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By PwC Deutschland | 20. Oktober 2022

ECJ: Joint and several liability of legal entities for Value Added Tax

The European Court of Justice decided that the VAT Directive does in certain defined circumstances not preclude a national regulation providing for an automatic joint and several liability for VAT debts and late payment interest thereon. In its current judgment the ECJ specifically confirmed that the Bulgarian regulation on automatic joint and several liability for VAT debts of a legal entity does not violate EU law. This applies, for example, if the jointly and severally liable person is the managing director of the legal entity.

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Background

The main issue in the dispute is the Bulgarian regulation on automatic joint and several liability pursuant to Art. 19 (2) of the National Tax and Social Security Procedural Code (Danachno-osiguritelen protsesualen kodeks - in short: DOPK). The plaintiff had ordered, or at least had knowledge of, the transfer of an amount from the assets of the company (G) to a natural person associated with him through a third party, thereby acting in bad faith under national law. The amounts had been transferred to an account of the solicitor with whom the company had concluded a contract for legal services, and the solicitor had transferred them to the account of the plaintiff's wife, which the plaintiff could also dispose of. Due to the decline of the company's assets by those “missing amounts”, the VAT debt and the accrued default interest were not paid.

The specific concern of the referring court (Administrative Court of Bulgaria) was whether it is permissible under EU law (in this case: Article 273 of the VAT Directive and the principle of proportionality) for a natural person not subject to VAT (here: the plaintiff) to be held liable based on Article 19(2) of the DOPK for VAT not paid by the company (G) and interest due on the outstanding VAT amount. These questions first imply that such liability of a non-taxable person falls within the scope of EU law. Therefore, if a legal situation is not covered by EU law, the ECJ would not have jurisdiction to rule on it. The National Revenue Agency (the defendant) argued that the VAT Directive is not intended to apply to a system of joint and several liability covering all categories of tax and social security contributions, such as that provided for in Article 19(2) of the DOPK.

ECJ decision

To begin with, the ECJ was forthright to underscore that the applicability of the VAT Directive cannot be called into question just because the national Bulgarian regulation was not aimed at the time to transpose the EU Directive into national law. The national regulation at issue is intended precisely to ensure compliance with the provisions of the VAT Directive should fulfill the obligation imposed on the Member States by Article 325 (1) TFEU to combat effectively acts contrary to the financial interests of the EU. It is therefore necessary to identify the provisions of EU law which are applicable in situations such as that in the main proceedings. Earlier, **the Advocate General in his Opinion** of 2 June 2022 had dismissed the referral by saying that the general joint and several liability of a company’s executive body (non-taxable person) for conduct causing harm to the company which results in the non-payment of tax debts owed by the company, is not the subject of the VAT Directive and does not come within the scope of EU law and therefore, the court was not to have jurisdiction to answer the questions raised.

The ECJ, however, answered the three questions referred for a preliminary ruling by deviating from the GA's assessment as follows:

By its **first question**, the referring court asks whether Article 273 of the VAT Directive and the principle of proportionality **must be interpreted as precluding national legislation** which provides for a system of joint and several liability for a legal person’s VAT debts in the following circumstances (i. e. the facts in the case of dispute):

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- The person held jointly and severally liable is a manager or member of an executive body of the legal person;

- this person made, in bad faith, payments from the legal person's assets which could be characterized as a hidden distribution of profits or dividends, or transferred those assets free of charge or at a price significantly lower than the market price;

- the acts carried out in bad faith had the effect of rendering the legal person unable to pay all or part of the VAT for which it is liable;

- the joint and several liability is limited to the amount by which the legal person's assets were depleted as a result of the acts carried out in bad faith; and

- that joint and several liability is incurred only in a situation where it proves impossible to recover from the legal person the amounts of VAT payable.

The ECJ answered **that this is not the case** and Art. 273 of the VAT Directive and the principle of proportionality **do not preclude the national regulation** as described above (more details in para. 68 through para. 85 of the judgment).

In a **second question** it is asked whether Article 273 of the VAT Directive and the principle of proportionality must be interpreted **as precluding national legislation** providing for a system of joint and several liability, such as that described in the first question, **which extends to default interest payable by the legal person** on account of a failure to pay VAT within the mandatory time limits laid down by that directive.

On this point, too, the ECJ notes that **EU law does not preclude the national rule** described, which provides for automatic joint and several liability **which also covers the default interest** owed by the legal person (para. 86 through para. 96).

The **third question** should clarify whether the principle of proportionality must be interpreted as **precluding national legislation** which provides for automatic joint and several liability, such as that described in the first question, which **extends to interest on late payment of taxes** and where **the late payment is not attributable to the conduct of the person held jointly and severally liable but to the conduct of another person** or to the existence of objective circumstances.

Here, the ECJ sees **no correlation between the requested interpretation** of EU law **and the circumstances or the subject matter of the original dispute**, which is why **the third question is not admissible**.

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Source:

The ECJ case reference is **C?1/21**, *Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika“* judgment of 13 October 2022.

Note from a German point of view These or similar cases are dealt with in Section 69 of the German Fiscal Code, which provides that legal representatives of natural and legal persons and the managing directors of unincorporated associations of persons and estates (…) are liable insofar as claims arising from the tax debt relationship are not assessed or not fulfilled in a timely manner or not assessed or not fulfilled in a timely manner as a result of an intentional or grossly negligent breach of the duties imposed on them, or insofar as tax refunds or tax reimbursements are paid without legal cause as a result. The liability also includes the late payment surcharges payable because of the breach of duty.

Schlagwörter

liability for VAT, secondary VAT liability