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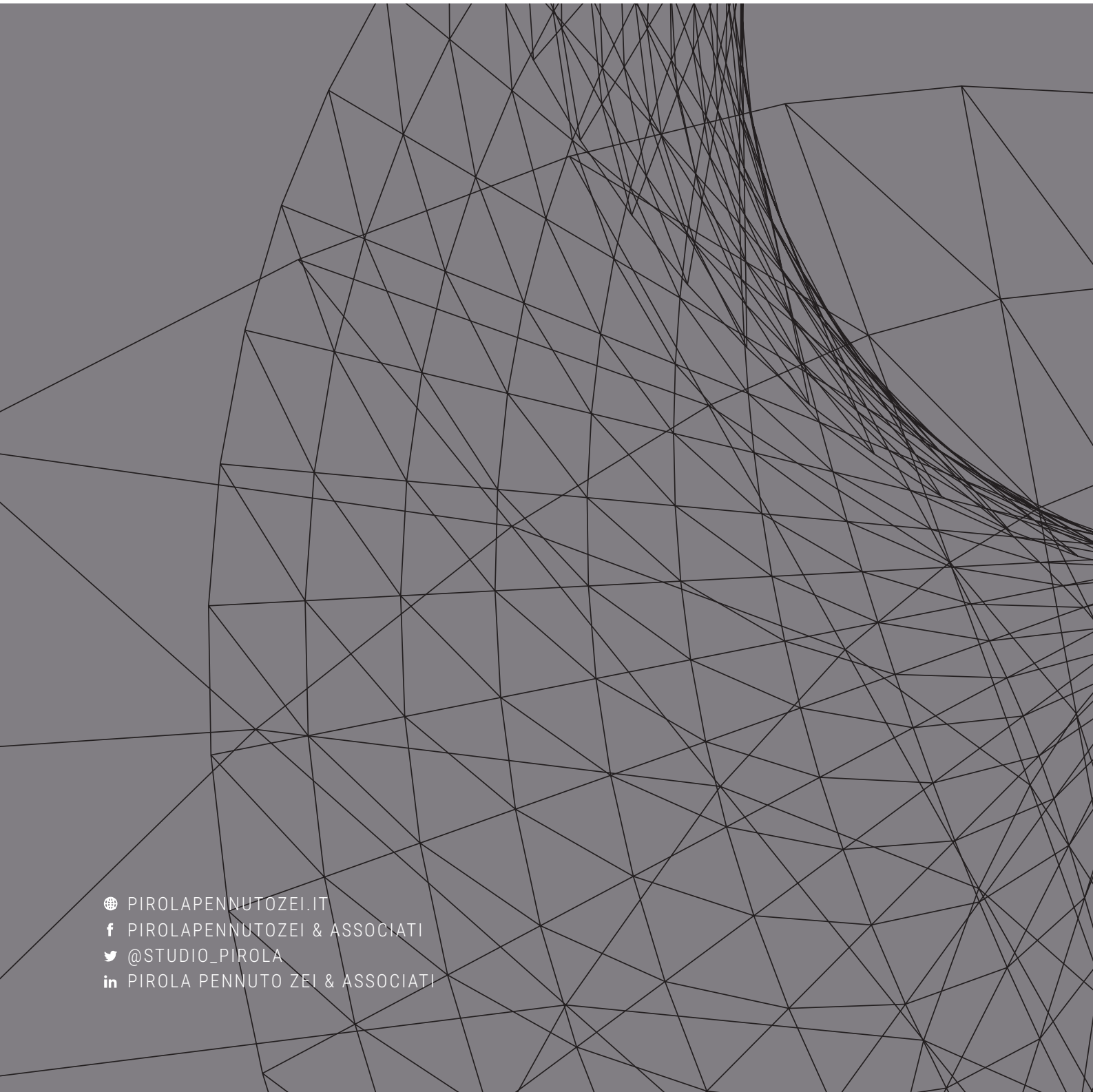
EUROPEAN

NEWSLETTER / AUGUST-SEPTEMBER 2019



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INDEX

EUROPEAN COURT OF JUSTICE

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1.1

Reference for a preliminary ruling – direct taxes – European Directive 90/434/EEC – European Directive 2009/133/EC – article 8 – capital gains related to the exchange of securities – transfer of securities received at the time of the exchange – deferred capital gain – taxation of shareholders - different bases of assessment and rate rules being used to tax - reductions of the basis of assessment intended to take into account the period for which securities have been held. Judgment dated 18 September 2019. Joint cases C-662/18 and C-672/18, AQ (C-662/18), DN (C-672/18) vs. *Ministre de l'Action et des Comptes publics*

Article 8(1) and (6) of Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States and Article 8(1) and the second subparagraph of Article 8(2) of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States must be interpreted as meaning that, in the context of an exchange of securities, they require the application, to the capital gain relating to the securities exchanged and deferred for taxation and to the capital gain resulting from the transfer of the securities received in exchange, of the same tax treatment, in the light of the tax rate and the application of a tax allowance to take account of the length of time the securities were held, as that which would have been applied to the capital gain which would have been realised on the transfer of the securities existing before the exchange if the exchange had not taken place.

The tax ruling requests refer to the interpretation of article 8 of Council Directive No. 2009/133/EC, of 19 October 2009, on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States and the transfer of the registered office of an SE or SCE between Member States and article 8 of Council Directive no. 90/434/CEE, of 23 July 1990, on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States.

The facts originating the main disputes refer to operations involving companies with registered office in one single Member State (i.e. the French Republic).

The European judges have commented on the related French regulations and the above mentioned Directives and have specified that a measure that consists in establishing the capital gain resulting from the exchange of securities and leading to the chargeable event for the taxation of that capital gain being deferred until the year in which the event putting an end to the deferral of taxation occurs, constitutes merely 'a technique' which respects the principle of fiscal neutrality in that it leads to the exchange of securities not giving rise, of itself, to any taxation of that capital gain (see Judgment *Jacob and Lassus*). Deferral of the chargeable event for the taxation of the capital gain relating to the securities exchanged necessarily means that the taxation of that capital gain follows the tax rules and the rate in force at the date on which that chargeable event occurs. It follows that, if, on that date, the tax legislation concerned provides for an allowance scheme for the length of time the securities were held, a capital gain deferred for taxation must also benefit from such an allowance scheme, under the same conditions as would have been applicable to the capital gain that would have been made on the transfer of securities existing before the exchange if the latter had not taken place.

1.2

Reference for a preliminary ruling — Common system of value added tax (VAT) — Directive 2006/112/EC — Sale of land on which a building is located at the time of supply — Classification — Articles 12 and 135 — Concept of 'building land' — Concept of 'building' — Assessment of the economic and commercial reality — Evaluation of objective evidence — Intention of the parties. Judgement dated 4 September 2019. Case C-71/18, *Skatteministeriet* contro *KPC Herning*

This request for a preliminary ruling concerns the interpretation of Articles 12 and 135 of Council Directive 2006/112/EC of 28 November 2006 and has been made in proceedings between the *Skatteministeriet* (Ministry of Taxation, Denmark) and KPC Herning A/S, a company governed by Danish law, concerning the value added tax (VAT) payable on the supply of immovable property.

The European Court of Justice has held that a supply must be regarded as a single supply where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (see judgment *Sequeira Mesquita*). A supply must be regarded as ancillary to a principal supply if it does not constitute, for customers, an end in itself but a means of better enjoying the principal service supplied (judgment *Mailat*).

As regards the qualification of a land with an existing building with must be fully or partly demolished, reference should also be made to the following judgments:

- Judgment dated 19 November 2009, *Don Bosco Onroerend Goed;* the European Court of Justice has considered the transfer of the property and the demolition of the building as a single transaction of sale of a land that had not been built on;
- Judgment dated 8 July 1986, *Kerrutt;* the Court has specified that, despite the economic connection between all transactions carried out and their common purpose (i.e. constructing a building on the land purchased), they should have not been considered a single transaction.

In the above mentioned Judgment the European Court of Justice has deemed that: "*Article 12(1)(a) and (b), (2) and (3) and Article 135(1)(j) and (k) of Directive 2006/112 must be interpreted as meaning that a supply of land supporting a building at the date of that supply cannot be classified as a supply of 'building land' where that transaction is economically independent of other services and does not form a single transaction with them, even if the parties' intention was that the building should be wholly or partly demolished to make room for a new building*".

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EUROPEAN TAX NEWSLETTER | AUGUST - SEPTEMBER 2019

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 30 SEPTEMBER 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