

Communication concerning the decision of the Curia of Hungary  
in administrative case n° Kfv.I.35.690/2017

The purpose of the application of Article 80, paragraph (1), point a) of the VAT Directive is to prevent tax fraud and tax evasion, irrespective of whether the parties to the transaction were or should have been aware of such tax avoidance.

The plaintiff is a business entity partially owned by a local government. The plaintiff, acting as a seller, concluded a sales contract with the local government, acting as a buyer, to sell a base of operations, an industrial site and an outbuilding located on the bank of the river Danube for a purchase price of 80 496 000,- HUF. Subsequently, the local government sold the above real estates for a gross purchase price of 325 872 000,- HUF. Upon performance of the latter sales contract, the local government submitted a tax declaration and applied for a VAT deduction relating to the tax on the purchase of the real estates concerned. As a result of its investigation, the tax authority established that there had been an ownership link, as defined by Article 80, paragraph (1) of the VAT Directive, between the plaintiff and the local government, there had been a supply of goods, and the consideration received by the plaintiff had been lower than the real estates' open market value. On the basis of comparative information, the tax authority fixed the real estates' market value at 180 600 000,- HUF. Since the conditions laid down in Article 80, paragraph (1), point a) of the VAT Directive have been met, the first instance tax authority decided that the taxable amount should be the open market value. Hence, the authority concluded that the party concerned should be liable to pay a VAT debt of 16 684 000,- HUF – in respect of the time period between 1 January and 30 June 2007 – due to the difference between the purchase price paid by the local government and the open market value, as well as a tax penalty and default interest.

The court of first instance rejected the plaintiff's claim. The court argued that there had been no need to make a reference for a preliminary ruling to the European Court of Justice, because the relevant provisions of the VAT Directive had not left the court in any doubt as to their interpretation.

Pursuant to the plaintiff's petition for judicial review, it has been established neither in the tax authorities' proceedings nor during the court's process that, based on the cumulative conditions set forth in Article 80, paragraph (1), point a) of the VAT Directive, the local government had not been fully entitled to tax deduction in connection with the purchase of the plaintiff's real estates. The plaintiff also argued that Article 80, paragraph (1), point a) of the VAT Directive did not constitute a directly applicable and mandatory provision, in addition, the conditions laid down therein had been met only to a very limited extent. In the case of tax avoidance jointly committed by the parties to a transaction with common economic interests and sanctioned by Article 80 of the VAT Directive, the seller has a tax liability, while the buyer is not or not fully entitled to tax deduction. Based on section 155/A of the Code of Civil Procedure, the plaintiff requested the Curia to make a reference for a preliminary ruling as to the interpretation of Article 80 of the VAT Directive.

The Curia upheld the judgement of the court of first instance.

The Curia decided on the admissibility of the plaintiff's request for the launch of a preliminary reference procedure by taking into account the criteria set out by the European Court of Justice in the CILFIT case. The Curia found that the relevant provision of the VAT Directive had not been duly transposed into Hungarian tax law legislation. Section 22 of the Hungarian VAT Act, applied by the tax authorities in their proceedings, did not comply with the VAT Directive, but with the provisions of Directive 77/388/EEC, no longer in force at the time of the authorities' investigation. As regards the direct applicability of Article 80, paragraph (1) of the VAT Directive, it could also be stated that its content was unconditional and sufficiently clear and precise. With regard to the aforementioned circumstances, the European Court of Justice concluded in paragraphs 53-62 of its

judgement rendered in joined cases C-621/10 and C-129/11 – which was deemed to be applicable by the plaintiff, but was disregarded by the court of first instance – that Article 80, paragraph (1) of the VAT Directive was of direct applicability.

Article 80, paragraph (1), point a) of the VAT Directive stipulates that in order to prevent tax evasion or avoidance, Member States may in any of the following cases take measures to ensure that, in respect of the supply of goods or services involving family or other close personal ties, management, ownership, membership, financial or legal ties as defined by the Member State, the taxable amount is to be the open market value, where the consideration is lower than the open market value and the recipient of the supply does not have a full right of deduction under Articles 167 to 171 and Articles 173 to 177. As regards the direct application of Article 80, paragraph (1), point a) of the VAT Directive, it is not necessary to consider whether or to what extent tax avoidance has actually occurred.

Budapest, the 13<sup>th</sup> of November 2018

Administrative and Labour Department of the Curia of Hungary