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Some Considerations about the Practical Importance of CJEU Judgements

1. Introduction

As partisans of the full harmonization of the EU tax system, the purpose of the paper, based on two recent judgements of the CJEU, is to emphasize the possibility to extend some of the solutions to the field of direct taxation (see section 2) but also, to show the risks of the preliminary rulings, especially when the Advocate General and the Court are exceeding their role (see section 3).

2. The need of an extended application of the CJEU case-law in the field of non-harmonized direct taxation

The full harmonization of tax legislation at the EU level remains a desire, as the Common Consolidated Corporate Tax Base (CCCTB) project has not been completed yet and its future is uncertain. The indirect harmonization in the field of direct taxation via the CJEU case-law is another direction by

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which progress is made in this area, through the TFEU provisions on fundamental freedoms.[3]

The proponents of the broadest application of EU law can identify other solutions for the "exploitation" of the CJEU judgements, where they use as arguments certain principles formulated by the Court, especially if national law does not expressly resist or, better, where national law provides the right framework for such an extension. In particular, we refer to judgements of the CJEU in the field of VAT which have the potential to be used in direct taxation, from the perspective of the principles they enshrine.

Such a possibility has emerged in Romanian tax law, under the judgement delivered by CJEU in case *Zabrus Siret*.[4]

In this case, a Romanian company tried to correct its VAT returns after it has been subjected to a tax inspection, because it had identified, after the inspection, certain supporting documents which it had not found at the time of the inspection, being within the five-year limitation period provided by the Romanian Fiscal Procedure Code[5] in Art. 91.

However, the tax administration has denied the company the right to correct its VAT returns by invoking the provisions of Art. 84 in conjunction with Art. 105 of the Romanian Fiscal Procedure Code and with the provisions of Annex No. 1 to the Order approving the Guidelines for correcting clerical errors in value added tax returns.[6]

The Romanian court of last degree invested with the resolution of the company's request (Suceava Court of Appeal) has asked the CJEU to provide the necessary guidance to solve the conflict between the taxpayer and the Romanian tax administration, asking CJEU whether the provisions of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive)[7] "preclude a national legislation which, by way of derogation from the five-year limitation period imposed by national law for the correction of VAT returns, prevents […] a taxable person from making such a correction in order to claim his right of

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[3] R. Bufan, J. Malherbe, M. Buliga, N. Șvidchi, *Tratat de Drept Fiscal*, Vol. 2: *Drept fiscal al Uniunii Europene*, Hamangiu, Bucharest 2018, pp. 310–384.

[4] CJEU, judgement, 26 April 2018, *Zabrus Siret*, C-81/17.

[5] RO, Government Ordinance No. 92 of 24 December 2003 establishing the Fiscal Procedure Code [*Codul de procedură fiscală*], Official Gazette, Part I, No. 863 of 26 September 2005, repealed by Law No. 207 of 20 July 2015 establishing the Fiscal Procedure Code [*Codul de procedură fiscală*], Official Gazette, Part I, No. 547 of 23 July 2015.

[6] RO, Order No. 179 of 14 May 2007 approving the Guidelines for correcting clerical errors in value added tax returns [*Ordin pentru aprobarea instrucțiunilor de corectare a erorilor materiale din deconturile de taxă pe valoarea adăugată*], Official Gazette, Part I, No. 347 of 22 May 2007.

[7] EU, Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Official Journal EU L 347, 11 December 2006, p. 1, amended.

deduction on the sole ground that that correction relates to a period that has already been the subject of a tax inspection."

Interestingly, the Romanian tax administration invoked in defence of the restrictive interpretation of the Romanian Fiscal Procedure provisions two principles, namely the principle of the unity of tax inspections, but also the principle of legal certainty, as mentioned by the Court in Para. 39 of the judgement.

The Court's solution was to consider that preventing a taxpayer, within the legal limitation period, from correcting his tax returns for a certain period on the grounds that the period in question has already been subject to a tax inspection constitutes a violation of the principles of effectiveness, of fiscal neutrality and of proportionality, as argued in Paras. 40–44 of the judgement.

The principle of neutrality is expressly regulated in the Romanian Fiscal Code[8] in Art. 3(a) in the following wording: "The taxes and charges covered by this Code shall be based on the following principles: The neutrality of tax measures in relation to the different categories of investors and capital, with the form of ownership, ensuring equal conditions to investors, Romanian and foreign capital."

It should be noted that Art. 3 is found in Title I "General provisions", applicable (with certain exceptions) to all the taxes provided for in the Romanian Fiscal Code, including direct taxes such as the corporate tax and the income tax. As a result, the principle of fiscal neutrality, outlined in the *Zabrus Siret* case, could also be invoked before the Romanian courts in the case of a Romanian taxpayer who wishes to correct his corporate tax returns, after the period to which the returns relate has been the subject of a tax inspection.

Such an opportunity appeared to us in a case pending before a Romanian court in which a company had purchased some cooling equipment of high value and decided to depreciate it under the accelerated regime provided by the Romanian law. Under the provisions of Art. 24 of the Romanian Fiscal Code the taxpayer in question was entitled to deduct for tax purposes, within the first 12 months after putting into operation, a depreciation of 50% of the purchase value of such equipment. But, due to an accounting error, in the first 12 months after the purchase, the company did not deduct any tax depreciation for the equipment; instead, it deducted the 50% only in the 12 subsequent months (months 13–24 of the purchase). The error was acknowledged by the company only during the tax inspection, but the company was no longer able to submit a correcting

[8] RO, Law No. 571 of 22 December 2003 establishing the Fiscal Code [*Codul fiscal*], Official Gazette, Part I, No. 927 of 23 December 2003 repealed by Law No. 227 of 20 July 2015 establishing the Fiscal Code [*Codul fiscal*], Official Gazette, Part I, No. 547 of 23 July 2015.

tax return, considering the restriction imposed by the provisions of Art. 84 of the Romanian Fiscal Procedure Code.

During the proceedings before the court of first degree, the designated accounting expert identified this problem, pointing out that according to Art. 84 of the Fiscal Procedure Code, tax returns can be corrected by the taxpayer on its own initiative; however, it is not possible to correct tax returns for tax periods which have been subject to tax inspection or for which a tax inspection is in progress.

Under the same reasoning the court of first degree has rejected the legal action of the taxpayer in respect of the possibility to correct the tax return during the tax inspection.[9] It should be mentioned that the court of first degree judgement was delivered before the CJEU's judgement in *Zabrus Siret*.

The taxpayer appealed the judgement of the court of first degree, arguing, by relaying on the *Zabrus Siret* judgement, that the approach of the tax administration, confirmed by the court of first degree, violated the principle of neutrality provided by Art. 3(a) of the Romanian Fiscal Code. In the opinion of the taxpayer, the different treatment, applied solely on the ground that he has been subjected to a tax inspection before the expiration of the five-year limitation period, represents an unjustified violation of the principle of neutrality.

Considering the merits of the appeal made by both sides of the dispute, the court of appeal overturned the judgement of the first degree court and sent it for retrial to the same court.[10]

Regardless of the judgment to be given in this case, what should be noted from the foregoing is that, the general principles of the EU, relevant in the taxation field, can be invoked before the national courts in tax disputes in matters of non-harmonized taxes, especially if the "environment" offered by domestic law, the doctrine or national case-law allow or encourage such an extension.

3. What happens when the Advocate General and the CJEU are exceeding their role

It is an acknowledged fact that "although, in order to deliver its judgement, the Court necessarily takes into account the legal and factual context of the dispute in the main proceedings, as defined by the referring court

[9] RO, Timișoara Court of Appeal, judgement, No. 88/31.03.2016, file 1657/59/2014.

[10] RO, High Court of Cassation and Justice, judgement, No. 2275/22.04.2019, file 1657/59/2014.

or tribunal in its request for a preliminary ruling, it does not itself apply EU law to that dispute. When ruling on the interpretation or validity of EU law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute in the main proceedings, but it is for the referring court or tribunal to draw case-specific conclusions, if necessary, by disapplying the rule of national law that has been held to be incompatible with EU law."[11]

In a Romanian case[12] it seems that CJEU's considerations regarding the factual aspects have been taken as such by the national court which made the request for a preliminary ruling and which, in the end, decided the case.

The questions referred to CJEU were raised in a tax case, in which the appellant, a university professor, practiced several liberal professions: chartered accountant, tax advisor, insolvency practitioner, and lawyer. Also, occasionally, the appellant derived copyright royalties from publishing activity.

The issue, however, was not necessarily related to the number of the liberal professions carried out by the appellant (although this contributed to the complexity of the case), but to the fact that the appellant, along with two other individual persons, owned an immovable property which was rented to two companies. The appellant held the majority of the shares in one of the companies and was one of its directors.

Following a tax inspection performed regarding the activity of the appellant, the tax inspectors considered that the income from the rental of the immovable property should be taken into consideration when calculating the turnover threshold provided under the Romanian legislation for the application of the special exemption scheme for small enterprises (RON 220,000 or EUR 65,000). Only by including the income from rental in the calculation of the threshold would the appellant exceed the threshold and would be obliged to register for VAT purposes and fulfil the related obligations. In the end, the tax inspectors registered retroactively, ex officio, the appellant for VAT purposes and calculated the VAT the appellant should have collected and paid since that moment and the related accessories.

The appellant was of the opinion that, from the VAT point of view, the rental of a co-owned personal immovable property, qualified as an ancillary transaction, both in the light of the CJEU pro rata deduction case-law in which this notion was analysed, and of the criteria regulated in the

[11] CJEU, *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*, Official Journal EU C 380 of 8 November 2019, point 11.

[12] CJEU, judgement, 9 July 2020, *AJFP Caraş-Severin and DGRFP Timişoara*, C-716/18.

Romanian Implementing Rules of the Fiscal Code[13] provisions, elaborated based on the CJEU case law.

In this context, the national court of last degree decided to send CJEU three questions analysed both by the Advocate General and by the Luxembourg Court in case *AJFP Caraş-Severin and DGRFP Timişoara*.

In their analysis, the Advocate General[14] and the CJEU pointed out that the application of their interpretation of the VAT Directive provisions is the task of the national court. However, one cannot neglect the fact that these statements are preceded by some very strong specifications (especially in the opinion of the Advocate General, Paras. 50–53) which seem to deprive the national court of its right and the correlative task to apply the interpretation of the court in the light of the circumstances of the case; in our opinion, by reading the opinion of the Advocate General and the judgment of the CJEU one cannot escape the feeling that the case was actually decided in Luxembourg and that there is nothing else for the national court to do, but to comply, which actually seems to have happened.

By doing so, we consider that, in the end, the facts that represented the point of reference in the case were analysed superficially and taken as such, irrespective of their true representation in reality. Considering that the national court had set aside the arguments and the evidence in this regard provided by the appellant, there is a high probability for it to have been persuaded by the interpretation applied to the facts of the case by the Advocate General and by the CJEU.

As such, after stating that it is the task of the national court to apply the interpretation of the VAT Directive to the facts of the case, the Court listed the elements that should be considered in order to determine the existence of an ancillary transaction, namely the nature of the immovable property, the source of its financing, and its use.

Specifically, for the case at issue, in Para. 45 of the judgement, the Court listed a series of elements (outlined also by the Advocate General), all to the disadvantage of the appellant, followed by the specification that it is for the referring court to decide if they represent arguments that demonstrate that the renting activity under discussion in the case is related to the usual professional activity of the appellant (whereas the Advocate General already stated that such elements demonstrate such a relation, Paras. 50–53 of the opinion).

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[13] RO, Government decision No. 44 of 22 January 2004 approving the rules for implementing Law No. 571/2003 on the Fiscal Code [*Pentru aprobarea Normelor metodologice de aplicare a Legii nr. 571/2003 privind Codul fiscal*], Official Gazette, Part I, No. 112 of 6 February 2004.

[14] CJEU AG Kokott, opinion, 6 February 2020, *AJFP Caraş-Severin and DGRFP Timişoara*, C-716/18.

These elements are the following: the appellant declared that he performed his profession as a practitioner in collective proceedings at the address of the rented immovable property, the immovable property was partially let to a company of which the appellant is a shareholder and director, and which carries a similar (tax consultancy) activity to that of the appellant.

In our opinion, a close analysis of the elements pointed out by the CJEU does not reveal a strong connection of the renting activity with the professional activity of the appellant, as it results in a clear manner from reading the AG opinion and CJEU judgement.

As such, when it comes to the nature and the source of financing, the appellant argued, without being contradicted by the tax authorities, that the immovable property was represented by a house with a yard; its rooms were transformed into offices, but the transformation costs were entirely incurred by the tenants. Therefore, the appellant did not bear any costs in this regard. The only costs incurred by the appellant were those related to the partial price paid upon the acquisition and with the subsequent instalments for the bank loan contracted to finance the remaining price, the instalments being covered from the rent paid by the tenants.

It is important to mention that the appellant proved that the portion of the price paid upon the acquisition of the immovable property was not covered from income derived from the appellant's liberal professions, but from a private donation. For this reason, the immovable property was never included in his professional allocated assets, but maintained in his personal ownership.

As to the use of the immovable property, the national court argued that the direct link of the renting activity with the professional activity of the appellant results from the elements pointed out by the CJEU as necessary to be taken into account.

One of these elements is represented by the fact that the registered office of the appellant's insolvency practitioner profession was at the address where the immovable property in discussion was located. Both the Advocate General and the CJEU seem to disregard the fact that the registration was purely formal, as there was no indication that the appellant actually used that immovable property: it was a personal co-owned property, outside the professional allocated assets, and no costs were made/deducted by the appellant with the use of this property. The existence of the registered office does not imply automatically the fact that economic activities are carried out there. Moreover, the appellant showed that the economic activities related to all the liberal professions were carried out at the address which was declared as the registered address for the chartered accountant and tax advisory professions.

The other element that represented, in the opinion of the Advocate General and of the Court, an argument for the existence of a close and direct link, is the fact that, in one of the companies which rented the immovable property, the appellant was a shareholder and a director. Moreover, it was pointed out that the company in question carried similar activities to that of the appellant.

The aspects that were neglected in this regard are: the immovable property was only partially rented to the company in question, the appellant was not the only shareholder and director of that company, and the rental contract was concluded with this company not only by the appellant, but by the all co-owners, the other two owners having no holding and no position in the company at issue.

As to the arguments that the company carried out a similar activity with that of the appellant, it seems that the following aspects were considered as irrelevant: the fact that the tax consultancy was only one of the professions carried out by the appellant and this activity represented only a secondary object of activity of the company, not the main one.

However, most important is that, from a VAT point of view, the company in discussion represented a separate taxable person and it cannot be claimed that the economic activity of the company represents the economic (professional) activity of the appellant, regardless of the facts that the appellant is a shareholder and director in that company.

It is our opinion that the economic activity of the company and its nature could have been used as an argument only where the appellant could have been considered as acting as a taxable person in his capacities as shareholder and/or director. This conclusion results from the arguments of the CJEU, according to which an ancillary transaction must not be a direct, permanent and necessary link with the professional activity of a taxable person. It was demonstrated that the appellant did not act as a taxable person, neither in his relation with the company as shareholder, nor in his relation as director.

Thus, as director the appellant never received a payment from the company; an essential condition for a transaction to be included in the VAT scope is for it to be made for a consideration. Moreover, as director the appellant did not act independently, but in the name and on the account of the company,[15] the economic responsibility for his acts belonging to the company. Secondly, as shareholder, the appellant received occasionally dividends, and according to the CJEU case-law on this matter: "the mere acquisition, holding and sale of shares in a company do not, in themselves,

[15] See: CJEU, judgement, 13 June 2019, *IO*, C-420/18; CJEU, judgement, 18 October 2007, *van der Steen*, C-355/06.

amount to an economic activity within the meaning of the Sixth Directive, since the mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis. Any dividend yielded by that holding is merely the result of ownership of the property […] It is otherwise where the holding is accompanied by direct or indirect involvement in the management of the companies in which the holding has been acquired, if that entails carrying out transactions which are subject to VAT, such as the supply of administrative, financial, commercial and technical services […]".[16]

Accordingly, even if the appellant would have been actively involved in the management of the company, this involvement is not accompanied by the provision of management or other kinds of services for consideration. Therefore, it cannot be stated that the appellant acted as a taxable person in his capacity as shareholder in relation with the company.

Overall, one cannot state that the interpretation of the CJEU is wrong or that its reasoning departs from its case-law on ancillary transactions in the field of pro rata deduction. The issue is that the CJEU, given its prerogative to make references to the factual context of the case, actually dictated to the national court what elements to examine, there being no doubt regarding its opinion on the outcome of such an examination. It seems that the national court either was trapped by the findings of the CJEU or found in these findings enough to rely on without further examinations.

4. Conclusions

The EU harmonized law is constantly evolving by enshrining at the Union level the most appropriate principles and practices from the law of the Member States, in order to respond to the upcoming requirement, to which the national law of the most Member States, for various reasons, is not suited yet.

The superior quality of EU law, as it is "built" continuously by the CJEU, especially in terms of principles and rules that give expression, in tax matters, to broader demands of democracy and the rule of law, requires that it be applied on a large scale.

Thus, specialists and connoisseurs of EU law have the moral obligation to invoke principles extracted from EU law in purely internal situations in

[16] CJEU, judgment, 30 May 2013, *X*, C-651/11, Paras. 36 and 37.

non-harmonized tax fields, because court decisions of superior reasoning quality can be obtained, the scope of EU law is extended and, ultimately, more and more citizens are convinced of the advantages of harmonization in tax law and in legal matters in general.

This practical extension can be limited only by the consequences of the principle of procedural autonomy of the domestic law, which, from the Romanian experience, however, does not have a major impact, because the procedural rules are almost identical in tax matters.

References

Bufan R., Malherbe J., Buliga M., Șvidchi N., *Tratat de Drept Fiscal*, Vol. 2: *Drept fiscal sl Uniunii Europene*, Hamangiu, Bucharest 2018.

Abstract

In this paper the authors analyse two CJEU judgments delivered as a result of preliminary questions in the VAT field sent by Romanian courts, with the purpose to outline the benefits of the preliminary ruling procedure, but also its drawbacks. It is the authors' opinion that some of the general principles governing indirect taxes, as developed by the CJEU, could be used successfully in the field of direct, unharmonized taxes, especially when there are strong reasons in this regard. The judgment in case *Zabrus Siret* is a good example in this sense. On the other hand, the authors question the CJEU's assessment of the facts of the case, considering the impact of such an assessment on the national referring court, by providing as example the judgement in case *AJFP Caraş-Severin and DGRFP Timişoara*.

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