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RIGHT TO JUSTICE – CHALLENGES OF MODERN AGE

Zbornik radova 37. Susreta Kopaoničke škole prirodnog prava – Slobodan Perović
Proceedings of the 37th Meeting of Kopaonik School of Natural Law – Slobodan Perović

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MILOŠ VASOVIĆ

INPUT VAT DEDUCTION DENIAL AS AN ANTI-EVASION AND FRAUD MEASURE

The Court of Justice of the European Union has developed a measure allowing national authorities to deny the right to deduct input VAT in a case of fraud and evasion, and has been persistent in its case law. As other anti-evasion measures in Serbia are not enough to effectively suppress VAT evasion or fraud, and Serbia does not have in its VAT Law the provision such as the one developed by the Court, the author analyses if an existing secondary tax liability provision could be taken as a legal basis for applying the measure developed by the Court of Justice of the European Union. This paper aims to set out a recommendation to the Serbian legislator to adopt the anti-evasion/fraud measure developed by the Court of Justice of the European Union in its rich case law on this matter. Following the hypothesis that national VAT legislation needs to be further harmonised with the EU VAT legislation, and that Serbia needs an effective means to collect VAT unpaid to protect its national fiscal interests, the author in this paper used the normative dogmatic and content analysis methods with particular reference to the case law of the Court of Justice of the European Union.

Key words: *value added tax, denying the right to deduct input VAT, tax fraud/evasion, Court of Justice of the European Union, secondary tax liability*

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INTRODUCTION

Tax evasion, fraud, or avoidance,[1] can be a huge problem in a country. This is specifically referred to VAT, as it is rather exposed to evasion or fraud that can lead to considerable tax loss. This is because of the "invoice-credit" method, under which registered traders charge tax on their sales and issue corresponding invoices to their customers, who, if also registered, can use these invoices to establish a right to credit or refund against their own output VAT liability.[2] This problem was solved by the Court of Justice of the European Union (hereinafter: CJEU) by limiting the principle of neutrality, and allowing tax authorities to deny the deduction right of the input VAT in the case of fraud/evasion to any participant in the transaction chain who knew or should have known that the transaction was fraudulent. Serbian VAT, accounting for a quarter of the total tax revenue collected, is also based on the "invoice-credit" method, which makes it appealing to fraudsters to evade it, as the reward for them, in terms of money representing the VAT evaded, could be very high.

The paper aims to set out a recommendation to the Serbian legislator to adopt the anti-evasion/fraud measure developed by the CJEU, from the perspective of protecting the national fiscal interest, and that national VAT legislation needs to be further harmonised with the EU VAT legislation. The result could be the effective recovery of VAT unpaid, as other anti-evasion means are not efficient enough, or they are very limited in scope. The adoption of the mentioned measure can be seen in enacting a new rule within the statute regulating VAT, or by using the CJEU reasoning as a tool of interpretation of domestic secondary tax liability provision, resulting in denying the deduction right of the input VAT.

In this article the author first clarifies to what extent is VAT exposed to evasion and fraud. He then analyses the case law of the CJEU on denying the

[1] To understand a general difference between tax evasion, avoidance, and fraud, see: Jelena Kostić., Zoran Pavlović, "Poreski delikti u zakonodavstvu Savezne Republike Nemačke", *Strani pravni život*, No. 1, Vol. 64, 2020. DOI: *https://doi.org/10.5937/spz64-25515*; Lidija Živković, "O rešenjima koje donosi predlog Unshell Direktive" *Strani pravni život*, No. 4, Vol. 66, 2022, 371. DOI: *https://doi.org/10.56461/SPZ_22402KJ*; For detailed tax avoidance explanation see: Christopher Bergedahl, "Anti-Abuse Measures in Tax Treaties Following the OECD Multilateral Instrument – Part 1", *Bulletin for International. Taxation*, No. 1, Vol. 72, 2018, 11; For detailed tax evasion explanation see: Marcus Livio Gomes, "The DNA of the Principle Purpose Test in the Multilateral Instrument", *Intertax*, No. 1, Vol. 47, 2019, 69; For detailed tax fraud explanation see: Rita de la Feria, "Tax Fraud and Selective Law Enforcement", *Journal of Law and Society,* No. 2, Vol. 47, 2020, 244–245.

[2] Stephen C. Smith, Michael Keen, "VAT Fraud and Evasion: What Do We Know, and What Can be Done?", *International monetary Fund*, Working Paper No. 2007/031, Washington, DC 2007, 4. Available at: *https://www.imf.org/external/pubs/ft/wp/2007/wp0731.pdf* , 29. 8. 2024.

deduction right in cases of fraud/evasion. Finally, he recommends that it is highly beneficial for several reasons for Serbia to adopt this anti-evasion/fraud measure and recommends enacting a new provision in its VAT legislation, or using the secondary tax liability provision (joint and several tax liability) as a legal basis for the application of the mentioned CJEU-developed measure. For drafting his recommendation, the author used the normative dogmatic and content analysis methods with particular reference to the case law of the CJEU.

VAT AND THE EXPOSURE OF INVOICE-CREDIT METHOD TO EVASION/FRAUD

VAT is an indirect tax where the goal is to tax consumption. The burden of the tax is passed on from taxable persons to consumers by taxing the added value at each stage of the production and distribution chains while allowing deductions or refunds of the input VAT that taxable persons incur in the production of taxable goods or provision of taxable services.[3] Therefore, on each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.[4]

VAT is significantly exposed to evasion/fraud because taxpayers can initiate false claims for credit or refund and exploit the credit mechanism. This is because of the "invoice-credit" form, under which registered traders charge tax on their sales and issue corresponding invoices to their customers, who, if also registered, can use these invoices to establish a right to credit or refund against their own output VAT liability.[5] Serbian VAT legislation also encompasses the "invoice-credit" form. Specifically, only the invoice is enough to deduct input VAT, while the actual payment or the actual supply are irrelevant for exercising the right to deduct input VAT.[6]

The most common VAT fraud/evasion schemes encompass missing trader companies. The missing trader company charges their customers VAT, but disappears before paying tax to the authorities. As the VAT is not applicable on

[3] Eleonor Kristoffersson, Pernilla Rendahl, *Textbook on EU VAT*, Iustus Förlag, Uppsala, 2024, 19.

[4] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006, Art. 1, par. 2.

[5] S. C. Smith, M. Keen, op. cit., 4.

[6] Igor Tatić *et. Al.*, *Knjiga o porezu na dodatu vrednost* (ed. Igor Tatić), Poreska kancelarija Tatić d.o.o., Beograd, 2021, 883–887.; The Law on VAT, Art. 28.

cross-border transactions, especially within the EU, a trader can buy a product from another country VAT-free, sell it domestically with VAT and pay no VAT to the tax authorities,[7] while the buyer can deduct it.[8] Missing trader also encompasses a wide panel of VAT fraud typologies, including Missing Trader Intra-Community Fraud (MTIC), Missing Trader Extra-Community (MTEC) fraud, carousel fraud, cross-invoicing, contra-trading and barter trading.[9]

DENYING THE RIGHT TO DEDUCT INPUT VAT IN THE EUROPEAN UNION

The neutrality of the VAT demands that taxable persons supplying goods and services can be relieved of input VAT on purchased supplies, but in the face of VAT fraud, the CJEU has severely limited the portent of the neutrality principle.[10] The CJEU has carefully navigated its way between a dogmatic interpretation of the provisions of the directive and the neutrality principle when requirements for input VAT are not fulfilled.[11] For that purpose, it has again resorted to the knowledge test that protects taxable persons only if they did not and could not have known that the transaction was connected to fraud.[12] Specifically, a taxable person, who knew or should have known that with their purchase they were taking part in a transaction connected to a fraudulent evasion of VAT, shall be regarded as a participant in that fraud, regardless of whether or not they profited from the resale of the goods.[13] That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.[14] The result of this fraudulent activity is a denial of the deduction right to other participants in the transaction chain. In the following part of this chapter, the author will analyse some of the most important CJEU cases on denying the deduction right, and try to determine relevant specific criteria for applying this anti-evasion/fraud measure in the EU.

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[7] Marius-Cristian Frunza, *Value added tax fraud*, Routledge, London and New York, 2020, 6.

[8] Ben Terra, Julie Kajus, *A Guide to the European VAT Directives*, volume 1: Introduction to European VAT, IBFD, Amsterdam, 2024, 52.

[9] More on VAT fraud typologies, see: M-C. Frunza., op. cit., 6–7.

[10] Roland Ismer, Elena Fuchs, "Rights and Obligations of Taxable Persons when VAT Fraud is Concerned", *CJEU – Recent Developments in Value Added Tax 2022* (eds. George Kofler *et al.*), Series on International Tax Law, Vol. 139, Linde, Vienna, 2024, 1–2.

[11] *Ibidem.*

[12] *Ibidem.*

[13] E. Kristoffersson, P. Rendahl, op. cit., 178.

[14] *Ibidem.*

The first case where CJEU limited the neutrality principle in connection with tax fraud/evasion was the *Optigen and others* case.[15] Companies, such as Optigen Ltd, were participants in a carousel fraud,[16] but they were not aware of the fact that there was fraud in a transaction chain. The tax administration was of the opinion that if there was VAT fraud/evasion committed in a transaction chain, all participants should be denied the right to deduct input VAT.[17] CJEU was of the different opinion in which it was stated that each transaction in a chain should be evaluated separately.[18] Each transaction must therefore be regarded on its own merits and the character of a particular transaction in the chain cannot be altered by earlier or subsequent events.[19] The right to deduct input VAT of a taxable person who carries out such transactions cannot be affected by the fact that in the chain of supply of which those transactions form part of another prior or subsequent transaction is vitiated by VAT fraud, without that taxable person knowing or having any means of knowing.[20] Furthermore, only objective, and not subjective analysis has to be carried out by tax authorities.[21] In the same year, CJEU ruled the same in the joined cases *Axel Kittel and Recolta Recycling* stating that the fraudulent intention is not important, but only the objective criteria for determining if the taxpayer knew or should have known that they were taking part in a transaction connected to fraud/evasion, is important.[22]

CJEU does not provide sufficient evidence on how to prove that a taxpayer knew or should have known that they were participating in a transaction connected

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[15] CJEU, 12 January 2006, C-354/03; C-355/03; C-484/03, *Optigen Ltd, Fulcrum Electronics Ltd, and Bond House Systems Ltd v Commissioners of Customs & Excise*, ECLI:EU:C:2006:16.

[16] More on carousel frauds with examples, see: Aleksandar Petković, "Offshore poslovanje", *Osnove savremene teorije poreza* (ur. Dragan Mikerević, Milan Pucarević), Banja Luka, 2023, 330–331; M-C. Frunza., op. cit., 6; Flavius-Bogdan Puie, "VAT. Carousel Fraud in European Union", *Caiete de Drept Penal*, Vol. 2023, No. 1, 2023; Maria Berrittella, Filippo Alessandro Cimino, "An Assessment of Carousel Value-Added Tax Fraud in the European Carbon Market", *Review of Law and Economics*, No. 2, Vol. 13, 2017, 4–6.; Lucija Sokanović, Luka Pribisalić, "Kružne prijevare: zašto nastaju i mogu li se učinkovito suzbiti?", *Hrvatski ljetopis za kaznene znanosti i praksu*, No. 2, Vol. 30, 2023, 353–354.

[17] Miloš Milošević, *Nezakonita evazija poreza na dodatu vrednost*, Pravni fakultet Univerziteta u Beogradu – Centar za izdavaštvo i informisanje, Beograd, 2014, 173.

[18] *Ibidem.*

[19] CJEU, C-354/03; C-355/03; C-484/03, para. 47.

[20] *Ibidem*, para. 55.

[21] M. Milošević, op. cit., 173.

[22] CJEU, 6 July 2006, C-439/04; 440/04, *Axel Kittel and Recolta Recycling*, ECLI:EU:C:2006:446., Paras. 52, 60 and 61.

to fraud/evasion.[23] CJEU clearly pointed out in its case law that whether taxable persons knew or should have known that they were involved in a fraudulent transaction needs to be determined by the referring court.[24] The CJEU was consistent on this matter in its case law, while regarding the question of how knowledge or a need-to-know should be established by the Member States, the CJEU was not consistent. In its decisions in the *Federation of Technological Industries* case,[25] and in the *Vlaamse Oliemaatschappij NV* case,[26] the CJEU initially expressly stated that Member States may rely on presumptions, although they must not be irrebuttable. Even further, such presumptions may not be formulated in such a way as to make it practically impossible or excessively difficult for the taxable person to rebut them with evidence to the contrary.[27] In its later judgements in *Crewprint*,[28] *Ferimet*[29] and *Aquila*[30] cases, however, the CJEU deviated from this line and stated that the decision of whether a taxable person knew or should have known about the fraud cannot be determined on the basis of assumptions.[31] Instead, the Member States need to establish the facts to a sufficient legal standard by means other than presumptions.[32] In addition, the knowledge test is applicable to all participants in the transaction chain, and not just to the ones who directly traded with the taxpayer who evaded VAT.[33] Anyhow, the CJEU is of the opinion that in the case of indications of fraud, a VAT-taxable person may be expected to exercise greater diligence, but the taxable person cannot be required to carry out complex and far-reaching checks, such as those which the tax authority

[23] R. Ismer, E. Fuchs, op. cit., 2–3.

[24] CJEU, 1 December 2022, C-512/21, *Aquila*, ECLI:EU:C:2022:950, paras. 31–33; CJEU, 24 November 2022, C-596/21 *Finanzamt M*, ECLI:EU:C:2022:921, paras. 37–39; CJEU, 15 September 2022, C-227/21 *HA.EN.*, ECLI:EU:C:2022:687, para. 27; CJEU, 11 November 2021, C-281/20, *Ferimet*, ECLI:EU:C:2021:910, para. 50; CJEU, 17 December 2020, C-656/19, *BAKATI*, ECLI:EU:C:2020:1045, para. 83; CJEU, 3 September 2020, C-610/19, *Vikingo*, ECLI:EU:C:2020:673, para. 66.

[25] CJEU, 11 May 2006, C-384/04, *Federation of Technological Industries and Others*, ECLI:EU:C:2006:309.

[26] CJEU, 21 December 2011, C-499/10, *Vlaamse Oliemaatschappij*, ECLI:EU:C:2011:871.

[27] CJEU, C-384/04, para. 32.

[28] CJEU, 3 September 2020, C-611/19, *Crewprint*, ECLI:EU:C:2020:674.

[29] CJEU, 11 November 2021, C-281/20, *Ferimet*, EU:C:2021:910.

[30] CJEU, 1 December 2022, C-512/21, *Aquila*, EU:C:2022:950.

[31] R. Ismer, E. Fuchs, op. cit., 7–8.

[32] CJEU, C-281/20, para. 52.; CJEU, C-512/21, para. 32.

[33] For example, see: CJEU, 14 April 2021, C-108/20, *Finanzamt Wilmersdorf*, ECLI:EU:C:2021:266, paras. 29–32.

has the means to carry out.[34] What is also important is that there are strong indications that the latest relevant point in time to know is the time of the taxable person's own supply, while a later gain of knowledge and a later need to know are harmless.[35]

On the other hand, the CJEU was very clear that the existence of some circumstances cannot be enough to deny the deduction right. For example, it is irrelevant that the transaction in question did not procure any economic advantage for the taxable person.[36] In addition to this, a potential loss of direct taxes also does not suffice for a denial of input VAT.[37] Also, the mere fact that the members of the supply chain knew one other, although it is to be taken into account in the overall assessment of all the evidence and all the factual circumstances of the case, is not sufficient to establish the taxable person's participation in the fraud.[38] Therefore, it is only one factor to be considered.[39]

DENYING THE DEDUCTION RIGHT IN SERBIA

We will divide this chapter into two subchapters. The first one will be on the reasons why Serbia should implement the CJEU reasoning that allows the Member States to deny the deduction right to other participants in the transaction chain if they knew or should have known that the transaction is fraudulent. Next, as Serbia is not a Member State, we will try to find the legal basis for domestic tax authorities to use the mentioned anti-evasion/fraud measure within its current tax legislation.

Reasons why Serbia should implement CJEU's provision to prevent tax evasion/fraud

First of all, as VAT accounts for a quarter of the total tax revenue collected in Serbia,[40] and taking into regard that VAT, due to its „invoice-credit" form,[41]

[34] CJEU, C-512/21, para. 52.

[35] R. Ismer, E. Fuchs, op. cit., 10–11.

[36] *Ibidem*, paras. 26 and 35.

[37] R. Ismer, E. Fuchs, op. cit., 7–8.

[38] CJEU, C-512/21, para. 44.

[39] R. Ismer, E. Fuchs, op. cit., 8–9.

[40] Ministarstvo finansija Republike Srbije, *Bilten javnih finansija*, tom 12, broj 220, 2023, 37–38.

[41] I. Tatić *et. al*, op. cit., 883–889.

is highly exposed to tax evasion/fraud, this is a strong indicator that national fiscal interests need to be protected at all cost. It is also a big problem in the EU, as the VAT gap[42] is quite big. For example, in 2020 the VAT gap was around 100 billion euros, while in the following year it was estimated at around 60 billions euros.[43] To protect fiscal interest, a country has to have some anti-evasion measures to prevent tax fraud/evasion, or effectively collect evaded VAT. In the EU, tax administrations can use the anti-evasion measure from the case law of the CJEU and deny the deduction right of input VAT. Serbia is not obliged to use this measure developed by the CJEU, but it is highly beneficial, since the VAT is one of the most important kinds of tax in Serbia, similarly to EU Member States. Even if there are no reliable means that can be used to measure what specifically contributed to lowering the VAT gap in the EU, anti-evasion/fraud measures, such as the one developed by the CJEU, certainly contributed. This is also a strong indicative reason why Serbia should adopt this measure.

Another reason is that there are no adequate anti-evasion measures in Serbian tax laws that can effectively suppress tax evasion, or ease the process of collecting VAT unpaid due to evasion/fraud. There are a few existing measures Serbian tax authorities could use in this manner. The first one is the reverse charge provision that applies only to some supplies.[44] This anti-evasion provision can effectively suppress tax evasion, fraud, and even avoidance, because the seller does not get their VAT, and they cannot evade VAT.[45] The problem with this provision is that it cannot be applicable for all, or majority of supplies, as that way, the VAT becomes a retail sales tax.[46] Tax administration can also use the provision on secondary tax liability.[47] The problem with this provision is that domestic authorities

[42] VAT gap is the estimated difference between expected VAT revenue and the actual amount collected.

[43] European Commission: Directorate-General for Taxation and Customs Union, Grzegorz Poniatowski, Mikhail Bonch-Osmolovskiy, Adam Śmietanka, Aleksandra Sojka, *VAT gap in the EU – 2023 report*, Publications Office of the European Union, Brussels, 2023, 22. Available at: *https://data.europa.eu/doi/10.2778/911698*, 30. 8. 2024.

[44] Art. 10 of the Law on VAT.

[45] Thiess Buettner, Annalisa Tassi , "VAT fraud and reverse charge: empirical evidence from VAT return data", *International Tax and Public Finance*, No. 3, Vol. 30, 2023, 850.

[46] S. C. Smith, M. Keen, op. cit., 24.

[47] "Persons contributing to or aiding the evasion of payment of another person's tax – [shall be deemed liable] for the amount of such person's tax debt the payment of which was evaded" – Art 33, para. 2, subpara. 2 of the Law on Tax Procedure and Tax Administration, *RS Official Gazette*, No. 80/02, 84/02 – correction, 23/03 – correction, 70/03, 55/04, 61/05, 85/05 – other law, 62/06 – other law,

did not use it for VAT, and that it is only described in general. The lack of a specific description of that norm does not have to be considered a bad thing, because the norm could be interpreted in a way the CJEU structured denying the deduction right provision. This will be addressed in the following subchapter. In the end, tax authorities can use the principle of facticity to collect the VAT unpaid due to tax evasion/fraud.[48] In order to do it, in trials before the criminal court, besides the taxpayer who evaded VAT, other participants in a transaction chain have to be charged with tax evasion.[49] After that, the tax administration can issue a tax claim toward those participants and deny them the right to deduct input VAT that was previously evaded, or collect VAT unpaid in another way the tax administration deems appropriate. This provision is rather broad, and in addition, to start with the administrative procedure for VAT collection (denying the deduction right), the charge before the criminal court has to be brought against the other participants in the transaction chain. Also, if illegally acquired material gain (through tax fraud/evasion) is confiscated in criminal proceedings which end before the tax administrative proceedings, then taxation will not be imposed.[50] This makes the principle of facticity not an appropriate means to fight VAT evasion/fraud compared to the means developed by the CJEU.

Thirdly, Serbia seeks to become an EU member. In 2013, Serbia signed the Stabilisation and Association Agreement,[51] that demonstrated Serbia's will to join the EU. Serbia made a big effort and over the past years has harmonised its tax laws with the EU legislation. This can be seen from the newest Report on the progress of the Republic of Serbia in the accession process from 2023 (hereinafter:

63/06 – correction of other law, 61/07, 20/09, 72/09 – other law, 53/10, 101/11, 2/12 – correction, 93/12, 47/13, 108/13, 68/14, 105/14, 91/15 – authentic interpretation, 112/15, 15/16, 108/16, 30/18, 95/18, 86/19, 144/20, 96/21 i 138/22), (hereinafter: LTPTA).

[48] "When income is generated or property acquired contrary to the law, the Serbian Tax Administration shall assert tax obligations in accordance with the law governing the relevant type of tax", Art.9, par. 3 of the Law on Tax Procedure and Tax Administration – LTPTA.

[49] The principle of facticity, as defined in the last paragraph, by using the linguistic interpretation, could be understood that Tax Administration could assert tax obligations in accordance with the law governing the VAT, only if there is a criminal charge of generating income or acquiring property contrary to the law (tax evasion). This means that the taxpayer to whom the tax authorities are looking to deny the deduction right, has to be previously charged with tax evasion together with the missing trader company, or as an accomplice in the same case.

[50] Dejan Popović., *Poresko pravo*, Pravni fakultet Univerziteta u Beogradu – Centar za izdavaštvo, Beograd, 2017, 56.

[51] Stabilisation and Association Agreement, 2013, *https://www.mei.gov.rs/upload/documents/sporazumi_sa_eu/saa_textual_part_en.pdf*, 29. 8. 2024.

the Report),[52] where it is stated that Serbia would in the following years harmonise its VAT legislation furthermore with the EU VAT legislation. It is also mentioned in the Report that Serbian had made efforts to improve the operational capacity and computerisation of the tax administration and to fight tax evasion, notably on VAT and excise duties, resulting in better tax collection.[53] It can be concluded that Serbia, as a potential and future EU Member, has a moral, but not legal, obligation to harmonise its VAT legislation with the EU VAT legislation that also includes the CJEU case law. As further harmonization is to take place in the following years, it can be expected for Serbia to implement the provision on denying the deduction right in a case of tax fraud/evasion.

Legal basis for applying the CJEU reasoning in Serbian tax legislature

Serbian VAT Law[54] does not contain the provision that allows tax authorities to deny the deduction right in the case of fraud or evasion. However, there is one provision in the Law on Tax Procedure and Tax Administration (hereinafter: LTPTA)[55] that could be used as a legal basis for applying the anti-evasion/fraud measure developed by the CJEU, and that is the secondary tax liability. The LTPTA is a procedural law that applies to all kind of taxes, including VAT. Therefore, the secondary tax liability provision is applicable to VAT as well. The text of the provision goes as follows:[56]

"Persons contributing to or aiding the evasion of payment of another person's tax – [shall be deemed liable] for the amount of such person's tax debt the payment of which was evaded."[57]

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[52] Commission staff working document, Serbia 2023 Report, SWD(2023) 695 final, 8. 11. 2023, 115. Available at: *https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_695_Serbia.pdf*, 29. 8. 2024.

[53] Commission staff working document, Serbia 2023 Report, SWD(2023) 695 final, 8. 11. 2023, 115. Available at: *https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_695_Serbia.pdf*, 29. 8. 2024.

[54] The Law on VAT, *RS Official Gazette*, No. 84/04, 86/04 – correction, 61/05, 61/07, 93/12, 108/13, 6/2014 – harmonised dinar amounts, 68/2014 – other law, 142/14, 5/15 – harmonised dinar amounts, 83/15, 5/16 – harmonized dinar amounts, 108/16, 7/17 – harmonised dinar amounts, 113/17, 13/18 – harmonised dinar amounts, 30/18, 4/2019 – harmonised dinar amounts, 72/19, 8/20 – harmonised dinar amounts and 153/20 and 138/22).

[55] Art. 31, para. 2, subpara. 2, the LTPTA.

[56] Art. 31, para. 2, subpara. 2, the LTPTA.

[57] This is the official translation that can be found on the website of the Serbian Tax administration: *https://www.purs.gov.rs/en/Individuals/review-of-regulations/Law/LAW-ON-TAX-PROCEDURE-AND-AX-ADMINISTRATION.html*, 2. 9. 2024.

This provision is described in general without any further clarification within the LTPTA, or any other legal document. As the author is of the knowledge that the provision was not used so far in the field of VAT, and the description of the provision is general in nature, it is very liable to interpretation.

In the EU, there is one very similar provision to the secondary tax liability and that is the joint and several tax liability, that is a part of an anti-evasion arsenal[58] in EU legislation. Directive on the common system of value-added tax (hereinafter: VAT Directive)[59] prescribed this provision in the Article 205. The VAT Directive provided a basis for the Member States to enact the joint and several tax liability. Furthermore, the CJEU defined how the provision should be applied, encompassing the knowledge test in the same way it was done in cases where the Court denied the right to deduct the input VAT to the participants of the transaction chain where the fraud/evasion took place.[60] Besides that, all Member States that implemented Article 205 of the VAT Directive, incorporated the knowledge test as a part of the national joint and several tax liability provision.[61] To summarise, the knowledge test is also the relevant criterion when it comes to third parties being held liable in case of fraudulent supply chains, as well as in the cases of denying the deduction right.[62] If national courts apply the knowledge test, they can either deny the deduction right, or hold other participants liable for the VAT evaded, as the fiscal effect is the same, and that is the recovery of unpaid VAT. To conclude, if the knowledge test is satisfied after carrying out an objective analysis, and the tax authority can demonstrate that a person, who is a participant in a transaction chain, knew or should have known that the transaction was fraudulent, the result can be denying the deduction right, or allowing to deduct input VAT but asking the participant to pay the VAT evaded by another person in the transaction chain.

Returning to the Serbian secondary tax liability provision, as the provision is described in general, the CJEU reasoning on denying the deduction right in the case of fraud/evasion could be used as an interpretative tool. This being said,

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[58] Lucija Sokanović, "Missing Trader Fraud as part of Organised Cime in EU", in 22nd International Scientific Conference on Economic and Social Development, *The Legal Challenges of Modern World* (eds. Željko Radić, Ante Rončević, Li Yongqiang), No. 22, Split, 2017, 163.

[59] Council Directive 2006/112/EC of 28 November 2006 on the common system of value-added tax, OJ L 347, 11. 12. 2006, Art. 205.

[60] CJEU, C-384/04, para. 1.

[61] See the tabular view of the implemented provision in each Member State: Fabiola Annacondia ed., *EU VAT Compass 2022/23,* IBFD, Amsterdam, 2022, 973–977.

[62] R. Ismer, E. Fuchs, op. cit., 4.

the words "contributing to" and "aiding" could be understood in a way that the knowledge test has to be satisfied.[63] The knowledge test can be further used in the same manner as it was prescribed in the CJEU case law. The Serbian provision addresses the liability of another person which is close to the joint and several tax liability from the VAT Directive, but it does not explain how the unpaid tax will be collected – by denying the deduction right of another taxpayer, a participant in the fraudulent transaction chain, who has to pay more in output VAT, or not restricting the deduction right but asking the participant to pay additionally what was previously evaded by another taxpayer (a missing trader for example). The fiscal effect stands the same in both cases.

The author recommends using domestic secondary tax liability provision as a legal basis for the application of the anti-evasion/fraud means on denying the deduction right developed by the CJEU. Another way to apply this anti-evasion/fraud measure, is to enact new provisions in the VAT Law. While the adoption process is not quite so easy to implement and usually takes time, the author sees an opportunity for the Tax Administration to take advantage of the current general provision on secondary tax liability, and to apply the CJEU measure to combat VAT evasion and fraud and to collect VAT unpaid more effectively.

CONCLUSION

VAT is a kind of tax where, because of the invoice-credit method, the exposure to tax evasion/fraud is very high, especially if a missing trader company is a participant in a transaction chain. The neutrality of the VAT demands that taxable persons supplying goods and services can be relieved of input VAT on purchased supplies, but in the face of VAT fraud, the CJEU has severely limited the portent of the neutrality principle. Specifically, if the knowledge test is satisfied, by carrying the objective analysis only, the taxpayer can be denied the right to deduct the input VAT in the case where fraud or evasion took place within the transaction chain. After analysing the case law of the CJEU on denying the deduction right, the author concluded that it is a very effective means to collect the VAT unpaid. The CJEU established when and how denying the deduction right can be applied. The only thing the CJEU did not provide is the sufficient evidence

[63] It cannot be expected that someone who aided with or contributed to tax evasion did not have any knowledge of tax evasion/fraud within the transaction chain. The LTPTA, or any other legal document, does not say anything on the knowledge test, but it could be said that the national legislature incorporated the knowledge test into the secondary tax liability provision by adding the words "aided with" and "contributed to".

on how to prove that a taxpayer knew or should have known that they were participating in a transaction connected to fraud/evasion. The CJEU clearly pointed out in its case law that whether taxable persons knew or should have known that they were involved in a fraudulent transaction needs to be determined by the referring court.

There are a few reasons why it would be highly beneficial for Serbia to implement this anti-evasion/fraud means within its tax laws applicable to VAT. First, VAT accounts for 25% of the total tax revenue collected in Serbia. This is a strong indicator that national fiscal interests need to be protected at all costs. Second, the reverse charge, joint and several tax liability as defined within the secondary tax liability provision, and the principle of facticity are not efficient enough to suppress VAT evasion/fraud, or collect unpaid VAT. The reverse charge provision is very efficient tool to fight VAT evasion/fraud, but cannot be applied to all kinds of supplies as that will lead to VAT becoming a retail sales tax. Joint and several tax liability provision as it stands in LTPTA is defined too broadly, which is the reason why it was not used so often in VAT cases by tax authorities. The principle of facticity is also very broad, and in addition, to start with the administrative procedure for VAT collection, the charge before the criminal court has to be brought against the other participants in the transaction chain, to whom the deduction right the tax authorities want to deny. Also, if illegally acquired material gain (through tax fraud/evasion) is confiscated in criminal proceedings which end before the tax administrative proceedings, then taxation will not be imposed. Lastly, national VAT legislation needs to be further harmonised with the EU VAT legislation. Serbia seeks to become an EU member, and in 2013 Serbia signed the Stabilisation and Association Agreement that demonstrated Serbia's to join the EU. The 2023 Report shows that national VAT legislation needs to be further harmonised with the EU VAT legislation. As further harmonisation is to take place in the following years, it can be expected from Serbia to implement the provision on denying the deduction right in a case of tax fraud/evasion.

In the end, the author concluded that Serbia did not incorporate this anti-evasion/fraud measure, but domestic secondary tax liability (joint and several tax liability) could be observed as a legal basis for applying the CJEU reasoning on denying the deduction right in a case of a fraud/evasion. This way, the CJEU approach could be used as an interpretative tool enabling tax authorities in Serbia to deny the right to deduct the input VAT. Another way of applying the CJEU approach is to enact new provisions in domestic VAT legislation, by using the CJEU case law on denying the right to deduct input VAT as a guideline.

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OSPORAVANJE PRAVA NA ODBITAK PRETHODNOG POREZA KAO ANTIEVAZIONA MERA

Rezime

Sud pravde Evropske unije je razvio jednu antievazionu meru koja omogućava nacionalnim poreskim vlastima da ograniče primenu odbitka prethodnog poreza. Srbija u svoj nacionalnom zakonodavstvu nema meru sličnog obima koja bi mogla na tako efikasan način da posluži prevenciji utaje PDV. S obzirom na to da postojeće antievazione mere u domaćem zakonodavstvu nisu dovoljno efikasne ili im je obim ograničen, autor posebno analizira mogućnost primene sekundarne poreske obaveze kao pravnog osnova za korišćenje antievazionog pravila koje je razvio Sud pravde Evropske unije. Cilj rada jeste davanje preporuka domaćem zakonodavcu da donese novo pravilo slično onom koje je razvio Sud pravde Evropske unije, ili da iskoristi sekundarnu poresku obavezu kao pravni osnov za korišćenje navedene mere u cilju odbijanja prava na iskorišćavanje prethodnog poreza. Polazeći od pretpostavke da se domaći propisi koji regulišu PDV moraju dalje usklađivati sa Evropskim PDV zakonodavstvom, i da je Srbiji potrebno efikasnije antievaziono sredstvo kako bi se povratio utajeni PDV, autor je u radu primenio dogmatsko-pravni i metod analize sadržaja sa posebnim osvrtom na praksu Suda pravde Evropske unije.

Ključne reči: porez na dodatu vrednost, ograničavanje prava na odbitak prethodnog poreza, poreska evazija, Sud pravde Evropske unije, sekundarna poreska obaveza

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