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VAT exemption for payments cannot be applied to a service provider that only instructs banks to transfer sums of money.

Amendments to Law no. 217/2016 regarding the reduction of food waste. Tax implications

The enforcement of measures undertaken for the food waste prevention will become optional, according to Law no. 200/2018 for the amendment and completion of Law no. 217/2016 on the reduction of food waste, published in the Official Gazette no. 647 dated July 25th, 2018.

Additional compliance obligations for companies offering sponsorships

Taxpayers granting sponsorship, acts of patronage or private scholarships will have the obligation to submit a new form, annually, i.e., Form 107 "Informative Statement regarding the beneficiaries of sponsorships/patronages/private scholarships", according to Order no. 1825/2018, published in the Official Gazette no. 646 dated July 25, 2018.

Decision of the CJEU on VAT exemption for instructions to pay

On 25 July 2018, the Court of Justice of the European Union (CJEU) released its decision in case C-5/17 DPAS Limited. This case is relevant to businesses operating across a range of sectors, including banks, outsourcers (payment processing providers), and FinTech platforms.

In brief, following the opinion of the AG from earlier this year, the CJEU considers that the VAT exemption for payments does not apply to instruction to pay (direct debit of a bank account for a patient that is paying his/her dentist). In fact, DPAS services were considered to be administrative in nature and limited to requesting the relevant financial institution/bank to actually transfer the amounts. The fact that DPAS first received and then transferred the money via its bank accounts was not relevant to this end.

Background

DPAS operates dental payment plans on behalf of dentists, where, pursuant to a direct debit mandate, collects the amounts from patients and remits them to the dentists.

In fact, DPAS instructs the bank to transfer the agreed amount from the patient's account to DPAS bank account, and, after withholding a service fee, requests the bank to on-transfer the money to the dentist's bank account.

The question answered by the CJEU concerned whether the service provided by DPAS qualified as a VAT exempt supply regarding transfers or payment services within the meaning of Article 135(1)(d) of the EU VAT Directive. It is specifically mentioned that the taxpayer does not itself debit or credit any accounts, but performs an essential service for that transfer to occur.

Decision

The CJEU has broadly followed the AG's opinion, holding that DPAS's services do not qualify for exemption.

The CJEU considered that the services provided by DPAS, although essential to performing the payment, are administrative in nature and do not make the legal and financial changes which characterize the transfer of a sum of money.

It argued that DPAS performs merely a step prior to the transactions concerning payments and transfers and does not itself carry out the transfers or the materialization in the relevant bank account of the dental plan sums, but asks the relevant financial institutions to carry out the transfers.

Another important argument brought by the Court – that was not mentioned by the Advocate General – was that DPAS is not responsible for the failure or cancellation of a direct debit mandate, as this was the liability of the patient. In other words, DPAS did not undertake any responsibility on transferring the amounts to the dentist (if the patient had no money in its bank account to honor the direct debit, DPAS was not liable to wire the money to the dentist and e.g. subsequently settle the amount with the dentist).

Moreover, in DPAS case, there were no difficulties to determine the taxable amount. One of the reasons for which financial services are VAT exempt under EU VAT law is to overcome the difficulties connected with determining the taxable amount and the amount of deductible VAT frequently (somehow inherent) met for such services.

Implications

Following the trend of the CJEU's case-law of last years, this decision confirms once again that the VAT exemption for transactions concerning payments/transfers is to be strictly interpreted, resulting in a narrow application.

The key impact is that many essential services that occur in the chain of payments/transfers, prior to the actual materialization of the transfer in the bank accounts, cannot benefit from the VAT exemption.

This decision will be relevant to financial services providers (especially outsourcers and parties in the card payment cycle), adding to the risk that their services might be subject to VAT. However, the decision can bring the benefit of VAT deduction for providers having mostly foreign EU customers.

Businesses (such as banks) that do not have full VAT deduction right will face the additional cost, unless transferred to the end consumer. Same will happen if the payment service providers earn their fee directly from the end consumer (who will suffer an additional cost). However, where the payment services providers earn their fees from fully taxable businesses (e.g. online stores), the decision should not affect such businesses given their full VAT deduction right.

The CJEU does reinforce the fact that the exemption should not be limited to banks and financial institutions. It is somewhat unclear which parties are capable of actually providing a payment service that falls within the VAT exemption. Except for banks themselves, most parties intervening in the payment cycle do not debit/credit the bank accounts.

The decision is even more relevant in the light of the Revised Payment Services Directive (PSD 2), which will bring more parties to the table. It may be that most of these parties will have to tax their services. For example, under PSD2, several parties are allowed to give instructions for payments (payment initiation service providers). As they do not execute the payments themselves, they should, in principle, charge VAT to the consumer (banks, e-commerce or private individuals).

For further questions regarding the aspects mentioned in this alert, please contact us.

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Amendments to Law no. 217/2016 regarding the reduction of food waste

- The enforcement of measures undertaken for the food waste prevention by economic operators within the food sector is eliminated.
- Among the measures of preventing food waste, the Law no longer mentions the possibility of sponsorship of food products, while the donation remains an available option (among the other regulated measures by Law).
- The donations can be performed anytime within the last 10 days of validity until reaching the minimum durability date (except for perishable foods, which will be established through Government Decision).

- The specific conditions for setting the selling prices by associations and foundations, respectively by social undertakings are amended, i.e., selling prices which will allow the recovery of functioning costs.
- Economic operators will provide annual reports to the relevant authorities presenting plans and actions undertaking for the reduction of the food waste, as well as the results obtained.

The Law, including the newly introduced amendments, will be suspended until February 1, 2019, date until which the methodological norms for application will be published.

Fiscal implications

The Law clarifies the conditions for deductibility of the expenses incurred with the view of undertaking the measure of food waste reduction and the related VAT. Hence, these amounts are deductible for corporate tax purposes as per the provisions of art. 25 par. (4) let. c), points 4, 5 and 6 of Law no. 227/2015 regarding the Fiscal Code):

"Art. 25, (4): The following expenses are not deductible […]

c) expenses with respect to inventories or depreciable fixed assets identified as missing inventory or damaged, non-attributable, as well as the related VAT, if due under the provisions of Title VII. These expenses are deductible under the following conditions/situations:

[…]

4. food intended for human consumption with a close-to-expiry date, other than those in the situations/conditions referred to in points 1 and 2, if their transfer is made in accordance with the legal provisions on the reduction of food waste;

5. animal by-products not destined for human consumption other than those in the situations/conditions set out in points 1 to 3, if their disposal is carried out in accordance with the legal provisions on the reduction of food waste;

6. food products that have become unfit for human or animal consumption if the targeting/management is aimed at transforming them into compost/biogas or neutralizing them, according to the legal provisions on the reduction of food waste. [...]".

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Additional compliance obligations for companies offering sponsorships

- The Order no. 1825/2018 introduces the obligation of preparing and filing an annual informative statement detailing the beneficiaries of sponsorships/ patronages/private scholarships (Form 107) granted by:
  - corporate income taxpayers, granting sponsorships, patronages or private scholarships;
  - taxpayers falling within the scope of Law no. 170/2016 regarding the tax on specific activities, which also pay corporate income tax and grant sponsorships, patronages or private scholarships;
  - micro-enterprise income taxpayers granting sponsorships.
- The deadline for the submission of Form 107 is:
  - for corporate income tax payers: up to the deadline for submitting the annual corporate income tax return (March 25th of the following year);
  - for micro-enterprise income taxpayers: until January 25th of the following year.
- Specific deadline terms are applicable for taxpayers with a modified tax year or those undergoing dissolution with/without liquidation.
- Carried-forward sponsorships (for the use of tax credit) should be also included in Form 107.
- First form should be submitted in 2019.

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