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EU COURT OF JUSTICE

1.1

Request for a preliminary ruling – Value-added tax (VAT) – Deduction of input tax – Origin and scope of the right to deduct. Judgement dated 7 August 2018, Case C-16/17, *TGE Gas Engineering GmbH – Sucursal em Portugal* contro *Autoridade Tributária* e *Aduaneira*

Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/45/EU of 13 July 2010, and the principle of neutrality must be interpreted as precluding the tax authority of a Member State from regarding a company which has its headquarters in another Member State and the branch which it has in the first of those States as constituting two separate taxable entities on the ground that each of those entities has a tax identification number, and, for that reason, from refusing that branch the right to deduct value added tax (VAT) on the debit notes issued by an economic interest group of which that company, and not its branch, is a member.

The request for a preliminary ruling has been filed within the scope of a dispute between *TGE Gas Engineering GmbH – Sucursal em Portugal* and *Autoridade Tributária* e *Aduaneira* (Tax and Customs office, Portugal) regarding the reject by the latter to grant *TGE Gas Engineering GmbH* the right to the deduction of the value-added tax arising from the re-invoicing of the costs of an economic interest group of undertakings (*ACE - Agrupamento Complementar de Empresas*).

The court requested that articles 167 and 168 of the VAT Directive and the principle of neutrality must be interpreted as precluding the Tax authority of a Member State from considering that a company with registered office in another Member State and its branch in the above Member State are separate taxable entities since each of them hold a tax identification number and, for this reason, refusing the right to deduction of VAT in respect of debit notes issued by an economic interest group of undertakings of which that company, and not its branch, is a member.
Article 9(1) of the VAT Directive provides that a taxable person is any person who, independently, carries out any economic activity. It is especially important for the uniform application of the VAT Directive that the notion of '*taxable person*', defined in Title III thereof, is given an autonomous and uniform interpretation (see *Skandia* judgment). Consequently, in the event of a company located in a Member State and its branch

located in another Member State, from the *ECJ* case-law it can be inferred that the two entities may be treated as a single taxable entity for VAT purposes except that the branch carries out an independent economic activity (see judgments on *FCE Bank, EU Commission/Italy,* not published, *Le Crédit Lyonnais*). The *ECJ* has specified that the Tax authority of a Member State cannot reject to grant the deduction of input VAT solely because at the time of the incorporation of the economic interest group of undertakings the taxable person has utilized a tax identification number as a non-resident entity without permanent establishment and, for the re-invoicing of the costs related to the group of undertakings, the tax identification number of its branch, resident in that State.

1.2

Reference for a preliminary ruling — Taxation — Value added tax (VAT) — Right of deduction — Acquisitions made by a taxpayer declared '*inactive*' by the tax authorities — Refusal of the right of deduction — Principles of proportionality and neutrality of VAT. Judgment dated 12 September 2018, Case C-69/17, *Siemens Gamesa* Renewable *Energy România SRL,* formerly *Gamesa Wind România SRL,* vs. *Agenția Națională de Administrare Fiscală*

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/45/EU of 13 July 2010, in particular articles 213, 214 and 273 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which it is permissible for the tax authorities to refuse, on account of a failure to submit tax returns, a taxable person which has made acquisitions during the period in which its VAT identification number was revoked the right to deduct VAT on those acquisitions using VAT returns filed — or invoices issued — after the reactivation of its identification number, on the sole ground that those acquisitions took place in the period during which its VAT identification number was de-activated and where the substantive requirements have been satisfied and the right of deduction is not being invoked fraudulently or abusively.

The request for a preliminary ruling has been filed within the scope of the dispute between *Siemens Gamesa Renewable Energy România SRL* and l'*Agenţia Naţională de Administrare Fiscală* (Romania) regarding the company's right to the deduction of the VAT paid on the purchases made in a period when its VAT identification number was revoked. According to article 168 a) of European Directive 2006/112 it emerges that in order to qualify for the right to deduct, it is necessary:

- that the interested party be a '*taxable person*' within the meaning of that directive and;
- that the goods or services relied on to confer entitlement to that right be used by the taxable person

for the purposes of his own taxed output transactions, and that, as inputs, those goods or services must be supplied by another taxable person the goods and services to which the deduction right refers are utilized (see *Paper Consult* judgment)[1].

Moreover, the principle of neutrality requires that the deduction of input VAT is granted if the substantial requirements are satisfied, even if certain formal requirements have not been met by the taxable persons (see *Astone, Paper Consult and Zabrus Siret* judgments). The identification for VAT purposes and the obligation for the taxable person to report the commencement, change and cessation of business are formal requirements for control purposes which cannot call into question the right to deduct VAT, in the case where the substantive conditions which give rise to that right are satisfied (see *Salomie* and *Dobre* judgments).

It ensues, in particular, that "*a taxable person for VAT purposes cannot be prevented from exercising his right of deduction on the ground that he was not identified as a taxable person for those purposes before using the goods purchased in the context of his taxed activity*" (see *Nidera Handelscompagnie* and *Dobre* judgments). Thus, penalising the failure on the part of the taxable person to comply with the obligations relating to accounts and tax returns by a denial of the right to deduct clearly goes further than is necessary to attain the objective of ensuring the correct application of those obligations; a different solution may be adopted, if the failure to satisfy such formal requirements entails preventing the provision of the evidence that the substantial requirements have been observed.

1.3

Reference for a preliminary ruling — Articles 63 to 65 TFEU (Treaty on the Functioning of the European Union) — Free movement of capital — Deduction of taxable profits — Shareholdings of a parent company in a capital company whose management and registered office are located in a non-member State — Dividends distributed to the parent company — Tax deductibility subject to stricter conditions than deduction of profits from shareholdings in a non-tax-exempt capital company governed by national law. Judgment dated 20 September 2018, Case C 685/16, EV vs. *Finanzamt Lippstadt*

The request has been made in proceedings between *EV,* a partnership limited by shares governed by German law, and the *Finanzamt Lippstadt* (Central Tax Office, *Lippstadt*, Germany) concerning trade tax imposed on *EV.*

1 As regards the procedures to exercise the right to deduct, which are comparable to formal requirements or conditions, article 178 a) of European Directive 2006/112 prescribes that the taxable person must hold an invoice issued in compliance with articles from 220 to 236 and articles from 238 to 240 of that Directive.

The *ECJ* has clarified that the question referred for a preliminary ruling must be understood to relate solely to the treatment of profits distributed by companies whose management and registered office are located in non-member States, without encompassing cases in which profits are distributed by companies whose management and registered office are located in another Member State and have pointed out that the tax treatment of dividends may fall within the scope of Article 49 TFEU on the freedom of establishment and Article 63 TFEU on the free movement of capital. National legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the scope of Article 49 TFEU on freedom of establishment. By contrast, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in light of the free movement of capital (see *SECIL* judgment).

The *ECJ*[2] has analysed the different tax treatment in Germany of dividends distributed by a resident company and dividends distributed by a company located in a non-member State. By virtue of the first sentence of Paragraph 9(2a) of the *GewStG 2002*[3], when a resident company receives dividends from another resident company, which are subject to tax, the trade tax reduction presupposes only ownership of at least 15% of the share capital of the distributing company at the start of the tax period and taking the profit obtained through those shareholdings into account for the purpose of determining the taxable profit. By contrast, as regards the distributions made by a company established in a non-member State, under the first sentence of Paragraph 9(7) of the *GewStG* 2002, a shareholding of at least 15% must be owned from the start of the reference period, without interruption, and, in addition, the gross revenues must come from certain active sources of income.

The Court has clarified that "*articles 63 to 65 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which subjects a deduction of profits from shareholdings in a capital company with its management and head office in a non-member State to stricter conditions than a deduction of profits from shareholdings in a non-exempt capital company governed by national law*".

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2 The shareholding of at least 15% of the subsidiary does not necessarily imply that the company holding those shares exercises a definite influence over the decisions of the company distributing the dividends (see *Deister Holding and Juhler Holding judgment*).

3 *Gesetz über die Besteuerung bei Auslandsbeziehungen (Außensteuergesetz)*: tax regulation on foreign transactions dated 8 September 1972, hereinafter also the «*AStG*».

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LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 30 SEPTEMBER 2018.
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