



VAT fully chargeable at the time a supply is carried out – even in the case of instalment payments

1 Background

In 2018, the ECJ and the German Federal Fiscal Court both issued rulings in the *baumgarten sports* case. A player's agent had placed a professional football player with a club. The agent's commission was paid to him in instalments every six months. Each respective payment was subject to the condition that the player continued playing for the club. In this case, VAT was chargeable every six months. This was facilitated by the agent invoking a favourable EU regulation.

2 Facts of the current case (C-324/20)

The plaintiff carried out a sale of land intermediary service in 2012. The plaintiff received its fee of EUR 1,000,000 plus EUR 190,000 VAT in five annual instalments of EUR 200,000, plus EUR 38,000 VAT. The plaintiff paid the tax authorities EUR 38,000 VAT annually, in each case, upon receipt of the instalment. The tax office, however, demanded the entire VAT be paid in 2012, namely EUR 190,000 (plus 6% interest p.a.).

The German Federal Fiscal Court first referred the question to the ECJ as to whether, also in this case, the VAT was only chargeable at the time the individual instalment payments were made. In contrast to the *baumgarten sports* case, the payments to the plaintiff were not conditional. They were only dependent on the passage of time. The Federal Fiscal Court also referred a second question to the ECJ, in the event that the VAT was indeed fully chargeable in 2012. That second question was whether, immediately upon the VAT was chargeable, the issue of uncollectibility (sec. 17 para. 2 no. 1 of the German VAT Act) would arise as regards the instalments to be paid in the following years. The consequence would be that the plaintiff would only be required to pay VAT in the amount of EUR 38,000 in 2012. Due to subsequent collection, the plaintiff would have to pay VAT on the amount received in each of the following years (EUR 38,000 per year).



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3 ECJ judgments

As regards the first question, the ECJ took the view that the VAT for a one-off supply of services paid for in instalments is chargeable at the time the supply is rendered. According to the ECJ, this follows from the wording, the objective and the systematics of the VAT Directive. VAT is chargeable in instalments only if the supplies are made repeatedly or continuously over a certain period of time.

According to the ECJ, there is also no non-payment (= uncollectibility). Payment in instalments does not equate to a case of uncollectibility. Non-payment is characterised by the fact that the fulfilment of the claim is uncertain. Despite the neutrality of VAT as regards the taxable person, no other result is necessary with regard to the chargeability of the VAT or with regard to uncollectibility. The obligation to pay the VAT existed irrespective of whether the taxable person had previously received the remuneration. As a result, the plaintiff was required to pay VAT in the amount of EUR 190,000 in 2012.

4 Consequences for the practice

The decision demonstrates that taxation in the period the transaction is carried out is not only difficult to handle correctly in practice, but it also shows, in an “impressive” way, that it is not compatible with the neutrality of VAT (at least in circumstances of the present kind). Even if the ECJ asserts the opposite view, no taxable person will understand why he is not burdened with VAT – at least by way of pre-financing – in circumstances of the present kind. Contrary to the opinion of the ECJ, the obligation to pay VAT, without first receiving it from the recipient of the service, as provided for in the VAT Directive, does not justify this lack of neutrality, especially in the case of extensive periods of time.

The exact demarcation from the *baumgarten sports* case, as regards the incurrance of VAT, remains unclear following the ECJ judgment. In the *baumgarten sports* case, as in the present case, the plaintiff had also supplied intermediary services and thereby actually rendered its supply of services. In its current order for reference, the Federal Fiscal Court has shown that the difference between the two cases lies in the method of payment. In the *baumgarten sports* case, the payment is dependent on a condition, whereas in the present case, it is dependent on the passage of time. However, the ECJ did not comment on the method of payment as being a possible criterion for demarcation. It also did not mention any other demarcation criterion. Thus, it remains unclear in which circumstances, in the case of a supply of services that is remunerated by means of subsequent payments, the VAT is to be assumed fully and immediately chargeable. It remains to be seen whether the Federal Fiscal Court will identify criteria for demarcation in its follow-up decision.

If, in future, taxable persons conclude instalment payment agreements with taxable persons entitled to full input VAT deduction, they would be well advised to issue an invoice at the time the supply of service is carried out, showing VAT for the full agreed amount. In this case, the recipient is immediately entitled to full input VAT deduction. He can therefore immediately pay the total VAT amount due to the supplier without any significant disadvantage. The instalments can then subsequently be settled in accordance with the agreement. The supplier should ensure that a corresponding regulation is included in the civil law contract.

If the recipient is not entitled to full input VAT deduction, this procedure, namely paying the full VAT amount at the time of supply is, from a VAT perspective, also possible. It must be clarified in each individual case whether the supplier can enforce this contractually. If this is not possible, the costs of pre-financing the VAT must be taken into account in the supplier's price calculation. Alternatively, it should generally be considered whether the facts can be structured in such a way that partial supplies of services are assumed.