

EU COURT OF JUSTICE - CASE C-521/19

FRAUDULENT INTENT CANNOT AFFECT VAT NEUTRALITY



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By decision made on 1 July 2021 in case C-521/19, *CB v Tribunal Económico Administrativo Regional de Galicia*, the EU Court of Justice stated the principle according to which the consideration assessed by the tax authorities with regard to a taxable transaction not invoiced must be regarded as a price already including VAT, unless, under national law, the taxable persons have the possibility of subsequently passing on and deducting the VAT paid on the purchases of goods and services concerning the transaction not invoiced.

The decision stems from a request for a preliminary ruling from the *Tribunal Económico-Administrativo Regional de Galicia* (Regional Tax Tribunal, Galicia, Spain), concerning articles 73 and 78 of the VAT Directive on the determination of the taxable base. According to the facts of the case, the Spanish tax authorities – following a tax audit – took the view that the fees for agency services rendered by an independent contractor, who did not invoice such fees to the principal, did not include VAT and therefore calculated the tax due on the entire amount of the consideration assessed (instead of deducting the VAT included in such amount).

According to the Court of Justice, the prevention of tax evasion is an objective recognised and encouraged by the VAT Directive. However, the rules on the determination of the taxable income in a transaction between taxable persons are not included among the instruments available to Member States to punish the parties' fraudulent conduct. Therefore, in the light of the principle of the neutrality of VAT, the Court concluded that the VAT Directive (and in particular articles 73 and 78) had to be construed in the sense that, if it was ascertained that a VAT taxable person had not invoiced and declared the existence of a transaction to the tax authorities, the amounts received by such taxable person had to be regarded as amounts already including VAT unless under domestic legislation the taxable persons had the possibility of subsequently passing on and deducting the input VAT paid on the purchases, even if fraudulent conduct was deemed to exist.



As regards the possibility to pass on the VAT paid, the EU Court's position appears to be in line with that of Italian courts, according to which (e.g., Supreme Court decision no. 26554 of 23 November 2020) the agreed price will be deemed to include the tax only "if the supplier is unable to recover from the purchaser the VAT collected by the tax authorities", in accordance with article 60(7) of Presidential Decree no. 633/72 (the Italian VAT code). Conversely, with regard to the right to the deduction of input VAT, domestic legislation – unlike Spanish legislation – contains no provision prohibiting the deduction of the VAT paid by the seller/service provider who failed to invoice the transaction, although this right has often been disputed at the time of a tax audit if fraudulent conduct was identified. The Court of Justice decision constitutes an admonition to the tax authorities to ensure the neutrality of the tax by allowing the deduction of input VAT.

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