

Greek Supreme Administrative Court issues landmark decision regarding the right of businesses to reclaim VAT on bad debts

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The Greek Supreme Administrative Court has ruled (Decision 355/20.02.2019) in pilot trial proceedings, in which EY had a substantive role, that the provision¹ of the Greek Value Added Tax (VAT) Code² which excludes the reduction of the taxable amount in the case of total or partial non-payment of the price (bad debts) is not in line with the provisions of the European Union (EU) VAT Directive.³ It is also not in line with the principle of VAT neutrality and the principles of effectiveness and proportionality of the Treaty on the Functioning of the European Union.

The Supreme Administrative Court's decision is fully in line with the same determination of the Court of Justice of the European Union (CJEU) in its previous decisions C-246/16 (*Enzo di Maura*) and C-396/16 (T-2).

Pursuant to the decision of the Supreme Administrative Court with respect to the correct interpretation and application of article 19 par. 5a of the Greek VAT Code, in the context of the VAT Directive, the following apply:

- ▶ The taxable amount is the consideration actually received, thus the tax authorities may not collect a VAT amount exceeding the tax which the taxable person has himself received as consideration.
- ▶ A derogation from the rules determining the taxable amount (strictly limited to situations of total or partial non-payment) is only permissible in order to ensure the proper collection of VAT and the prevention of fraud. This,

however, is only allowable to the extent that it is strictly necessary so as to ensure that the measures taken effect to the least possible degree, the objectives and principles of the VAT Directive and they are not used in a manner jeopardizing the neutrality of VAT.

- ▶ The power to derogate is intended only to enable EU Member States to counteract the inherent uncertainty of the definitive non-payment of an invoice by respecting the EU fundamental principles of proportionality and equality.
- ▶ However, such a power of derogation cannot go beyond that uncertainty, to the extent that it would be possible to exclude altogether the reduction of the taxable amount, since such a possibility would run counter to both the fundamental principles and the fundamental principle of the neutrality of VAT, while also undermining the objective of fiscal harmonization pursued by the VAT Directive.
- ▶ Consequently, in a situation where after the conclusion of the transaction, it may be adequately substantiated that the debt will definitely not be repaid or there would be a probable extended period of (total or partial) non-payment, the taxable person is entitled to reduce the taxable amount.
- ▶ In the case that a subsequent (total or partial) payment of the consideration occurs, the taxable basis may be re-evaluated upwards.
- ▶ The above interpretation does not hinder the tax authorities from pursuing recovery of the input VAT amount that the insolvent customer may have deducted in relation to the same taxable transactions.

In view of the above:

- ▶ The provisions of the Greek VAT Code, according to which businesses are not allowed to recover VAT on bad debts in the case of total or partial non-payment of the consideration, are not in line with the European VAT Directive; therefore, the Greek VAT Code should be amended so that VAT on bad debts does not constitute an element of cost for the business, as it has been so far.
- ▶ Decision 335/2019 of the Supreme Administrative Court was issued regarding a Greek business that was put under a rehabilitation procedure of the Greek Insolvency Code. Thus, it is clear legislatively that the Greek VAT Code is not in line with the European VAT Directive where there is certainty that the debt will remain totally or partially unpaid due to bankruptcy, insolvency or special liquidation procedures.
- ▶ However, the same position could support that the reduction of the taxable amount and the recovery of VAT on bad debts to businesses is also imperative under circumstances substantiating certainty of non-payment by the customer even outside the scope of the above procedures.
- ▶ Businesses may consider the possibility of pursuing the recovery of VAT paid on bad debts on the basis also of the subject decision taking into account the respective statute of limitations or time or other restrictions depending on the case.

Endnotes

1. Article 19 par. 5a.
2. L.2859/2000.
3. 2006/112/EC.

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