

No more VAT on the remuneration for private copying says the CJEU regarding Polish VAT rules

[DROITS D'AUTEURS / DROITS VOISINS]
CJEU, 18 January 2017, C-37/16

The Court of Justice of the European Union may just have indirectly questioned the treatment of the remuneration for private copying (or “copy levy”) as regards to VAT in France, with a decision rendered on 18th January 2017 regarding the interpretation of Polish VAT rules.

In brief, the CJEU ruled that, under the VAT directive 2006/112, holders of reproduction rights do not make a supply of service to producers and importers of blank media and of recording and reproduction devices on whom organizations collectively managing copyright and related rights levy fees in respect of the sale of those devices and media (§35). Indeed, the Court says that the fair compensation does not constitute the direct consideration for any supply of services, because it is linked to the harm resulting from the reproduction of the right holders' works (§30).

Meanwhile in France, the copy levy is subject to VAT for collecting societies and right holders. It has not always been the case: the act of 3rd July 1985 which implemented the copy levy into French law specifically provided in article 32 that the copy levy was exempt of VAT. It was later abrogated by the act of 17th July 1992.

Although the decision is yet to be commented by the French tax authorities, it is not excluded that the CJEU ruling may result in a modification of the French VAT legislation for collecting societies and right holders. At this stage, on the basis of this ruling, they may potentially seek reimbursement of the VAT unduly paid on the copy levy (although basically VAT is not a burden between professionals subject to VAT).

This being said, as regards to sales of goods giving rise to the copy levy, Article 267-I-1° of the French tax code provides that the VAT tax base includes taxes, fees and levies of any nature except for the VAT itself. Accordingly the amount of copy levy is to be included in the VAT tax base of the concerned products (as stated in the 2012 tax authorities' guidelines). This rule derives from the EU directive applicable to the VAT base of services and good deliveries (Article 78 of EU directive 2006/112).

It is therefore far from certain that the fact that the copy levy fee should not be considered as a direct consideration for any supply of service would result in an accordingly reduced VAT basis of the selling price of the devices giving rise to the copy levy. The French tax authorities would be reluctant to such an approach despite the 2012 tax authorities' guidelines regarding the VAT basis stating that, from an accounting point of view, the copy levy is paid by the manufacturer or importer only on behalf of consumers, and does not constitute a part of the cost of the product.

Loïc FOUQUET – Sylvie CANONGE