



The CJEU ruled on the interpretation of Art. 90 of VAT Directive concerning “VAT on bad debt relief” and the relevant Italian Implementing provision (Case C-246/16 *Enzo Di Maura*)

On 23 November 2017, the Court of Justice of the European Union (“CJEU”) issued its decision in the case C-246/16 *Enzo di Maura*. The case concerned the implementation in the Italian VAT legislation of Article 90, para. 1 and 2 of Directive 2006/112/EC (“VAT Directive”) which lays down the so-called “VAT bad debt relief” according to which taxpayers have to reduce the VAT taxable amount of supplies of goods and services in case the customer does not pay the consideration for the supply in full or in part.

The decision deals with the application of VAT bad debt relief within the framework of insolvency procedures. Pursuant to Italian legislation implementing the VAT Directive (i.e. Article 26(2) of Presidential Decree no. 633/1972, “Italian VAT Decree”) as interpreted by Italian Courts and the Italian Tax Agency the right to recover VAT is contingent on proof that insolvency procedures have previously been conducted and that the result of such procedures was unsuccessful. By operation of the above legislative and interpretative framework, in Italy VAT recovery could take place only following the final distribution of the proceeds deriving from the alienation of the assets owned by the bankrupted company/entrepreneur or after the issuance of a Decree by an Italian Tribunal declaring the exhaustion of the insolvency procedure (in other words, the debt must be definitively unrecoverable).

The CJEU ruled that provisions laid down by Art. 90, para. 1 and 2, VAT Directive embody a fundamental principle of the EU VAT common system according to which the taxable amount is the consideration actually received (case C-330/95, *Goldsmiths*). In accordance with that principle:

- Art. 90(1) VAT Directive imposes on Member States the obligation to reduce the taxable base in cases of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place;
- Art. 90(2) VAT Directive allows Member States to derogate from para. 1 in cases of total or partial non-payment.

In previous rulings (case C-330/95, *Goldsmiths*) the CJEU already held that rationale of Article 90(2) VAT Directive – that provides for a derogation of the obligation embodied in the previous paragraph – is twofold: (i) the reduction of the taxable base can be derogated because partial or total non-payment of the consideration of a given supply may only be temporary or; (ii) because it may be difficult to ascertain the moment in which that non-payment crystallizes. Nevertheless, according to the CJEU, that derogation does not confer upon Member States the power to exclude the right to reduce the taxable base altogether.

The CJEU, in the case at hand, analysed if the strict conditions laid down by Art. 26(2) of the Italian VAT Decree complied with the principles governing the EU VAT common system and, in particular, if they were justified.

The CJEU replied in the negative.

In particular, according to the CJEU, the fact that the derogation laid down by Art. 90(2) VAT Directive takes into account the inherent uncertainty of the definitive non-payment of a supply of goods or services does not mean that a taxable person can be deprived of its right to reduce the taxable amount for as long as the debt is not definitely unrecoverable. The CJEU emphasized that, in the specific case of Italy, certainty that the debt is definitively irrecoverable can be obtained only in around ten years after the moment in which the bankruptcy or enforcement procedure initiated. Such a period causes a cash flow disadvantage compared to competitors in other Member States that clearly undermines the objective of fiscal harmonization pursued by the VAT Directive.

On the basis of the above, the CJEU concluded that Article 90(2) VAT Directive does not permit the application of a provision, such as Art. 26(2) Italian VAT Decree, depriving taxpayers of the right to reduce the taxable amount in the event of total or partial non-payment subject to the condition that insolvency proceedings have been unsuccessful to the extent such procedures may last a very long period of time (in case of Italy, ten years).

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