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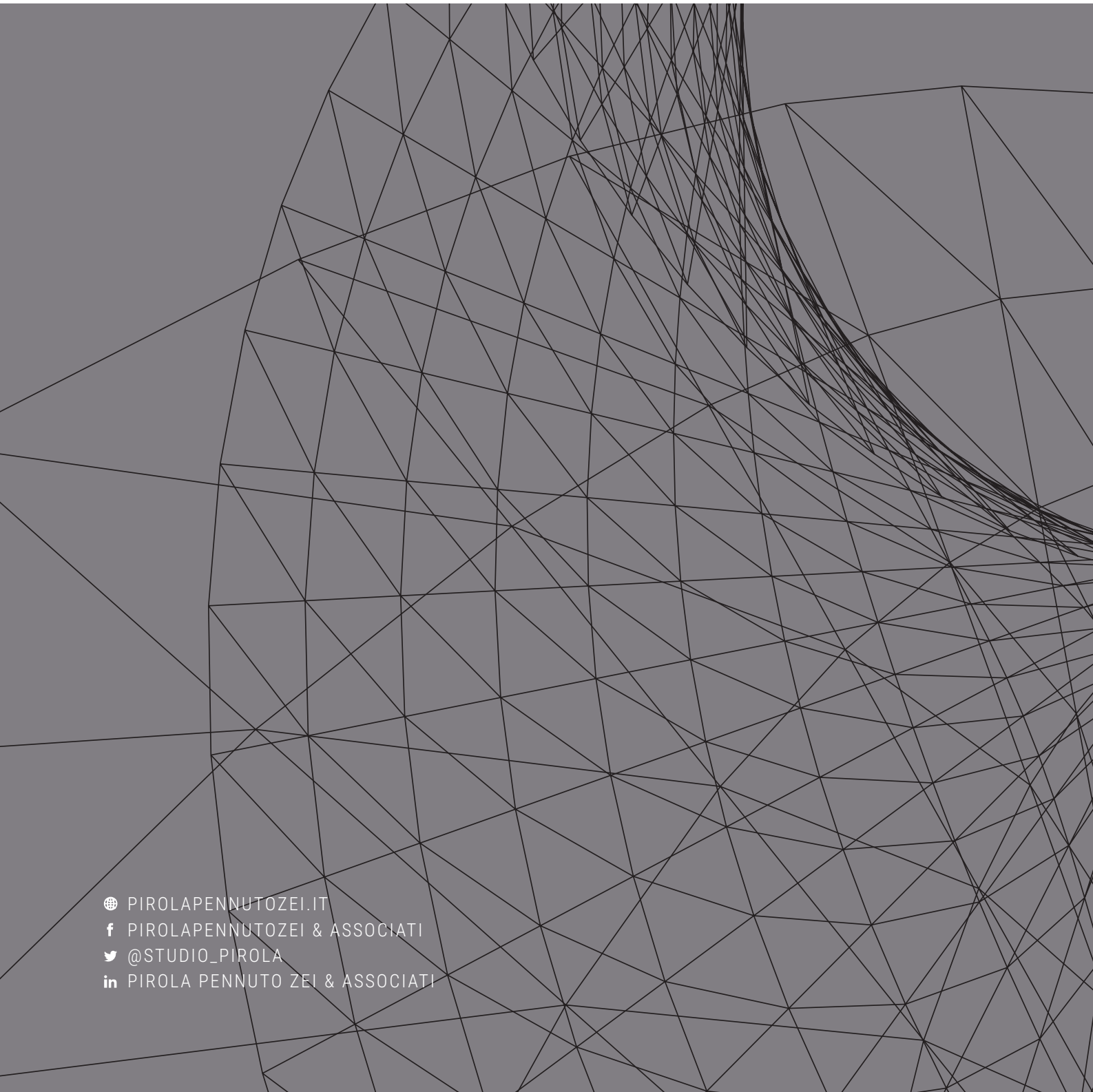
EUROPEAN

NEWSLETTER / MAY 2019



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GUIDANCE

1.1

Council revises its EU list of non-cooperative jurisdictions. **Press release dated 17 May 2019**

On 17 May 2019 the European Commission removed Aruba from the EU list of non-cooperative tax jurisdictions, while Bermuda and Belize have committed to promote tax transparency, fair taxation, implementation of OECD BEPS measures, substance requirements for zero-tax countries (criteria adopted by the European Commission at the *ECOFIN* Council held in November 2016).

As stated on the European Commission's website, the countries in the list below are those that refused to engage with the EU or to address tax good governance shortcomings (situation on June 14 of 2019):

- *American Samoa*
- *Belize*
- *Guam*
- *Samoa*
- *Trinidad and Tobago*
- *US Virgin Islands*
- *Fiji*
- *Marshall Islands*
- *Oman*
- *United Arab Emirates*
- *Vanuatu*

Please refer to the following documentation:
1) Detailed explanation of the methodology and the scoreboard;
2) External Strategy for Effective Taxation;
3) EU anti-tax avoidance requirements on financing and investment operations.

EUROPEAN COURT OF JUSTICE

2.1

Judgement dated 8 May 2019. Reference for a preliminary ruling - Common system of value added tax (VAT) - Directive 2006/112/EC - Article 168(a) - Deduction of input tax - Principle of VAT neutrality - Taxable person engaged in both economic and non-economic activities - Goods and services purchased for the purposes of performing both transactions subject to VAT and non-taxable transactions - Absence of apportionment criteria in national legislation - Principle of lawfulness of the tax. Case C-566/17. *Związek Gmin Zagłębia Miedziowego w Polkowicach* vs. *Szef Krajowej Administracji Skarbowej*

Article 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding national practice which permits a taxable person to deduct the entirety of the input value added tax (VAT) paid on the purchase of goods and services by that taxable person for the purposes of performing both economic activities, which are subject to VAT, and non-economic activities, which do not come within the scope of VAT, on account of the absence, in the applicable tax legislation, of specific rules on allocation criteria which would allow the taxable person to determine the share of input tax which ought to be deemed to be connected to his economic and non-economic activities respectively.

This request for a preliminary ruling concerns the interpretation of article 168 a) of VAT Directive and has been made in proceedings between *Związek Gmin Zagłębia Miedziowego w Polkowicach* and the Polish Tax Authority concerning the right to deduct VAT on the purchase of goods and services utilized for activities subject to VAT and non-economic activities outside the scope of application of VAT.

The European Court of Justice has specified that the existence of a right to deduct requires, on the one hand, that the taxable entity acting as such purchases goods or services and utilizes them for the purposes of its economic activity (see Judgement *Eon Aset Menidjmunt*) and on the other hand, in order for VAT to be deductible, input transactions must (on a general basis) have a direct connection with output transactions which entail a right to deduct. Basically, "*the right to deduct the VAT paid on the input purchase of goods and services requires that the expenditure incurred for that purchase was a component of the cost of the output transactions (see judgements of 13 March 2008, Securenta, C-437/06, EU:C:2008:166, par. 27; of 6 September 2012, Portugal Telecom, C-496/11, EU:C:2012:557, par. 36, and of 16 July 2015, Larentia + Minerva and Marenave Schiffahrt, C-108/14 and C-109/14, EU:C:2015:496, par. 23 and 24)*".

If a taxable entity utilises goods and services to carry out either economic transactions entailing the right to deduct and transactions not entailing the right to deduct (i.e. exempt transactions), articles from 173 to 175 of VAT Directive prescribe the rules to determine the portion of VAT deductible, which must be proportional to the amount of the economic taxable transactions. Specifically, such rules refer to input VAT on the expenditure connected solely with economic activities by separating taxable transactions, entailing the right to deduct, and exempt activities, not entailing such right (see the above mentioned judgements *Securenta, Portugal Telecom, Larentia + Minerva and Marenave Schiffahrt*). In order to avoid prejudice to the neutrality guaranteed by the common system of VAT, the transactions not falling within the scope of application of VAT Directive must not be included in the calculation of deduction proportions (see judgements *Floridienne and Berginvest, Cibo Participations* and *EDM*).

There being no provision on this matter in the VAT Directive, procedures and criteria to apportion the amounts of input VAT between economic and non-economic activities must be decided by Member States (see judgement *Gmina Ryjewo*).

2.2

Judgement of 8 May 2019. Reference for a preliminary ruling — Common system of value added tax (VAT) — Directive 2006/112/EC — Articles 90 and 273 — Total or partial non-payment, by the debtor, of a sum due to the taxable person in respect of a transaction subject to VAT — Taxable amount — Reduction — Principles of fiscal neutrality and proportionality. Case C-127/18. *A –PACK CZ s. r. o.* vs. *Odvolací finanční ředitelství*

Article 90 of Directive 2006/112 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that a taxable person cannot correct the VAT taxable amount, in the case of total or partial non-payment, by its debtor, of a sum due in respect of a transaction subject to that tax, if the debtor is no longer a taxable person for the purposes of VAT.

This request for a preliminary ruling concerns the interpretation of the principles of fiscal neutrality and proportionality and of Article 90 of Council Directive 2006/112/EC and has been made in proceedings between *A-PACK CZ s. r. o.* and the *Odvolací finanční ředitelství* (Appellate Finance Directorate, Czech Republic) concerning the latter's refusal to grant *A-PACK CZ* an adjustment of the amount of value added tax (VAT) paid in respect of unpaid debts considered to be irrecoverable as a result of the debtor's insolvency.

It is settled case-law of the Court that Article 90(1) of Directive 2006/112, which relates to cases of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply which gave rise to the payment of VAT takes place, requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. That provision embodies one of the fundamental principles of Directive 2006/112, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received (see, *inter alia,* judgment of 6 December 2018, Tratave, C 672/17, EU:C:2018:989, paragraph 29 and the case-law cited).

Article 90(2) of that directive permits the Member States to derogate from that rule in the case of total or partial non-payment of the price of the supply. Such power to derogate in the case of total or partial non-payment is based on the notion that in certain circumstances and because of the legal situation prevailing in the Member State concerned, non-payment of consideration may be difficult to establish or may only be temporary (see judgements *Goldsmiths* and *Di Maura*). The exercise of that power must be justified if the measures taken by the Member States for its implementation are not to undermine the objective of fiscal harmonisation pursued by Directive 2006/112 (see, to that effect, judgments of 3 July 1997, *Goldsmiths,* C 330/95, EU:C:1997:339, paragraph 18; of 23 November 2017, *Di Maura,* C 246/16, EU:C:2017:887, paragraph 18; and of 22 February 2018, T 2, C 396/16, EU:C:2018:109, paragraph 38) and it cannot allow the Member States to exclude altogether reduction of the VAT taxable amount in the event of non-payment (see, to that effect, judgment of 23 November 2017, *Di Maura*, C 246/16, EU:C:2017:887, paragraphs 20 and 21).

Moreover, the fact that the debtor has ceased to be a taxable person, in the context of insolvency proceedings, is rather, on the contrary, evidence of the definitive nature of the non-payment.

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Zei
& Associati
studio di consulenza
tributaria e legale

Via Vittor Pisani, 20
20124 Milano

T. +39.02.669951
F. +39.02.6691800

info@studiopirola.com
www.pirolapennutozei.it

EUROPEAN TAX NEWSLETTER | MAY 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 MAY 2019.
THIS NEWSLETTER IS INTENDED AS A SUMMARY OF KEY DEVELOPMENTS AND HIGHLIGHTS MATTERS OF GENERAL INTEREST, AND THEREFORE SHOULD NOT BE USED AS A BASIS FOR DECISION-MAKING.
FOR FURTHER DETAILS AND INFORMATION, PLEASE CONTACT YOUR RELATED PARTNER OR SEND AN EMAIL TO UFFICIOSTUDI@STUDIOPIROLA.COM