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Overview of CJEU's Polish cases of importance in 2021

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Introduction

Lidia Adamek-Baczyńska, Partner

Dear Reader!

The year is coming to an end and it is time to wrap up.

Year 2021 was full of tax changes, most of which are going to take effect at the start of 2022. For business, then, next year will be one of implementing the changes and adjusting to the new reality.

However, the quality and pace of the reform have given rise to controversies resulting in a host of Polish cases dealt with by the Court of Justice of the European Union (CJEU) in 2021.

CJEU resolved a number of long-time doubts surrounding the interpretation of extremely important VAT issues. The most important of these are summarised below:

- applicability of reverse charge mechanism in a VAT-neutral manner where the three-month time limit for deduction of input tax has passed (case C-895/19, judgment of 18 March 2021);
- availability of the right to invoice adjustment during a tax inspection if the taxable person acted in good faith to treat his transaction in accordance with the tax authorities' approach applicable at the date of the transaction (case C-48/20, judgment of 18 March 2021);
- ban on automatic imposition of additional VAT (so-called VAT penalty) due to its incompatibility with the principle of proportionality (case C-935/19, judgment of 15 April 2021);
- availability of reduced 5% VAT on sale of meals if the consumer himself chooses whether to consume the meal away from the premises or on the premises at a restaurant or in a shopping centre using resources provided for the purpose (case C-703/19, judgment of 22 April 2021);
- no need for taxable persons to pay VAT due on purchase of fuel via ICA if the tax has not yet become chargeable as appropriate for transactions of this kind (case C-855/19, judgment of 9 September 2021).

You are warmly welcome to have a read below for details of those cases and their impact on business in Poland.

Back to the past, or VAT on intra-Community acquisitions is neutral again

Olga Palczewska-Wielińska, Manager

On 18 March 2021, many businesses involved in intra-Community acquisitions (ICA) breathed a sigh of relief. On that day CJEU ruled to the advantage of such taxable persons in a Polish case (C-895/19) and held that Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive) precludes the Polish VAT Act regulation banning the deduction of input VAT on such an acquisition in the same month in which the tax due is reported unless the tax due is accounted for within three months from the end of the month in which the tax became chargeable. While the case is concerned with intra-Community acquisitions, the court's conclusions are universally applicable and have had their bearing also on other transactions subject to the reverse charge mechanism (such as importation of services). Consequently, the treatment of such transactions has changed a lot, and to the advantage of taxable persons, too.

The issue

Article 86(10b)(2)(b) of the VAT Act was re-enacted as of 1 January 2017 to provide that a taxable person making an ICA was entitled to deduct the related input tax and output tax in the same month only on condition the output tax was reported within three months from the end of the month in which the tax became chargeable. If an ICA was reported later than that, the input tax and the output tax each had to be accounted for in a different tax return so that arrears of tax arose and interest had to be paid. In such situations, the ICA-related VAT was no longer neutral.

The dispute started when a company ("Company") received an adverse ruling after it was unable to report VAT due on its ICAs within the three-month period for various reasons (a belated invoice, a mistaken classification of a transaction, an error of person preparing VAT registers and returns). Relying on VAT Directive and the principles of neutrality and proportionality of VAT, the Company sought an official confirmation that, in the case of an ICA, it does have the right to account for input tax and output tax in the same period. However, the Polish tax administration disagreed, arguing that the three-month period imposed by the VAT Act does not restrict the right of deduction and as such is not incompatible with VAT Directive or with those principles. The matter came up for judicial review to a court which then referred it to CJEU for a preliminary ruling.

CJEU held that the underlying Polish regulations are contrary to VAT Directive. It said that the right to deduct may only be subject to the substantive conditions laid down in VAT Directive, which in the case of an ICA are that there is a connection between the person's taxable transactions and his business. Delaying the right of deduction merely due to a breach of a procedural condition (failure to report output tax within a prescribed time) shifts the burden of VAT onto the taxable person and as such is unacceptable under the directive. Moreover, as the court held, it is illogical to require the taxable person to bear the burden of VAT due on an ICA all the more so since no amount is payable to the tax authority in relation to such a transaction (reverse charge applies).

Impact on Polish taxable persons

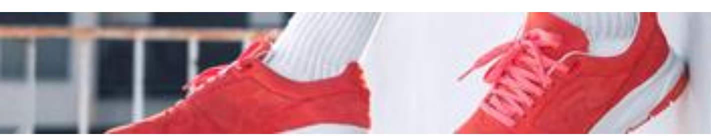
Where CJEU rules that VAT Directive precludes some national law, that law may not be applied by national tax authorities or courts. Consequently, taxable persons are not obliged to apply it, too. This means the end of the requirement that made businesses report input tax and output tax on an ICA in two different periods and pay interest because of that.

The case proved favourable also for businesses engaged in other transactions subject to the reverse charge mechanism, including importation of services. They may now rely on CJEU's judgment to report the transactions (input tax = output tax) in the month in which the tax becomes chargeable, whether the output tax is reported within three months or later.

What is more, the case may be used to apply to tax authorities for recovery of overpaid amounts as tax authorities used to follow a regulation ultimately held incompatible with VAT Directive.

Amendment to VAT Act

But that was not the end. Following CJEU's judgment, Poland implemented a package of legislative changes, called SLIM VAT 2, which repealed the rule that ICA-related input tax and output tax may be accounted for in the same month only if the three-month long stop date condition is satisfied. The same change was enacted for the other transactions subject to reverse charge. Thus, after more than four years, the underlying regulations are back to what they were before 1 January 2017. The changed law has been in force since 7 September 2021.



Invoice adjustment during a tax inspection actually is allowable

Monika Junyszek, Senior Consultant

18 March 2021 proved to be an optimistic day for Polish VAT payers. It marked the date of favourable CJEU's judgments in as many as two Polish cases: one about the treatment of ICAs reported with a delay and the other (case C-48/20) concerning bona fide invoice adjustments after commencement of a tax inspection. CJEU has given businesses arguments to use in case of disputes with tax authorities over the penalty laid down in Article 108 of the VAT Act, if their tax treatment of transactions is questioned even though they made every effort to ensure that, as at the time of the transactions, they were in compliance with applicable VAT Act regulations and/or current interpretations.

The issue

The VAT Act is silent on how to specifically treat transactions made with the use of fuel cards. Until 2011 the generally approved and consistent position was that they should be treated as chain transactions. It was not until 2012 that a different approach started to appear after Supreme Administrative Court's judgment of 14 August 2012 in case no. I FSK 1177/11, interpreting such transactions as provision of services. As of that time the VAT treatment of fuel card transactions became the bone of contention between Polish tax administration and taxable persons. Some light on the controversy was thrown by CJEU in its judgment of 15 May 2019 in case C-235/18 Vega International and by the Minister for Finance, Funds and Regional Policy in his public tax ruling dated 15 February 2021 on the proper treatment of transactions involving use of fuel cards. However, these pronouncements did not resolve all the doubts.

The case before CJEU was concerned with a Lithuanian company which provided special cards to transport firms to be used for purchasing fuel in petrol stations across Poland. Relying on the consistent approach of Polish tax authorities, the company decided that, for VAT purposes, its transactions should be treated as chain transactions that are taxable in Poland. Accordingly, the company deducted input tax charged to it by petrol stations and made sure Polish VAT was charged in its invoices for transport firms. However, the Polish tax authorities held that this was not the true picture of the actual transaction and the Lithuanian company only financed the fuel transactions made by transport firms at Polish stations while the fuel was actually purchased by those firms. Based on this treatment, the tax authorities concluded that the Lithuanian company provided VAT-exempt financial services and that, therefore, it was not entitled to deduct the tax stated in the fuel purchase invoices. Moreover, they considered that the company must pay the VAT from its sales invoices pursuant to Article 108 of the VAT Act (which requires payment of VAT charged in false invoices). The matter went up for judicial review.

CJEU held that Article 203 of Directive 2006/112 and the principles of proportionality and neutrality of VAT preclude national legislation which does not allow a taxable person acting in good faith to adjust invoices improperly indicating VAT following the initiation of a tax investigation procedure. This is all the more so as the recipient of such invoices would be entitled to reimbursement of that tax if the underlying transactions were duly declared. CJEU stated that it is for the Member States to provide for the possibility of adjusting any tax improperly invoiced where the person who issued the invoice shows that he acted in good faith.

SAC's response to CJEU

Following CJEU's position, the Supreme Administrative Court ("SAC") resolved on 24 June 2021 (case no. I FSK 1535/17) that the company should be granted appropriate relief from Article 108 penalty. The court made clear that the company classified the transactions in accordance with the national approach and as such should not legally suffer due to its decision to do so.

Impact on Polish taxable persons

Note that the case is important both for businesses transacting via fuel cards and those who recognise transactions in accordance with the current approach. CJEU offers them additional arguments in their disputes with tax authorities regarding the imposition of Article 108 penalty.

The case is also relevant for bona fide taxable persons wishing to adjust improperly invoiced VAT after the commencement of a tax inspection. The court's position can be used by them as a reason why they should be able to make such adjustments.

Polish VAT penalties are incompatible with Union law

Natalia Błażejewska, Senior Consultant

On 15 April 2021, CJEU resolved Polish case C-935/19 in a way that gave hope to all Polish taxable persons punished by Polish tax authorities with an additional VAT liability, called VAT penalty (or surcharge), following their inspections or investigations. CJEU held that the Polish law which allows the imposition of the 20% penalty is incompatible with the principle of proportionality and Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive). Even though the case was concerned solely with the 20% penalty, it offers general guidance on all types of VAT penalty. In reliance on CJEU's construal, Polish courts increasingly often question not only the 20% penalty, but also the 30% one or even the 100% one, quashing the impositions for incompatibility with EU legislation.

The **issue**

As of 1 January 2017 Poland has a law (VAT Act, Article 112b and 112c) that imposes additional VAT as a penalty. In accordance with Article 112b(1), penalty VAT is assessed where tax to be paid has been understated, tax to be reimbursed has been overstated, reimbursement/excess input tax has been reported instead of tax liability, a tax return has not been filed and tax has not been paid, or there has been an overstatement of positive difference between input tax and output tax for the purpose of recovery, with the assessment being 30% of the misstated amount. Article 112b(2) allows this rate to be reduced to 20% if the person adjusts the impugned return, or files one if non-filing occurred, and pays the arrears of tax. If the person makes the adjustment within 14 days from receipt of a notice of inspection, the penalty will go down to 15% (VAT Act, Article 112b(2a)). And Article 112c lists four specific cases where the penalty will be 100% with respect to invoices with VAT (including the case of an invoice having been issued by a non-existent entity or documenting a transaction that did not happen).

Admittedly, the VAT Act does provide for situations where the 15-30% penalty is not applied by tax authorities. But these are mainly defaults related to manifest errors or mistimed recognition of transactions. They do not cover such situations as an unintentional error in the tax treatment of a transaction, in which case the authorities automatically imposed the 30% penalty or the 20%/15% penalty (if the return was adjusted), depending on the type of default. The result was that businesses which wrongly categorised their transactions but which corrected the errors, filed the relevant adjustment after an inspection/investigation and paid the overdue VAT were still automatically charged the additional VAT by tax authorities.

This practice was contested by CJEU in its judgment of 15 April 2021. It held that the principle of proportionality and Article 273 of VAT Directive preclude the Polish legislation imposing the 20% VAT penalty where an exempt transaction is erroneously treated as a taxable transaction. According to the court, the law is incompatible with EU legislation because it does not take into account how the default established by tax authorities actually arose. In particular, the law does not single out a situation where the default arose as a result of taxable person's error which nevertheless is unrelated to any fraud or loss of fiscal revenue.

As a final remark, CJEU stated that, as provided for in Polish VAT regulations, the automatic imposition of additional VAT not only does not allow tax authorities to forbear the penalty, but also precludes it from being adjusted according to the gravity and nature of the default.

Impact on Polish taxable persons

The CJEU's judgment opened the floodgates and Polish courts started to reverse tax authorities' impositions of the 20% or 30% VAT penalty on a mass scale in reliance on CJEU's guidance as to the inconsistency of the underlying Polish law with EU legislation.

Recently, the Supreme Administrative Court followed CJEU also with respect to the 100% penalty (judgment of 22 October 2021, case no. I FSK 489/21). SAC confirmed that the CJEU's conclusion about the incompatibility of the 20% penalty with the principle of proportionality and the VAT Directive should be applied also to the 100% penalty, as appropriate. The Polish could held that VAT Act's Article 112c imposing the 100% penalty also prevents any consideration of the nature or gravity of the default and, in addition, fails to take into account the taxable person's conduct. As a result, Article 112c of the VAT Act, too, is contrary to the principle of proportionality and the VAT Directive.

As such, Polish courts follow CJEU's suit as regards the incompatibility of the VAT penalty regulations of the Polish VAT Act with the principle of proportionality and Article 273 of the VAT Directive.

With that said, we need to wait for a change of the impugned VAT Act provisions.

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VAT rate on sale of take-away meals – end of controversy

Marta Szwajcer, Junior Consultant

On 22 April 2021, CJEU resolved the Polish case C-703/19 concerning the treatment of sale of prepared food by a fast-food restaurant chain offering meals in different modes of purchase and consumption, i.e. at a restaurant, in food courts inside shopping centres, or as take-away meals. CJEU held that restaurant and catering services mean the supply of food accompanied by sufficient support services allowing for its immediate consumption by customers. Thus, if a consumer chooses to eat the meal away from the premises, the supply is a supply of goods subject to the 5% rate of VAT.

The issue

A taxable person operates a chain of fast-food outlets selling meals and prepared food. The person treated these operations as supplies of prepared meals and applied the 5% rate of VAT which is appropriate for supplies of goods. The tax authorities audited the operations and concluded that, regardless of the mode of sale, all the operations should be subject to the 8% rate applicable to food and beverage services. The matter reached SAC, which was in doubt and decided to ask CJEU for a preliminary ruling.

CJEU tackled the issue on several important dimensions. It held that the choice of the right VAT rate for sale of prepared meals or food must be informed by an analysis whether what is involved is a supply of goods in the form of prepared meals or food or a supply of restaurant services. The court made clear that restaurant services are identified by a number of hallmarks and activities, the supply of food being only one of them. The preparation of hot end products which is limited to what are actually basic actions done in a continuous and regular fashion does not automatically classify the whole operation as restaurant or catering services. The correct treatment of the transaction must be based on the consumer's point of view and on how the meals are served. Where the consumer chooses not to benefit from the resources made available by the outlet (such as waiter service, table, cutlery, toilet, cloakroom), it must be concluded that no support services accompany the supply of food or drink and that the transaction must be qualified as a supply of goods. However, the manner in which the meal is served must also be taken into consideration.

Impact on Polish taxable persons

CJEU's judgment gives catering and restaurant businesses an important argument in their struggle to defend the reduced VAT rate (5%) on sale of take-away meals in their outlets. The European court's position may relax the Polish tax authorities' approach which formed after the Finance Ministry issued public tax ruling ref. PT1.050.3.2016.156 on 1 July 2016 to the effect that ready meals vendors should apply the 8% rate of VAT because what must be considered in resolving whether their supply constitutes a supply of goods or of restaurant and catering services is whether their products are packed or frozen for subsequent consumption or rather prepared and served directly as ready meals. That they are offered for consumption on the premises or as take-away food was not part of those considerations.

CJEU's judgment also throws new light on the application of the right VAT rate to the business of selling prepared food or meals that are ready for consumption. Using it, businesses that have so far applied the 8% rate should revisit the issue to see if, under the circumstances presented by CJEU, their business model falls within the 5% VAT rate provisions. They should also explore the option of recovering overpaid tax with interest. Be that as it may, CJEU held that it is for the national court to determine the circumstances and conditions to be used as guidance in resolving the goods vs. services controversy in take-away restaurant settings.

First Polish cases after CJEU's judgment

CJEU's decision in Polish case C-703/19 has already generated a dozen or so judgments of Polish courts, confirming that sale of take-away meals may be taxed at the rate of 5%. They held that statistical classification of the goods or how they are packed is irrelevant from the VAT rate perspective. What matters is the final consumer's decision. If goods are prepared to be taken away, the rate of 5% is applicable. A contrary interpretation would result in a breach of the principle of neutrality of VAT.

Measures to tighten VAT collection system for intra-Community fuel purchases are effective but incompatible with EU law

Natalia Sęk, Senior Consultant

CJEU's judgment of 9 September 2021 in Polish case C-855/19 is crucial for fuel companies in terms of VAT treatment of fuel purchases by way of ICA. The European court ruled that the VAT Directive precludes regulations, such as the Polish "fuel package", which require the taxable person to pay VAT within 5 days from the date of purchase. Even though the case is concerned with the collection of VAT where goods from other Member States are placed into a tax warehouse, the general conclusion is that VAT Directive precludes the collection of VAT on an ICA before the tax becomes chargeable.

The issue

Poland introduced, with effect as of 1 August 2016, a series of legislative measures called the "fuel package" to tighten the VAT collection system for fuel transactions. One of the amendments was the introduction into the VAT Act of Articles 99(11a) and 103(5a) to address the time for the filing of return and payment of VAT on intra-Community acquisitions of fuel. These regulations require the taxable person to calculate and pay VAT, without request, within 5 days from when the goods enter a place of receipt of excise goods or a tax warehouse. Similarly, the person is required to file the related tax return on or before 5th day of the month following the month in which they became payable.

On the other hand, the VAT Act says that VAT becomes chargeable on an intra-Community acquisition generally on issuance of the invoice but in any case not later than on the 15th day of the month following the month of supply.

In the subject case, a taxable person made an intra-Community acquisition of diesel fuel in December 2016. The tax authorities considered the transaction to fall within Article 103(5a) of the VAT Act, i.e. that goods from another Member State were brought into a tax warehouse. The person did not pay VAT within 5 days from bringing the fuel into Poland nor did he file the related VAT return within the time prescribed by the VAT Act. The tax authorities required him to immediately pay the overdue tax with interest, but the person requested judicial review. His petition was dismissed at the trial court level but ultimately reached the Supreme Administrative Court, which was in doubt whether Article 103(5a) of the VAT Act was compatible with Union law to the extent it required VAT to be paid before it becomes chargeable. So the Polish court referred the matter to CJEU for a preliminary ruling.

CJEU held that the subject provisions of the VAT Act are incompatible with VAT Directive. Following the opinion of the advocate general, the court emphasised that while VAT Directive allows Member States to introduce measures accelerating the payment of tax, it does not grant them the right to bring forward the date on which VAT becomes chargeable as laid down in Article 69 of VAT Directive. Thus, a Member State is not authorised to accelerate the chargeability of VAT, such as this is done in Article 103(5a) of the Polish VAT Act, which requires the tax to be paid within just 5 days.

Impact on Polish taxable persons

For one thing, CJEU's judgment clearly shows that the impugned national law may not be applied by tax authorities or courts. For another, it gives businesses an important tool in their disputes with tax authorities.

The case might also be relied on to apply for reimbursement of any interest the tax authorities assessed for a delay beyond the 5-day time limit applicable to payment of VAT on intra-Community acquisitions, where such interest was charged under the law held incompatible with the directive.

Changes to VAT Act?

The VAT Act regulations questioned by CJEU are still in force. Given that the taxman sees the "fuel package" legislation as a source of large-scale advantages in terms of government revenue, it is difficult to say if or when the regulations will be amended. On the one hand, CJEU is rather clear that the regulations are incompatible with VAT Directive. On the other, the Ministry of Finance has already taken action for the European Commission to permit their continued application on the basis that they effectively serve the purpose of building a tighter VAT collection system and are viewed with favour by the fuel industry itself. The Polish lawmakers will certainly find it a considerable challenge to make sure the VAT Act is brought in line with EU legislation in a way that enables VAT to be effectively collected with respect to fuel transactions.

In wait for 2022...

Magdalena Szczepańska, Partner

The year 2021, which is drawing to an end, was marked by a host of interesting CJEU cases of major importance for taxpayers. What is more, these judgments concerned key issues whose resolution had been long awaited by business in Poland. Given the number of Polish cases before CJEU this year, it appears the Supreme Administrative Court has been increasingly often requesting the European court to rule on the compatibility of Polish VAT law with the VAT Directive. Ensuring that Polish national law is interpreted in accordance with European legislation is particularly important for the taxation of cross-border supplies.

Case C-895/19 was surely one of those precedential cases. But it is not the last Polish case before CJEU concerning intra-Community transactions as year 2022 is expected to witness the court's judgment in case C-696/20. This one is about chain transactions and the application of VAT Act's Article 25(1) and 25(2). The challenged regulations make it possible to require Polish taxable persons to report VAT on intra-Community acquisitions in two different Member States, unless they prove they have accounted for the tax in the country where the transport of the goods ended. The reference to CJEU concerns a situation where VAT on an ICA was accounted for by the final purchasers in the country where the transport ended, but not by the taxable person who was liable to do so. For the purposes of this transaction, the person gave his Polish VAT ID for intra-Community transactions. Holding that the person did not prove that VAT on this transaction was accounted for in the country of destination, Polish tax authorities decided that the tax is also due in Poland (as output tax and with no right of deduction). Questioning this treatment in terms of the proportionality and neutrality of VAT, SAC referred the matter to CJEU for resolution. The penalty aspect of the law in question has been controversial for years and is particularly acute where a VAT ID for cross-border transactions is stated as a result of error in the tax classification of a chain transaction, as in the subject case.

But that is not the only judgment of CJEU worth waiting for. In another reference from SAC, the European court was asked to rule on when it is appropriate to consider that a transaction involves a VAT-exempt part of business as a going concern. The reference is concerned with case number I FSK 892/18, where the national court must decide whether, in a sale of certain assets, it is necessary for the purchaser to continue the seller's business in any particular form for the assets to be treated as part of business as a going concern. The reason is that Polish law is not clear whether, in a situation where not all the assets used by the seller for doing his business are transferred, it is a sufficient condition for such treatment to apply that the purchaser continues the same kind of business. In particular, the Polish court has doubts about what elements can be crucial for deciding that a sale involves merely a set of assets which does not constitute part of business as a going concern.

The above matters are among many others now under CJEU's consideration. With SAC's questions to CJEU concerning complicated tax problems, it is extremely important to know if the interpretations of national law, as presented in those questions, are in accordance with VAT Directive. It is therefore hardly surprising that businesses are impatiently waiting for CJEU's decisions in new Polish cases.

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Doradztwo Podatkowe WTS&SAJA Sp. z o.o.
Registered office in Poznań
Bałtyk Building, 13th floor
ul. Roosevelta 22
60-829 Poznań

Warsaw Office
Central Tower, 22nd floor
Al. Jerozolimskie 81
02-001 Warszawa

Tel.: +48 (61) 643 45 50
E-mail: office@wtssaja.pl
www.wtssaja.pl

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