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EU **Tax Alert**

- CJ finds Belgian Excess Profit Rulings to constitute tax scheme
- The Commission releases roadmap with respect to the initiative to introduce a common EU-wide system for withholding tax
- Council of the European Union approves Public Country-by-Country reporting Directive
- CJ rules on VAT treatment of voluntarily granted discounts (*Boehringer Ingelheim RCV GmbH*)

Introduction

In this publication, we look back at recent tax law developments within the European Union. We will discuss, amongst other things, relevant case law of the national courts of the Member States, opinions of the Advocate Generals of the Court of Justice of the European Union as well as its case law. Furthermore, we set out important tax plans and developments of the European Commission and the Council of the European Union.

Highlights in this edition are:

- CJ finds Belgian Excess Profit Rulings to constitute tax scheme
- The Commission releases roadmap with respect to the initiative to introduce a common EU-wide system for withholding tax
- Council of the European Union approves Public Country-by-Country reporting Directive
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Highlights in this edition

CJ finds Belgian Excess Profit Rulings to constitute tax scheme

On 16 September 2021, the CJ decided to set aside the General Court's judgment that effectively forced the Commission to start investigating each Belgian Excess Profit Ruling separately. (See C-337/19P, *European Commission v Belgium and Magnetrol*.) The CJ found that the European Commission met the standard to find that the Belgian legal framework for Excess Profit Rulings as such qualified as a tax scheme, which could be ruled on as a whole. While in the meantime, the European Commission has opened 39 individual investigations, it had not closed those investigations, awaiting the outcome of this judgment.

As a result, the General Court will now have to address the material aspects of the case and determine whether the Belgian Excess Profit Ruling regime as such qualified as unlawful State aid and, if so, to uphold the Commission's 2016 recovery decision for the entire scheme. It would still be up to Belgium to calculate the benefit in each individual case (if any) following the Commission's instructions included in its decision, which has already taken place as the pending proceedings did not affect its duty to recover in the meantime.

The Commission releases roadmap with respect to the initiative to introduce a common EU-wide system for withholding tax

The Commission had earlier released a planned initiative to introduce a common EU-wide system for withholding tax on dividend or interest payments. The initiative also includes a system for tax authorities to cooperate and to exchange information with each other. The Commission has now launched its roadmap with respect to this initiative. The feedback period lasts from 28 September 2021 until 26 October 2021. After that, the public consultation is scheduled for Q3 2021 whereafter the adoption by the Commission is planned for Q4 2022.

Council of the European Union approves Public Country-by-Country reporting Directive

The Council of the European Union adopted on 28 September 2021, its position at first reading on the public Country-by-Country reporting. Under the proposed directive, EU and non-EU based multinationals are required to publicly disclose income tax information if they have a total consolidated revenue of more than EUR 750 million. The next step is that the European Parliament needs to approve the Council's position. When the public Country-by-Country obligations are to come into force depends on when the Directive will enter into force. The rules will apply at the latest to financial years starting on or after two years and six months after the date of entry into force of the directive. If, for example, the directive enters into force in November 2021, the rules will apply, at the latest, to financial years starting in or after May 2024.

European Union removes Anguilla, Dominica and Seychelles from its List of Non-Cooperative Jurisdictions

The Council of the European Union has decided to remove Anquilla, Dominica and the Seychelles from the EU list of non-cooperative jurisdictions. The nine remaining jurisdictions on the list are: American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, the US Virgin Islands and Vanuatu. The list will become official after its publication in the Official Journal. The next revision of the list is due in February 2022.

What the impact of the removal of these jurisdictions from the list could have under national tax law should be further reviewed. From a Dutch tax perspective, these jurisdictions will also be removed by the end of the year from the Dutch low taxed jurisdictions lists that are relevant for Dutch CFC legislation and the conditional withholding tax on interests and royalties.

CJ rules on VAT treatment of voluntarily granted discounts (*Boehringer Ingelheim RCV GmbH*)

On 6 October 2021, the CJ delivered its judgment in the case *Boehringer Ingelheim RCV GmbH* (C-717/19). Boehringer is a supplier of pharmaceutical products such as medicines. Boehringer supplied its products to wholesalers. These wholesalers then supplied the products to pharmacies, where the products were distributed to Hungarian patients. In Hungary, the medicines developed by Boehringer were subsidized by a health insurance fund called 'NEAK'. The pharmacies received a subsidy from NEAK for the supply of the medicines as well as the patient's own contribution. Boehringer concluded an agreement with NEAK, based on which Boehringer

granted volume discounts to NEAK. No legal obligation existed to conclude this agreement.

The Hungarian Tax Authority argued that Boehringer was not allowed to decrease the VAT taxable amount of its own supplies to the wholesalers with the amount of the discounts granted to the NEAK. In the first place, because there existed no legal obligation to provide the discounts and secondly, because the NEAK did not issue any invoices to Boehringer in connection to the discounts granted.

In its judgment, the CJ held that Boehringer was allowed to claim a refund of VAT in connection with the rebates granted to NEAK. By concluding the agreement with the NEAK, Boehringer had waived part of the remuneration received from the wholesaler. It would not stroke with the neutrality principle if Boehringer would then need to declare VAT based on a higher amount than it ultimately received. The fact that NEAK did not issue any invoices to Boehringer does not make this any different.

State Aid/WTO

Recovery of Spanish goodwill amortization scheme upheld

In 2009, the European Commission found that a Spanish tax amortization provision for financial goodwill, restricted to foreign acquisitions, constituted unlawful State aid as far as it concerned intra-EU acquisitions. Such amortization had allegedly been introduced to remedy the adverse effects of acquiring 5% and more shareholdings in non-resident companies, provided that they carried out business activities abroad subject to a corporate tax similar to that of Spain. In 2011, the Commission was a bit more tolerant with respect to extra-EU takeovers, where no recovery was deemed necessary for most of the aid granted prior to the opening of the formal investigation in 2007.

This case ended up at the CJ a second time, after the famous *World Duty Free/Banco Santander* judgments of 2018, and in a series of judgments on 6 October 2021, it finally ended this case (see, inter alia, Joined cases C-51/19P and C-64/19P *WDF and Spain v Commission*). It did indeed uphold the Commission's finding that the regime created diverts from the reference framework that does not allow for the amortization of financial goodwill (except in the case of entering into a Spanish business combination) and therefore, let the recovery decisions stand.

Block-exemption regulation to be revised to facilitate the EU's Green Deal and its digital ambitions

The European Commission will be updating its block-exemption regulation, most probably early 2022. Based on this regulation, some tax schemes will not have to be submitted to the European Commission for upfront approval if certain conditions are met.

Amongst the revisions to be expected are the inclusion of tax incentives for private investors that provide risk capital to small or medium-sized enterprises either directly or via a financial intermediary. Rules on aid for research, development and innovation (R&D&I) will also be widened as to explicitly facilitate innovation in digital technologies and solutions and technology infrastructure, which may also affect R&D&I-related tax incentives.

Partial relief of energy-intensive industries from environmental taxes or levies will now be covered. This would cover reduced tax rates or the use of a fixed or capped amount of tax or levy due. Apart from obligatory energy audits, also the implementation of recommendations from such audits and a substantial investment in greenhouse gas emissions will be relevant for approval.

A reduction of environmental taxes and parafiscal levies for certain sectors (other than the energy sector) which is passed on to consumers would lead to significant sales reductions, and will be capped at 80% of the tax involved and be subject to the condition that all undertakings in the same sector will have access to this. This in order to facilitate the initial introduction of such taxes. Also, in order for certain biomass fuels to continue to qualify for tax reductions they must comply with stricter sustainability and greenhouse gas emissions savings criteria than set by the EU before.

Note that whether these or any other tax measures would actually be introduced by a Member State is still that State's prerogative; the block-exemption regulation only provides a framework to make it possible without the need to await a Commission decision if maximum amounts of aid and other conditions are respected.

Direct Taxation

Portugal discriminates by only allowing a 50% deduction of dividend attached to shares listed on the Portuguese stock exchange (*Real Vida*)

In 1999 and 2000, Real Vida Seguros, S.A. (**Real Vida**) received dividends attached to shares listed on the Portuguese stock exchange and also on foreign stock exchanges, and deducted 50% of those dividends from its taxable base according to the Portuguese tax law. Following a tax audit, adjustments were made to the taxable base for the calculation of corporate income tax due for tax years 1999 and 2000 since the tax benefit of the 50% deduction should exclusively apply to dividends received on shares listed on the Portuguese stock exchange. Real Vida disagreed with the tax authorities, and claimed it is not in line with the free movement of capital. The Portuguese court consequently referred questions to the CJ for a preliminary ruling.

The CJ ruled that disallowing the 50% reduction of dividends from the corporate income tax base attached to shares listed on foreign stock exchanges is not in line with the free movement of capital. Although the Portuguese rule does not make an explicit distinction between dividends distributed by resident companies and dividends distributed by non-resident companies, it indirectly imposes a restriction on the free movement of capital as the number of non-resident companies whose shares are listed on the Portuguese stock exchange is limited, compared to the number of resident companies. As concluded in *Köln-Aktienfonds Deka* (C-156/17), an indirect restriction on the free movement of capital applies when a tax advantage is subject to a condition that, by its nature or in fact, is specific to the national market of that Member State in such a way that only resident companies of the Member State are capable of complying with that condition. In that sense, a Member State's tax practice, according to which favourable tax treatment is exclusively granted to dividends attached to shares listed on the national stock exchange, will result in investments in resident companies being favoured.

No justifications were applicable in this case. First, the CJ concluded that the situation of a taxpayer investing in shares listed on the Portuguese stock exchange was considered comparable with that of a taxpayer who makes investments in shares listed on foreign stock exchanges. Second, the promotion of the Portuguese stock exchange cannot justify a restriction of the fundamental freedoms guaranteed by the TFEU, according to the CJ.

AG Kokott opines that French system of advance payments and tax credits for redistribution of dividends is compatible with the Parent-Subsidiary Directive (*Schneider Electric and Others*, C-556/20)

Up to and including 2004, France provided for a system of tax credits and advance payments for the taxation of dividends in a chain of companies. In short, this system ensured that recipients of dividends paid by a French company received a tax credit of 50% of the dividend distributed, in order to neutralize the tax burden imposed on the same income at the level of the distributing company. In the case the profits underlying the distribution had not been taxed or had been taxed only partially, the re-distributing companies were required to make an advance payment of the corporate income tax to justify the credit received by its shareholders. Consequently, the advance payments could be offset against the credit received by the distributing company, resulting in a neutral outcome for the distributing companies. The outcome, however, is not neutral when distributing to parent companies established in other Member States as no tax burden could be imposed under the Parent-Subsidiary Directive (90/435) (Directive), i.e., the distributing company would have to make an advance payment without being able to offset it against its own tax credit. Consequently, Schneider Electric and other parent companies sought reimbursement of the advance payments. Subsequently, the French Court referred questions for a preliminary ruling to the CJ.

On 14 October, AG Kokott published her Opinion in this case. First, AG Kokott opined that the French system does not contradict the goals and scope of the Directive as set out in Articles 4 and 5 of the Directive. If the advance payment equals the amount of the tax credit, the dividends are not subject to a discriminatory or additional tax burden in cross-border situations, i.e., advance payment cannot even be regarded as a withholding tax, in contrast to the provisions of the Directive.

The second preliminary questions concerned compatibility with article 7(2) of the Directive, which, in principle, states that the Directive does not affect the application of domestic provisions designed to eliminate economic

double taxation of dividends, in particular provisions relating to tax credits granted to the recipients of dividends. In so far as that tax credit may be set off against the advance payment in the case of a redistribution which, in turn, merely corrects a substantively unjustified tax credit received by the shareholder, there are no concerns in terms of deviations from the Directive contradicting its spirit. For that reason, AG Kokott opined that French system of advance payments and tax credits for redistribution of dividends is compatible with the Directive.

AG Tanchev opines that Hungarian court is bound by EU case law despite deviating facts (*Grossmania*)

Grossmania is a commercial company based in Hungary which held rights of usufruct over immovable properties in Hungary. Grossmania did not appeal against the cancellation of its rights of usufruct. Article 63 does, however. does preclude national legislation to remove rights of usufruct on agricultural land whose holders do not have the status of close relation to the owner of the land (i.e., close relatives) (Joined Cases C52/16 and C113/16, *SEGRO and Horváth*). As a result, Grossmania applied to have its right of usufruct over the properties in question re-registered. This request was denied. Grossmania consequently lodged an administrative appeal. As the facts in this case slightly differ from *SEGRO and Horváth*, the referring courts had doubts as to whether Hungarian law or the EU case law was applicable.

AG Tanchev opines that the Hungarian court is bound by the judgment of the CJ regardless that the facts slightly differ. The CJ ruled that the Hungarian rights cancellation scheme is contrary to EU law, which should be followed not only by the Hungarian referring court but also by any other national authority.

AG Saugmandsgaard Øe opines that the Spanish tax 720 form is partly incompatible with EU law (*Commission v Spain, C-788/19*)

On 23 October 2019 the Commission brought an action against Spain to the CJ based on Article 258 TFEU. According to the Commission, Spain did not comply with EU law by introducing a tax scheme back in 2012 with the aim to prevent tax evasion and avoidance related to assets located abroad. Under this tax scheme, Spanish residents must declare certain assets and rights located abroad with the so-called '720 form'. Non-compliance can lead to 1) the classification of those assets as unsubstantiated capital gains and their inclusion in the general tax base, irrespective of the date of acquisition of the assets concerned, without the possibility to rely on a limitation period; 2) the imposition of a proportional fine of 150%; and 3) the imposition of fixed fines. The Commission considers that those three penalties and the rules for their implementation constitute disproportionate restrictions infringing several of the freedoms of movement in particular the free movement of capital.

On 15 July 2021, AG Saugmandsgaard Øe published his Opinion in this case. The AG first opined that the 720 form is undoubtedly restrictive and that there is no difference between taxpayers holding assets in national territory or abroad given the purpose of the legislation at issue (i.e., avoiding tax evasion). However, the restriction might be justified by the purpose of the 720 form if the legislation is proportionate.

With respect to the classification of assets as unsubstantiated capital gains without the possibility to rely on a limitation period, the AG opined that the legislation is only disproportionate with respect to bank accounts opened as from 1 January 2016. This because these accounts are already subject to the exchange of information under the DAC and the Commission did not provide the required evidence to prove that information regarding other assets was also exchanged under the same conditions.

Regarding the imposition of the proportional fine of 150% the AG also considered that the Spanish legislation is only disproportionate for the bank accounts opened as from 1 January 2016.

Finally, the AG stated that the fixed fines are disproportionate in general given that these are a lot higher than the fines that are imposed in domestic situations.

AG Saugmandsgaard Øe opines that granting tax exemption only to investment funds constituted by contract is in breach of EU law (*A SCPI, C-342/20*)

A SCPI (*Société civile de placement immobilier à capital variable*) is an investment fund established in France where it is treated as tax transparent. A SCPI intended to invest in Finnish real estate and to make other Finnish real estate investments as a result of which it asked the Finnish tax authorities for a preliminary ruling on its tax

treatment. Under Finnish tax law investment funds that are constituted by contract are exempt from Finnish income tax whereas funds incorporated in any other legal form are not. Based on this legislation, the Finnish tax authorities ruled that A SCPI was not exempt from Finnish income tax given that it had not been established by contract. The Helsinki Administrative Court referred the preliminary question to the CJ whether this legislation is in breach of the free movement of establishment and the free movement of capital.

The AG first ruled that the analysis in this case should be based on the free movement of capital as the Finnish legislation does not only apply to acquisitions of shareholdings which would lead to a definitive influence in Finnish companies. Subsequently, the AG noted that Finland does have a system of fiscal transparency but that A SCPI cannot benefit from it as it does not meet the requirements. This makes the problem in this case the compatibility with the freedom of movement of capital and no longer a divergence between national tax systems.

Subsequently, the AG opined that there is little doubt that a requirement of incorporation by agreement to qualify for tax transparency constitutes a restriction on the free movement of capital. The question whether certain investment funds constituted by articles of association in other Member States are in a comparable situation to that of Finnish investments funds established by contract is answered in the affirmative. If an investment fund constituted by articles of association has similar characteristics as an investment fund incorporated by contract, such fund is comparably transparent as a fund incorporated by contract. According to the AG, A SCPI was mostly transparent based on its characteristics whereby it was comparably transparent to a fund constituted by contract. By taking a formalistic approach of ‘transparency’ emphasizing the requirement of incorporation by contract, certain investment funds such as A SCPI are excluded that leads to an arbitrary difference in treatment between comparable situations. The AG also referred to Case 480/19 in that respect (reference is made to EUTA 189). The AG therefore concluded that the requirement to be constituted by contract to qualify for tax transparency constitutes a restriction on the free movement of capital. Such restriction can also not be justified according to the AG.

AG Richard de la Tour opines that limited deductibility of compulsory portions is not compatible with EU law (*XY v Finanzamt V, C-394/20*)

A deceased Austrian resident had immovable property in Germany. His daughter, also an Austrian resident, is his sole heir while his wife and son only receive the statutory share of the inheritance. Under German tax law, transfers based on an inheritance to children involving German immovable property are allowed a basic allowance of EUR 400,000 unless neither the deceased person nor the heir are German residents. In that case, the basic allowance is only available on the basis of a pro rata (i.e., the value of the domestic assets subject to the limited tax liability divided by the total sum of assets received by the inheritance). Subsequently, the heir may deduct the costs related to the statutory shares as expenses in the case the deceased and the heir are both German residents. If neither are resident of Germany, only expenses that are directly economically connected with German immovable property are deductible. The daughter filed the inheritance tax return in Germany in which she claimed the basic allowance of EUR 400,000 and deducted the statutory shares as expenses. The German tax authorities only granted a reduced basic allowance based on the pro rata and refused the deduction of the statutory shares. The daughter appealed against this decision.

On 7 October 2021, the AG Richard de la Tour published his Opinion in this case. The AG first noted that the case must be examined in the light of the free movement of capital. With respect to the basic allowance on a pro rata basis, the AG ruled that this is not a restriction on the free movement of capital as the assets subject to the limited tax liability are taxed at the same rate as in the case of the unlimited tax liability. Alternatively, the AG further considered whether the situations are objectively comparable, which is not the case, given that the basic allowance based on a pro rata depends on the scope of the tax liability. Should the CJ consider the situations comparable, the AG opines that the restriction could be justified based on the principle of territoriality and the need to ensure a balanced allocation of taxing powers of Member States.

With respect to the deduction of the costs related to the statutory shares, the AG stated, using the same reasoning as to determine the basic allowance, that a link should be established between the enrichment of the heir, the taxation thereof and the tax benefit granted (i.e., an

economic approach). Otherwise, the heir is taxed on part of the enrichment that does not actually exist. That would create a difference in treatment between the situations of heirs of residents and heirs of non-resident that have German immovable property that is not compatible with EU law. The AG finally opined that this cannot be justified based on the balanced allocation of taxing powers or the avoidance of double deduction of the expenses.

VAT

CJ rules on compatibility of Polish VAT practice for intra-Community acquisitions with EU VAT Directive (*G. sp. z o.o.*)

The CJ delivered its judgment in the case *G. sp. z o.o.* ('G') on 9 September 2021 (C-855/19).

G acquired diesel fuel in Poland from other EU countries. The Polish VAT regulation imposes an obligation on taxable persons to pay VAT on the intra-Community acquisitions before that VAT is formally due. In breach of the Polish VAT law, G failed to account for VAT on the intra-Community acquisitions within five days after the diesel fuel entered Poland and also failed to submit periodical statements about the number of acquisitions that took place. The Polish Tax Authority issued a VAT assessment (including interest and penalties) to G relating to the VAT amounts that were not reported on time based on the provisions of the Polish VAT regulation. In its judgment, the CJ answers the question whether the Polish practice is compatible with the EU VAT Directive.

In order for a VAT liability to arise, that VAT must first have become chargeable and for the VAT to have become chargeable, a chargeable event must first have taken place. With regard to intra-Community acquisitions, the chargeable event occurs when the intra-Community acquisition of goods is made. However, the VAT amount becomes due when the invoice is issued by the supplier of the goods or, at the latest, on the fifteenth day of the month following that in which the chargeable event occurred, where no invoice has been issued by the supplier before that date.

Although the VAT Directive offers the possibility to bring forward the date of payment of VAT that has become chargeable, the scope of this provision may not be extended to bring forward the date on which VAT becomes due. Consequently, the CJ ruled that Poland's national law which imposes an obligation to pay VAT on the intra-Community acquisitions before that VAT becomes due, is not compatible with the EU VAT Directive.

CJ rules on requirements for VAT refunds to non-established taxable persons (*GE Auto Service Leasing*)

The CJ delivered its judgment in the case *GE Auto Service Leasing* (C294/20) on 9 September 2021.

GE Auto Service Leasing ('GE') is a VAT taxable person established in Germany. GE's business activity consisted of the provision of cars to Spanish companies on the basis of lease agreements, as well as the occasional sale of used vehicles on Spanish territory. GE asked the Spanish Tax Authority for a refund of Spanish VAT paid on its business expenses. The Spanish Tax Authority asked GE to provide the original invoices and to provide background on the transactions carried out in Spain as well as the destination of the acquired goods or services. GE failed to share the invoices relating to the refund request. The refund request was ultimately rejected by the Spanish Tax Authority because GE did not share all the required information to process the refund request on time.

The Eighth VAT Directive stipulates the conditions for granting VAT refunds to non-established taxable persons (like GE). In its judgment, the CJ assessed whether the provisions of this Directive allow tax authorities to refuse VAT refunds if the taxable person did not submit all the documents and information required within the prescribed period.

The right to recover input VAT is a fundamental principle of the neutrality of the EU VAT system. The neutrality principle requires that a VAT refund is granted to the taxable person if all material requirements thereto are fulfilled, even if not all formal requirements are fulfilled. However, not fulfilling all formal requirements can, in some cases, lead to the taxable person failing to provide the necessary evidence of meeting the material conditions of VAT deduction.

The CJ has previously ruled that the provisions of the Sixth VAT Directive do not preclude national legislation under which a taxable person may be refused to recover VAT when in possession of incomplete invoices. This is even the case if those invoices are supplemented with additional information that may prove that the transactions took place as well as the nature and the amounts involved with the transaction. In this *GE* case, the CJ ruled that the Eighth VAT Directive also does not preclude national legislation

under which the right to a VAT refund may be refused where a taxable person, without reasonable justification and in defiance of requests for information, does not provide documents proving that the material conditions for a VAT refund are fulfilled. However, the CJ also stressed that these provisions do not preclude EU countries from accepting the provision of such evidence at a later date.

CJ rules on VAT recovery right for publicly financed media services (*Balgarska natsionalna televizia*)

On 16 September 2021, the CJ delivered its judgment *Balgarska natsionalna televizia* (C-21/20).

BNT is the public provider of audiovisual media services in Bulgaria. BNT does not receive any remuneration from the Bulgarian citizens. The business of BNT is partially subsidized by the State. BNT also realizes self-generated turnover by advertising, sponsoring and donations linked to the broadcasting activity. The deduction of input VAT on these expenses used by BNT to perform its activities was challenged. BNT argued that it was entitled to recover all input VAT, whereas the Bulgarian Tax Authority was only willing to grant a partial VAT refund for the broadcasting activities that were financed by revenue from BNT's commercial activities.

The CJ first assessed if the provision of publicly financed audiovisual media services should be considered an economic activity for VAT purposes. According to the CJ, this is not the case because the viewers do not pay a fee to BNT, as a result of which there is no legal relationship between BNT and its viewers. This means that the provision of the audiovisual media services should in principle be regarded as out of scope of EU VAT.

The CJ then ruled that BNT may not deduct input VAT charged on purchases of goods and services used directly for its non-economic broadcasting activities. For mixed use expenditures, which are used for BNT's economic and non-economic broadcasting activities, there is a partial VAT recovery right. It is for the Member States to determine the methods and criteria used for attributing the VAT amounts between these two turnover categories (taking into account the fundamental principles of the EU VAT system).

CJ rules on the margin scheme (*Icade Promotions SAS*)

The CJ delivered its judgment in the *Icade Promotions SAS* case (C-299/20) on 30 September 2021.

Icade Promotion SAS ('Icade') acquired plots of undeveloped land from private individuals and local authorities. These transactions were not subject to VAT. After dividing the land into apartment rights, Icade sold the land to private individuals for the purpose of the development of residential real estate. The VAT legislation in France contains a provision that stipulates that VAT will be due on the difference between the sales price and the acquisition price of the building land in the case the taxable person is not eligible for a refund of input VAT paid in connection with the acquisition. This margin scheme is based on an optional provision in the EU VAT Directive. This CJ ruling, therefore. is only relevant for the EU countries which have also implemented this provision in their national legislation.

Icade applied the abovementioned scheme based on which VAT was due on the profit margin realized with the on-sale of the land. However, Icade later requested a refund of the VAT amount paid to the French Tax Authority, based on the argument that this margin scheme did not apply. That provided a financial advantage to Icade because the on-sale of the plots of building land would then be exempt from VAT (as a result of which no VAT would need to be paid by Icade). The French Tax Authority disagreed and reasoned that the margin scheme did apply.

In its judgment, the CJ ruled that the VAT margin scheme does not apply to the on-sale of building land in the case that land was acquired in an undeveloped state and only became a plot of land with a building in the period between acquisition and the on-sale by Icade. In that case, the goods sold are not the same as the goods acquired by the taxable person. However, the CJ also emphasized that the margin scheme may be applied to the supply of building land if alterations are made to the characteristics of the building land between the moment of acquisition and on-sale (such as the division of the building land into different plots or the carrying out of work to connect the land to utilities such as gas or electricity). This shall, however, only apply if the land qualified as a building land at the moment of its acquisition.

CJ judgment on allocation of mixed-use assets (*Finanzamt N and Finanzamt G*)

On 14 October 2021, the CJ delivered its judgment in the joint cases C-45/20 (*Finanzamt N*) and C-46/20 (*Finanzamt G*).

The request for a preliminary ruling is based on two different appeals. The applicant in the first case acquired a newly built residential property, which also included an office. The applicant in the second case acquired solar panels and used some of the generated electricity himself and supplied the rest to a power supplier's transmission system. Both assets are used for non-business purposes and economic activities at the same time, as a result of which the taxable person should choose to (partially) allocate the respective asset to its business or non-business assets.

German VAT law stipulates that if no identifiable decision is made by the taxable person upon the deadline for the submission of the annual VAT return, it will automatically be assumed that the asset will be labelled a private asset. On the other hand, the applicants argued that they were entitled to a partial refund of the input VAT paid in connection to the acquisition of the mixed-use assets.

In its judgment, the CJ emphasized that the allocation decision is essential in establishing the right to deduct VAT. The right of deduction forms an integral part of the EU VAT system and in principle, may not be limited. However, based on various provisions in the EU VAT Directive and the principle of legal certainty, the CJ ruled that the German practice is, in principle, not in breach of the EU VAT system. In that regard, the CJ did state that the allocation decision is a formal decision and that failure to comply with such formal requirements does not lead to the withdrawal of the right to recover VAT. An allocation decision is valid if this decision can be demonstrated based on other objectives even when such a decision is not shared with the Tax Authority.

Opinion AG Tanchev on the right to recover input VAT (*Grundstücksgemeinschaft Kollaustraße 136*)

On 9 September 2021, AG Tanchev of the CJ delivered his Opinion in the case *Grundstücksgemeinschaft Kollaustraße 136* (C-9/20).

Grundstücksgemeinschaft Kollaustraße ('GK') rented a property where the option for a VAT taxed lease was exercised. The rent payments were therefore increased by 19% German VAT. The lessor granted deferral of payment to GK for the lease payments. This means that in the years 2013 to 2016, GK made lease payments relating to the years 2009 to 2012. The lessor applied the cash accounting system, as a result of which VAT became formally due upon payment by GK (and not already when the rental service was first provided). The VAT charged by the lessor was recovered by GK in the year in which it made the payment. The German tax authority disagreed and argued that the right to deduct input VAT arises at the moment when the rental services are provided, as a result of which the right to deduct input VAT was refused in the years 2013 to 2016.

As a main rule, the right to recover VAT arises when the VAT becomes formally due by the supplier. The AG, therefore, argued that GK was entitled to a refund of input VAT in the years in which the rental payments were made. According to the AG, a national regulation breaches the EU VAT Directive when it stipulates that the right to deduct input tax arises at the time the transaction is performed, even if the tax claim against the supplier only arises when the remuneration is received and the remuneration has not yet been paid by the recipient of the supply.

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