

Tax Advisory & Compliance Services

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The interaction between EU and Romanian VAT

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A brief overview of the EU Legislative framework re. VAT



Supremacy of Community Law

- “... the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights... Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.”

Case 26/62, Van Gend en Loos

- “By contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry in force of the Treaty, became an integral part of the legal system of the Member States and which their courts are bound to apply.”

Case 6/64, Costa v Enel

VAT and Community Law

- Directives:
 - First Council Directive 67/227/EEC dated 11 April 1967
 - Second Council Directive 67/228/EC dated 11 April 1967
 - Sixth Council Directive 77/388/EEC dated 17 May 1977
 - Eighth Council Directive 79/1072 dated 6 December 1979
 - Thirteenth Council Directive 86/560/EEC dated 17 November 1986
 - Council Directive 2006/112/EC dated 28 November 2006
- Directive: binding (to the result to be achieved, but Member States have choice of form and methods)
- Some regulations:
 - No. 1798/2003: administrative cooperation in the field of VAT
 - No. 1777/2005: implementing measure for the Sixth Directive
- Regulation: general application, binding, directly applicable

VAT Directives

- Obligations of Member States:
 - Member States to which a Directive is addressed are under the obligation to achieve a result
 - Wherever a Directive is correctly implemented, its effects extend to individuals through the implementing measures adopted by the Member State concerned
 - Special problems arise where a Member State has failed to implement a Directive correctly and where its provisions have not been implemented by the end of the period prescribed for that purpose
 - Member States can be held liable for damages
- ‘Should’ provisions vs. ‘May’ provisions
 - Breaching of ‘should’ provisions => e.g. infringement procedure

VAT Directives

- Direct effect:

“Thus, wherever the provisions of a Directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provision may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the Directive or in so far as the provisions define rights which individuals are able to assert against the State”

Case C-8/81 - Ursula Becker

VAT Directives

- No reverse direct effect
 - a Member State cannot rely on an unimplemented directive

Case 80/86 – Kolpinghuis
- No horizontal effect
 - a Directive does not create obligations for individuals or corporations who would be unaware of such obligations on the basis of national law

Case 91/92 - Faccini Dory

VAT Directives

- No full harmonisation of VAT in EU
 - The concept of a Directive itself
 - ‘Should’ vs. ‘May’ provisions
 - Principle of subsidiarity
 - Various language versions of the VAT Directives
 - Various implementations by Member States
 - Various interpretations by tax authorities
 - Use of simplification schemes
 - Etc.

European Court of Justice

- Deals a.o. with:
 - Disputes between the institutions
 - Disputes between the Member States
 - Disputes between the institutions and the Member States
 - Appeals against the decisions of the Court of First Instance
 - Prejudicial questions
 - Courts of last instance decides in its own discretion
- Important to note re. VAT:
 - The Court is the instance that gives the final and correct interpretation on the VAT Directives !!
 - Cases are applicable in all Member States !!

European Court of Justice

- Prejudicial questions
 - National courts can ask opinion of European Court of Justice
- Infringement proceedings against a Member State
 - Absence does not guarantee that a national provision is in conformity with Community legislation
 - Individuals cannot force the Commission to start infringement proceedings

C-150/99, Lindöpark

T-5/94, Lothar Schultz

European Court of Justice

- Some interesting points dealt with by the Court:
 - Clarification of concepts (e.g. fixed place of business, taxable person, ancillary and composite supplies)
 - Developing community definitions of legal concepts (e.g. immovable rental services)
 - Applying general and unwritten legal principles (e.g. principle of neutrality)
 - Clarifications on place of supply rules
 - Restrictive interpretation of exemptions and exceptions
 - Dealing with issues such as different language versions of EU VAT Directives

Other EU sources re. VAT

- EU Accession Treaty
- VAT Committee
- European parliamentary questions
- Etc.

How does this impact the Romanian VAT legislation?



Romanian VAT legislation

- Harmonized with the EU VAT law (see also last change of Fiscal Code) and use of simplification schemes
- The new amendments to the Application norms to the Fiscal code reflect that the ECJ cases are applicable in Romania, mentioning a.o.:
 - C-2/95 SDC, C-235/00 CSC – exemption of outsourced financial services
 - C-305/01 - MKG – factoring
 - C-472/03 - Arthur Andersen – exemption of insurance services
 - C-169/04 - Abbey National – exemption on activities of investments funds
- Also implicit references to ECJ cases
- Nevertheless, any ECJ case on VAT can be used in order to sustain a certain approach
- New changes in the EU VAT Directive will continue to impact Romania

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Annexes



Primary Community Law

Three Treaties:

- Treaty of Rome - EEC (renamed 1993: EC)
- Treaty establishing the European Coal and Steel Community - ECSC (expired 23 July 2002, since then within scope of EC)
- Eurotam Treaty

Amendments:

- Single European Act
- Treaty of the European Union (Treaty of Maastricht)
- Treaty of Amsterdam
- Treaty of Nice
- Treaty of Lisbon
- Acts of Accession

Secondary Community Law

- Legal instruments Art. 249 EC:
 - Regulation: general application, binding, directly applicable
 - Directive: binding (to the result to be achieved, but Member States have choice of form and methods)
 - Decision: binding (individual application: the persons to whom it is addressed must be named in it and are the only ones)
 - Recommendations/opinions: not binding

Legal principles

- Fundamental legal principles
 - Subsidiarity principle
 - Community loyalty
 - Prohibition of discrimination based on nationality
- Unwritten General Principles
 - Principle of fiscal neutrality
 - Principle of equivalence
 - Principle of effectiveness
 - Principle of legal certainty and foreseeability
 - Principle of proportionality
 - Principle of Member States liability
 - Principle of legitimate expectations and legal certainty