

# ECJ Advocate General Opines that VAT Deduction Right Can Be Limited Where a Minimum Threshold of Output Transactions Is Not Met, *Feudi di San Gregorio Aziende Agricole*, (Case C-341/22) (VAT)) – Details

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Report from Zsolt Szatmari, International VAT Manager, Switzerland

On 28 September 2023, Advocate General (AG) Anthony Michael Collins of the Court of Justice of the European Union (ECJ) opined that a national law which establishes an income threshold for classifying companies as non-operational and restricts the VAT deduction right for such non-operational companies is not contrary to EU law. In the case of *Feudi di San Gregorio Aziende Agricole SpA v. Agenzia delle Entrate* (Case C-341/22) the AG considered whether a national law aiming to tackle the abuse of law of non-operational companies by, amongst others, limiting the reimbursement of input VAT for such companies, could be contrary to the provisions of the VAT Directive. Details of the opinion are summarized below.

(a) Facts. Vigna Ottieri s.r.l. ("Vigna Ottieri") was a company established in Italy in 1996 that invested into production facilities, equipment and trademark in order to produce and sell wine. For this purpose, Vigna Ottieri leased its tangible and intangible assets to Feudi di San Gregorio Aziende Agricole SpA ("Feudi"). At that time, Feudi partially owned Vigna Ottieri.

Based on a domestic law applicable to shell companies (Law 724/1994), in 2010 the Italian tax authorities deemed Vigna Ottieri as a non-operational company and considered that the value of its output transactions subject to VAT in the tax year concerned was below the legally required threshold. Vigna Ottieri's sole revenue was originating from supplies made to Feudi with regard to the lease of tangible and intangible assets and the sale of some second-hand equipment. This revenue was disregarded by the tax authorities as they considered it related to the transfer of part of a business, which is outside the scope of VAT. A consequence of qualifying Vigna Ottieri as a non-operational company was the loss of its right to deduct input VAT. In 2012, Feudi fully acquired Vigna Ottieri.

(b) Issue. Vigna Ottieri appealed against the decision arguing that no transfer of business occurred. In 2013, the Regional Tax Court in Campania, Italy dismissed Vigna Ottieri's appeal, indicating that it can be treated as non-operational and that Vigna Ottieri had transferred part of its business to Feudi, thereby placing the transaction outside of the scope of VAT. In 2014, Feudi appealed the decision claiming that the tax authorities could not demonstrate that Feudi was carrying on the activity of Vigna Ottieri and also argued that the right to deduct VAT can only be limited in cases expressly listed by the Sixth Directive or in cases of tax evasion/avoidance. The Supreme Court of Cassation explained that Law 724/1994 regulates the VAT consequences for non-operational companies, which imply that these companies lose: (i) the right to get reimbursement of their excess VAT credit, (ii) the right to offset other liabilities with their VAT credit, (iii) the right to transfer the credit to third parties, and (iv) the VAT deduction right all

together if it fails to meet the minimal threshold for three consecutive years. However, the Supreme Court of Cassation has doubts as to whether article 30 of Law 724/1994 infringes the principles of legal certainty and the protection of legitimate expectations. The Supreme Court of Cassation decided to stay the proceeding and refer some questions regarding the compatibility of Law 724/1994 with the provisions of the VAT Directive and the right to deduct VAT to the ECJ.

(c) Advocate General's Opinion. The first question the AG investigated was whether the taxable person status of a business is impacted by the fact that it did not reach a turnover threshold expected by law. The AG referred to article 9 of the VAT Directive which defines a taxable person in the context of performing an economic activity. In this sense, the VAT Directive provides a non-exhaustive list of activities which qualify as economic activities. This list includes the exploitation of tangible and intangible assets for the purpose of obtaining income on a continuing basis. According to the AG, the term "exploitation" means a general aim to obtain income from that property, without regard to the number or value of transactions performed. However, the AG pointed out that neither the acquisitions nor the sale of an asset constitutes an exploitation, and that the simple holding of assets cannot be considered as an economic activity either. This is the underlying justification of article 19 of the VAT Directive, which gives EU Member States the option to treat the transfer of the entirety or part of the assets as out of scope of VAT. Nevertheless, this rule only applies where the transferred tangible and intangible assets constitute a unit which can carry on an independent economic activity. Therefore, the simple transfer of assets is not subject to this provision. The AG additionally highlighted that article 19 of the VAT Directive does not require the transferee to continue the same economic activity. The AG concluded that the supply of goods or services constitutes an economic activity even when the sole objective is to obtain a tax advantage. Consequently, a national rule may not make the taxable person status conditional upon the receipt of a certain level of income.

Regarding the second question, the AG reflected on whether EU Member States may impose rules such as the one in question in order to tackle tax evasion. From a VAT perspective, an abusive practice can be established when, as a result of that practice, a tax advantage is achieved which is contrary to the purpose of the underlying rule, and the essential aim of the transaction is to obtain this tax advantage. In the case at hand, Law 724/1994 sets up a presumption that a company is non-operational if it does not meet certain income criteria, but this presumption can be rebutted. The VAT deduction right can only be exercised when the acquired goods or services are used for taxable outputs. Therefore, the provision in question serves as an anti-avoidance measure with a legitimate goal, namely, to prevent non-operational companies from abusing the VAT system. Moreover, the fact that the legal presumption can be rebutted suggests that the provision is not contrary to the proportionality principle.

Finally, the AG found that the provision in question was also not contrary to the principle of legal certainty, as the consequences of the rule and the process of rebutting the legal presumption were all clearly laid down in the law.

Based on the above, the AG suggested the ECJ to answer the referred questions as follows:

"(1) Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the status of taxable person may not be refused where, in three consecutive years, the relevant transactions for VAT purposes carried out are of a value which is deemed not to be commensurate with the income which the available assets may be reasonably expected to yield.

(2) The principle of VAT neutrality and the principle of proportionality must be interpreted as meaning that they do not preclude national legislation under which the right to deduct input VAT paid on purchases or to be reimbursed such VAT or to use such VAT in a subsequent tax period may be refused where, in three consecutive tax years, the relevant transactions for VAT purposes carried out are of a value which is not deemed commensurate with the income which the available assets may reasonably be expected to yield and the taxable person concerned is unable to provide evidence of objective circumstances to explain that result. The conditions under which that evidence may be adduced must not make it virtually impossible or excessively difficult for the persons concerned to exercise the right to deduct VAT, which is a matter for the referring court to verify.

(3) The principle of legal certainty and the principle of the protection of legitimate expectations must be interpreted as meaning that they do not preclude national legislation under which the right to deduct input VAT on purchases or to be reimbursed such VAT or to use such VAT in a subsequent tax period may be refused where, in three consecutive tax years, the relevant transactions for VAT purposes carried out are of a value which is not deemed commensurate with the income which the available assets may reasonably be expected to yield and the taxable person concerned is unable to provide evidence of objective circumstances to explain that result."

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