 595/2003 on Income Tax, that is up to 80%.¹⁶

¹² Provision § 55 sec. 3 of the VAT Act.

¹³ Provision § 49, sec 2 and sec. 6 of the VAT Act. Special provisions apply in the event of insolvency – compare § 49 sec. 8 of the VAT Act.

¹⁴ Provision § 49 sec. 5, § 8 sec. 3, § 9 sec. 2 of the VAT Act.

¹⁵ Provision § 49a of the VAT Act is a transposition of Art. 168a of the VAT Directive.

¹⁶ Zuziková, A.: *Zákon o dani z pridanej hodnoty s komentárom*. In: Poradca 2011/5. Žilina: Poradca, 2011, p. 130. Provision § 49 sec. 5 of the VAT Act.

Another material condition which has to be fulfilled is that the deduction of input tax cannot be applied in respect to goods and services used for the supply of goods and services that are *exempt from tax* under § 28 to 42 of the VAT Act (with the exceptions set out in § 49 sec. 3 – under certain conditions – insurance and financial services, supply and commission the supply of investment gold).¹⁷ Proportional deduction applies in cases of goods and services used partly to supply goods and services that are not exempt and partly to supply those that are exempt.¹⁸ The procedure of proportional deduction is laid down in § 50 of the VAT Act.

In addition to goods and services exempt from the tax, the prohibition of tax deduction applies also to purchase of goods and services *for the purposes of entertainment and amusement* (for example, if the taxpayer invites his business partner for lunch in order to achieve a favorable business outcome) and in so-called *transitional items* pursuant to § 22 sec. 3 of the VAT Act (these are the cases when a taxable person as an agent for the buyer orders goods or services).¹⁹ The provisions of § 49 sec. 7 are the realization of the right guaranteed by Member States under the second subsec. of Art. 176 of the Directive 2006/112/EC to limit the right of deduction.²⁰

Formal material conditions are contained in the provision § 51 of the VAT Act, which lays down the time line of the right of deduction and the requirements which have to be met in respect of necessary documents (invoice, proof of the transfer of goods etc.).

At the end of this brief characteristics of Slovak VAT legislation it has to be noted that the taxpayer may deduct only a Slovak input VAT, i.e. VAT invoiced by a different taxpayer to taxable supplies of goods or services in Slovakia, or VAT charged by the taxpayer himself (e.g. intra-community acquisition of goods), or paid to the customs authority in the country in case of imported goods.

INTERPRETATION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN MATTERS CONCERNING THE RIGHT OF DEDUCTION

The above mentioned provisions governing deduction of input VAT often lead in practice to ambiguous interpretations by taxpayers and also by tax authorities themselves.

¹⁷ Provision § 49 sec. 3 of the VAT Act.

¹⁸ Provision § 49 sec. 4 of the VAT Act.

¹⁹ Provision § 49 ods. 7 of the VAT Act. Zuziková, A.: *Zákon o dani z pridanej hodnoty s komentárom*. In: Poradca 2011/5. Žilina: Poradca, 2011, p. 131.

²⁰ Zuziková, A.: *Zákon o dani z pridanej hodnoty s komentárom*. In: Poradca 2011/5. Žilina: Poradca, 2011, p. 131.

Given that the VAT Act is the transposition of the European Directive on VAT, the matters of interpretation may be relied upon the decisions of the Court of Justice of the European Union in matters of preliminary questions raised by national courts on the proper interpretation of the VAT Directive. Regarding the above conditions that must be met to realize the right of deduction couple of the most important decisions of ECJ can be mentioned.

In particular, connecting the date when the right of deduction arises with the date when the deductible tax becomes chargeable raises many questions. The right to deduct tax generally arises already at the time of delivery of goods or services, if the entrepreneur intends to use the product (or a service) for his business activities, even though it is not used for this purpose yet. The principle of substantive allocation of input tax to taxable outputs follows from this fact, depending on the purpose for which the goods or services are received, i.e. whether the goods or services are received for carrying out economic activities subject to output tax.²¹ In case of starting a business incurring capital expenditure in order to pursue this activity, the right to deduct the input tax arises when the tax becomes chargeable, regardless of whether an economic activity has actually started (*C-37/95 Ghent Coal Terminal*, *C-147/98 Gabalfrisa*).²² An objective intent is therefore the key factor, which means that even in cases where goods are destroyed by force majeure, and therefore will not serve to conduct a transaction subject to taxation, the right of deduction generally persists.²³

The right of deduction of an input tax, which was paid in connection with transactions in relation to performance of planned economic activity may be applied even in cases where it is already known to the tax authority that the planned economic activity will never be carried out (*C-400/98 Breitsohl*).²⁴ This is this case of bad investments, for example a case, when a particular person orders an elaboration of a study to assess whether a certain place is busy enough for opening a business there and the study shows that opening a business would not make sense on this ground, so no economic activity in connection with this transaction will eventually be carried out. Yet from the perspective of that particular person the economic activity was assumed to have started.²⁵

²¹ Zuziková, A.: *Zákon o dani z přidané hodnoty s komentářem*. In: Poradca 2011/5. Žilina: Poradca, 2011, p. 128.

²² Berger, W. – Kindl, C. – Wakounig, M.: *Směrnice ES o dani s přidané hodnoty*. Praha: 1. VOX - Nakladatelství, 2010, p. 472. *C-37/95 Ghent Coal Terminal*, par. 17, *C-147/98 Gabalfrisa*, par. 47.

²³ Berger, W. – Kindl, C. – Wakounig, M.: *Směrnice ES o dani s přidané hodnoty*. Praha: 1. VOX - Nakladatelství, 2010, p. 472.

²⁴ Berger, W. – Kindl, C. – Wakounig, M.: *Směrnice ES o dani s přidané hodnoty*. Praha: 1. VOX - Nakladatelství, 2010, p. 473. *C-400/98 Breitsohl*.

²⁵ Berger, W. – Kindl, C. – Wakounig, M.: *Směrnice ES o dani s přidané hodnoty*. Praha: 1. VOX - Nakladatelství, 2010, p. 473.

The fact that the right of deduction arises at the time when the tax becomes chargeable, which may not necessarily coincide with the date of payment for the price of goods or services and which may not even be met on the provider's performance, leads to situations in which it was also necessary to seek ECJ's view. From its decisions the case *C-414/10 Véleclair SA* may be mentioned, in which ECJ stated that the VAT Directive does not allow Member States to make the right of deduction of an import tax subject to previous real payment of this tax by a taxpayer if this person is also a person entitled to perform the deduction.²⁶

In its judgment in case *C-342/87 Genius Holding* ECJ held that the right of deduction does not arise in cases when the tax is charged on the invoice improperly, for example if it is charged by a taxpayer to a transaction that is exempt from tax, i.e. when there is no obligation to apply the output tax.²⁷

In matters relating to transactions exempted under § 28 to 41 of the VAT Act the judgment *C-4/94 BLP Group PLC* is significant. In this case ECJ ruled that the right of deduction "is conditional upon necessity of direct and immediate relationship between relevant goods or services received to carry out taxable transactions and the ultimate aim pursued by the taxable person is not significant in this respect."²⁸ ECJ thus rejected the argument of BLP company, which claimed the deduction for professional services (banks, solicitors and accountants) provided to the company in connection with the sale of shares (as an activity exempt from tax), that the interpretation of the Sixth Directive is to be extensive and should include activities that are indirectly related to the taxable transactions – i.e. activities that lead to gain cash for repayment of the debt arising from the taxable transactions.²⁹

It is clear that the institute of VAT deduction is easy to use, respectively abuse not only for the purposes of tax avoidance, but also to obtain substantial financial benefit from claiming the tax from the state, which has never been paid to it. In particular, trading between EU Member States facilitates these forms of abuse due to lack of transparency in commercial transactions of business entities by tax authorities of the Member States.

²⁶ *C-414/10 Véleclair SA*, par. 35.

²⁷ Zuziková, A.: *Zákon o dani z pridanej hodnoty s komentárom*. In: *Poradca 2011/5*. Žilina: Poradca, 2011, p. 127.

²⁸ Zuziková, A.: *Zákon o dani z pridanej hodnoty s komentárom*. In: *Poradca 2011/5*. Žilina: Poradca, 2011, p. 128.

²⁹ Zuziková, A.: *Zákon o dani z pridanej hodnoty s komentárom*. In: *Poradca 2011/5*. Žilina: Poradca, 2011, p. 128.

In assessing the boundaries between a legal effort to achieve the lowest possible tax liability and an abuse of deduction mechanism the following ECJ's case is important – *C-255/02 Halifax*. In this case an artificial arrangements were created by concluding various agreements between the parent company of Halifax and its subsidiaries with significant performance provided de facto by an independent party, and ultimately to the benefit of the parent company. Concluding agreements between Halifax and its subsidiaries, rather than just concluding the contract directly between Halifax and suppliers - an independent company, however, resulted in a significant over-deduction for each of the related companies. In its decision, ECJ primarily expressed the view that the terms used in the Sixth VAT Directive, which define taxable transactions subject to VAT, such as supply of goods, supply of services, taxpayers, and the like must be considered in themselves, on the basis of objective criteria on which these concepts were based whatever the purpose or results of these activities.³⁰ According to ECJ making the tax authorities obliged to proceed with an investigation to determine the intention of the taxpayer, except in exceptional cases, is contrary to the objectives of the common system of VAT to ensure legal certainty.³¹ Objective criteria are not satisfied in any way in the event of fraud, as in the case of false tax returns and false invoicing.³²

According to the ECJ the question whether the transactions are made only for the purpose of obtaining a tax advantage is irrelevant in determining whether there is a supply of goods or services and therefore an economic activity within the meaning of the Sixth VAT Directive. In deciding whether in such cases Community law is abused, ECJ pointed out that according to settled case-law, a person cannot fraudulently rely on Community legal norms or abuse them, and this principle of prohibiting abusive practices also applies to VAT. What is more, the fight against tax evasion, tax avoidance and abuse is an objective stated by the Sixth VAT Directive.³³ On the other hand, Community legislation must also provide legal certainty and its application must be predictable, especially if it concerns significant financial costs of an entrepreneur.³⁴ In addition, ECJ pointed out in his obiter dicta that the Sixth Directive does not oblige taxpayers to choose from several possible business transactions the one, which involves paying the highest tax; by contrast, taxpayers may choose to structure their business

³⁰ *C- 255/02 Halifax*, par. 53, 55, 56, 58.

³¹ *C- 255/02 Halifax*, par. 57.

³² *C- 255/02 Halifax*, par. 59.

³³ *C- 255/02 Halifax*, par. 68-71.

³⁴ *C- 255/02 Halifax*, par. 72.

so as to limit as much as possible their tax liability.³⁵ Abuse of the right of deduction can therefore be found only in those cases where, despite formal compliance with the conditions set out in the Sixth VAT Directive, it is clear that, based on objective criteria, the main objective of a transaction is to obtain a tax advantage, granting of which would be contrary to the purpose of this Directive, which is first of all the principle of fiscal neutrality.³⁶ ECJ has left the decision of whether in a given case there is an abuse of law, to the national court, which may take into account the purely artificial nature of these transactions, as well as the legal, economic and / or personal links between the businesses planning to reduce their tax liability.³⁷ In order to ensure the correct levying and collection of taxes and the prevention of fraud, Member States may take measures, which must be proportionate and therefore may not go beyond what is necessary to achieve those objectives.³⁸ To determine the correct amount of tax deduction the whole situation should be re-classified without transactions representing the abuse of right, and the tax that the taxpayer had artificially paid under the tax saving scheme, must be returned if necessary.³⁹

ECJ was dealing with the questions of an abuse of the right of deduction in many other preliminary rulings, from which a special type of frauds and most common form of tax evasion constitute so-called carousel frauds or missing trader frauds, which use the institute of VAT deduction in trade (or fictitious trade) between the EU Member States. According to the report of the Ministry of Finance of the Slovak Republic value added tax forms the largest share (73, 09%) of the estimated total loss (EUR 364 645 246.64 euros) to government budget as a result of tax frauds in 2009, and of this proportion the largest share is attributed to carousels.⁴⁰ Carousel frauds, using the VAT system in the EU, are the supplies of goods, which follow in a series of a chain, and in one place of the chain of the taxpayers the tax is not paid and the relevant economic operator ceases to exist, or cannot be traced.⁴¹ Carousel frauds must take place in at least two EU Member States. Often entrepreneurs involved in carousels may not even know that they are involved in the chain of carousel frauds. ECJ was aware of this fact when it ruled in *Joined Cases C-354/03 Optigen Ltd, Fulcrum Electronics Ltd C-355/03 and C-484/03 Bond House Systems Ltd*, that the right of deduction of input VAT of a taxpayer, who carried out the supply, is not affected by the fact that in the chain of deliveries

³⁵ *C- 255/02 Halifax*, par. 73.

³⁶ *C- 255/02 Halifax*, par. 74, 80, 86.

³⁷ *C- 255/02 Halifax*, par. 81.

³⁸ *C- 255/02 Halifax*, par. 92.

³⁹ *C- 255/02 Halifax*, par. 94, 96.

⁴⁰ http://www.kpmg.com/SK/en/Documents/TaxNews_June2011.htm

⁴¹ Šíroký, J.: *Daně v Evropské unii*. Praha: Linde, 2010, p. 146.

there is another supply, prior or subsequent to the transaction carried out by the person that is affected by fraud in the particular case, if the person did not know or could not know about the fraud.⁴² Conversely, if the person knew or ought to have known, that his/her transaction is involved in the performance associated with evasion of VAT, even negligently, the right to deduction may be denied regardless of whether that person made profit from the subsequent sale (*C-439/04 Kittel*).⁴³ ECJ ruled that where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, Article 17 of Sixth Directive 77/388 „precludes a rule of national law under which the fact that the contract of sale is void – by reason of a civil law provision which renders that contract incurably void as contrary to public policy on the ground that the basis of the contract is unlawful by reason of a matter which is attributable to the seller – causes that taxable person to lose the right to deduct the value added tax he has paid. It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of value added tax or to other fraud. By contrast, where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of value added tax, it is for the national court to refuse that taxable person entitlement to the right to deduct.”⁴⁴ The tax authority may thus not take into consideration the intent of other person than the relevant taxpayer. Taxpayers who undertake all measures which may be expected from them to be taken in order to avoid frauds within the transactions, should be able to rely on the legality of these transactions without risking to lose their right of deduction of input tax.

A similar issue was recently resolved by the ECJ in a similar way in case C-80/11 Mahagében kft and C-142/11 Péter Dávid where the procedure of Hungarian Tax Authorities was questioned. ECK decided that the VAT Directive precludes “a national practice whereby the tax authority refuses a taxable person the right to deduct, from the value added tax which he is liable to pay, the amount of the value added tax due or paid in respect of the services supplied to him, on the ground that the issuer of the invoice relating to those services, or one of his suppliers, acted improperly, without that authority establishing, on the basis of objective evidence, that the taxable person concerned knew, or ought to have known, that the

⁴² Široký, J.: *Daně v Evropské unii*. Praha: Linde, 2010, p. 147.

⁴³ Berger, W. – Kindl, C. – Wakounig, M.: *Směrnice ES o dani s přidané hodnoty*. Praha: I. VOX - Nakladatelství, 2010, p. 477.

⁴⁴ *C-439/04 Axel Kittel*.

transaction relied on as a basis for the right to deduct was connected with fraud committed by the issuer of the invoice or by another trader acting earlier in the chain of supply.“ The VAT directive must be interpreted as „precluding a national practice whereby the tax authority refuses the right to deduct on the ground that the taxable person did not satisfy himself that the issuer of the invoice relating to the goods in respect of which the exercise of the right to deduct is sought had the status of a taxable person, that he was in possession of the goods in question and was in a position to supply them, and that he had satisfied his obligations as regards declaration and payment of value added tax, or on the ground that, in addition to that invoice, that taxable person is not in possession of other documents capable of demonstrating that those conditions were fulfilled, although the substantive and formal conditions laid down by Directive 2006/112 for exercising the right to deduct were fulfilled and the taxable person is not in possession of any material justifying the suspicion that irregularities or fraud have been committed within that invoice issuer’s sphere of activity.“⁴⁵

CONCLUSION

The above decisions of ECJ reflect above all the importance of respecting the right of the deduction as a fundamental part of the VAT system in respect of which legal certainty for taxpayers must be maintained. Although this institute, especially when trading between EU Member States, is easily misused for tax frauds, which traumatize all areas of economic and social life, especially by significant disruption of state budget revenues, by distortion of competition in the business sector and by investing illegally gained profits to other forms of crime, the VAT system should be, in our opinion, retained in its current form. In fighting against the tax evasion, attention should be drawn to the efficient administration of taxes, including improvements of the exchange of information between tax administrations of the Member States, as defined in the objectives of the action program Fiscalis 2013.

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ES TEISMO PRECEDENTINĖS TEISĖS ANALIZĖ, SUSIJUSI SU PRIDĖTINĖS VERTĖS MOKESČIO LENGVATA EUROPOS SĄJUNGOJE

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Santrauka

Europos Sąjungos narėms pradėjus taikyti pridėtinės vertės mokesčių sistemą 1960-1970 metais, teisė į mokesčių lengvatą tapo pagrindine pridėtinės vertės mokesčio mechanizmo dalimi. Iš kilo daug klausimų ir įvairių mokesčių mokėtojų bei ES šalių valdžios atstovų interpretacijų dėl teisės į mokesčių lengvatą. Ši problema dažnai nagrinėjama ES teisme ir teismo sprendimai žymiu mastu įtakoja įstatymų, susijusių su pridėtinės vertės mokesčiu, leidybą. Straipsnyje apžvelgiami Europos teismo dėl pridėtinės vertės mokesčio lengvatos priimti sprendimai, kurie yra labai svarbūs ir mokslininkams, ir praktikams.

Pagrindinės sąvokos: pridėtinės vertės mokesčiai, teisė į lengvatą, teisės į lengvatą pažeidinėjimai, proporcinė lengvata, pridėtinės vertės apmokestinimas

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