

# ECJ Advocate General Opines That Additional Tax, Similar to VAT, Can Apply on Programme Fees: *GIS*, (Case C-249/22) (VAT)) – Details

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On 25 May 2023, Advocate General (AG) Maciej Szpunar of the Court of Justice of the European Union (ECJ) opined that from an EU VAT perspective, there is no legal objection for the Republic of Austria to impose an additional tax on programme fees to compensate the income loss linked to the VAT deduction right granted to public bodies that render broadcasting services. In the case of *BM v. Gebühren Info Service GmbH (GIS)* (Case C-249/22) AG Maciej Szpunar considered the VAT treatment of the programme fees charged by an Austrian public body which renders broadcasting services. Details of the opinion are summarized below.

(a) Facts. BM is a registered taxable person for VAT purposes in Austria and a recipient of radio and television programmes. BM is a user of broadcasting services and is located in a zone that is subject to the payment of programme fees to ORF, a public organization in charge of broadcasting contents within such zone. BM requested GIS, the public body responsible for collecting the broadcasting and programme fees, a refund concerning the VAT charged on the programming fees. After the denial of the request, BM filed a first judicial claim before the Federal Administrative Court in Austria. Finally, the controversy ended up with an appeal on a point of law before the Austrian Supreme Court.

(b) Issue. The Austrian Supreme Court decided to stay the proceedings to seek clarity on the application of the doctrine resulting from the ECJ judgment *Český rozhlas* (C-11/15) to the case at hand. The aim was to clarify whether the programme fees could be considered a consideration of broadcasting services subject to VAT, also in view of the special rule within the Austrian VAT regime (inherited from a period before the inclusion of Austria as Member State of the European Union), which allows to apply VAT on broadcasting services rendered by public bodies. See [ECJ Preliminary Ruling Request \(VAT\): GIS \(Case C-249/22\) –Verwaltungsgerichtshof Submits Referral on VAT Treatment of Public Service Broadcaster's Programme Fees \(21 June 2022\)](#).

(c) Advocate General's Opinion. The AG proposed to deal with the referred questions together, analysing firstly the nature of the programme fees. According to the AG, from a VAT point of view, the nature of a programme fee should be the same as of a broadcasting fee (the latter being the fee at issue in the case which gave rise to the ECJ judgment ruled in the case *Český rozhlas* (C-11/15)), because the differences between them are not sufficiently significant to determine that the programme fees should be seen as a consideration of broadcasting services subject to VAT. Those differences refer to: (i) the obligation to pay the programme fee is linked to the actual possibility of receiving the broadcasts transmitted by the ORF, not to the mere possession of a receiver; (ii) the amount of the programme fee is set by the ORF, not by the legislature as it occurs with the broadcasting fees; and (iii) the legal fiction established by the

Austrian legislature between the ORF and the (potential) recipients of its broadcasts at the time when the programme fee was implemented in 1966, is still recognized in the Austrian case law despite changes in the law since then.

Concretely, in accordance with the current historical and economic context, the mere disposal of a device for receiving contents within a specific territory cannot be regarded as an intention of the corresponding holder of using broadcasting services. Therefore, from a VAT perspective, there is no legal relationship between the device holders and the ORF in the framework of both parties exchanging reciprocal considerations, irrespective of the recognition by the Austrian law of an *ex lege* relationship among them and of the fact that the ORF could determine the programme fees. This also considering that the "supply of services for consideration" provided in Directive 2006/112, is an autonomous EU concept based on a legal relationship freely entered into by the parties. Hence, in the AG's opinion, the programme fee does not constitute consideration for the broadcasting services when provided by the ORF.

Nevertheless, in the AG's opinion, the above conclusion should be also confirmed by taking into consideration the applicable legal provisions. In this sense, a literal interpretation of articles 378(1) of directive 2006/112 and 151 of the Act concerning the conditions of accession of the Republic of Austria, does not lead to an idea different from the one previously exposed, as both provisions presume the existence of a supply of services (i.e. broadcasting services) subject to VAT, something that does not occur in the case of programme fees established by the ORF because their nature is the same of broadcasting fees (as observed in the context of the ECJ judgement *Český rozhlas* (case C-11/15)).

On the contrary, the AG considers that the principle of effectiveness mandates the application of a systematic and teleological interpretation, otherwise, the exception to the VAT exemption on broadcasting fees provided by Directive 2006/112 could not be applied in Austria. In other words, article 378(1) of Directive 2006/112 foresees a *stand still* clause whose objective application framework is exclusively to programme fees charged by the ORF. Notwithstanding the foregoing, the AG warns that the indirect taxation applied on programme fees based on the referred article cannot be regarded as VAT regulated under Directive 2006/112, and should be regarded as a different and additional tax recognized and implemented to compensate the income loss linked to the granting of the VAT deduction right to the public bodies rendering broadcasting services in Austria (i.e. the ORF).

In view of all of the above, the AG proposed to answer the questions referred by the Supreme Administrative Court in Austria) as follows:

"Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with Article 378(1) of that directive and Article 151(1) of the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded of 26 July 1994 and point 2(h) of Part IX of Annex XV thereto must be interpreted as meaning that the Republic of Austria is not precluded from levying a charge additional to the programme fee within the meaning of Paragraph 31 of the *Bundesgesetz über den Österreichischen Rundfunk* (Federal Law on the Österreichischer Rundfunk) in order to compensate for the loss of budgetary revenue from value added tax resulting from the right of a public service broadcaster to deduct tax paid on goods and services acquired by it for the purposes of its activities, which are financed by the proceeds of that programme fee."

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