

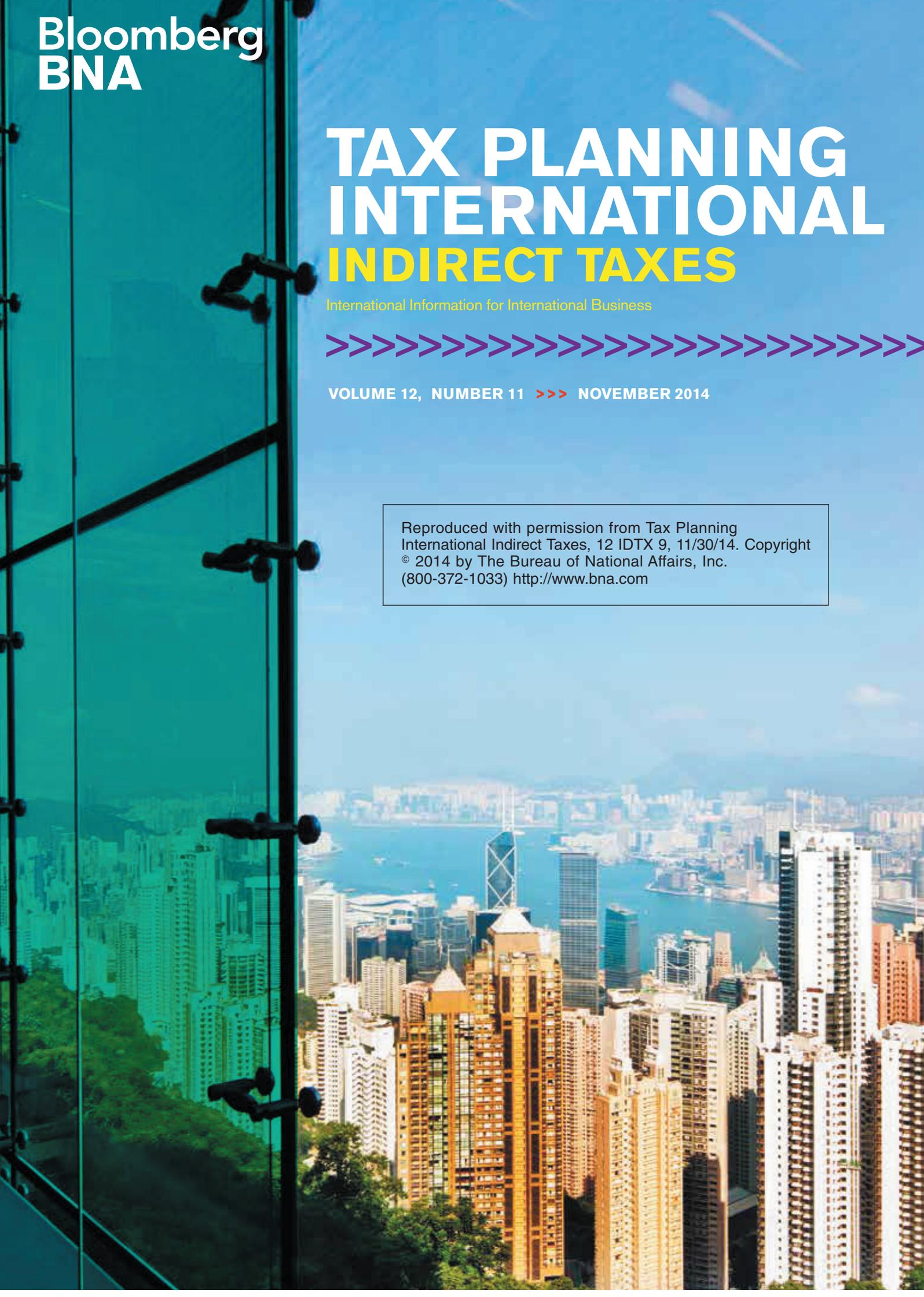
# TAX PLANNING INTERNATIONAL INDIRECT TAXES

International Information for International Business



VOLUME 12, NUMBER 11 >>> NOVEMBER 2014

Reproduced with permission from Tax Planning International Indirect Taxes, 12 IDTX 9, 11/30/14. Copyright © 2014 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>



# Bulgaria: VAT on Occasional Transactions Carried Out by Taxable Persons

**Veselina Petkova**

Associate Delchev & Partners, Bulgaria

As a fairly new EU member state, Bulgaria has had difficulty in recent years in finding the right balance between effectively collecting tax and fighting tax fraud on the one hand, and respecting taxpayers' rights and correctly applying VAT rules and principles on the other.

Taking into consideration that VAT revenues constitute the primary source of funding for the Bulgarian state budget, tax practitioners have begun to describe VAT as more of a “very arguable tax” as opposed to a “very attractive tax”. It is, therefore, not surprising that the vast majority of Bulgarian tax court cases concern the correct application of VAT and that many of the court battles are taken to the Court of Justice of the EU (“CJEU”) in order to seek interpretation of the EU VAT provisions in preliminary ruling procedures.

While most of the preliminary ruling requests referred by the Bulgarian courts to the CJEU concern, primarily, VAT deduction and the many facets of this fundamental right, the judgment of the CJEU in case C-62/12 *Kostov* stands out as one of the few that deal with the interpretation of the concept of the taxable person.

## I. Background

Mr Kostov is a self-employed private bailiff in Bulgaria who is registered for VAT purposes because of his primary economic activity as a bailiff.

In 2008 Mr Kostov concluded an agency contract with a Bulgarian company under which he undertook,

as an agent for the company, to make bids in three auctions of three plots of partially built-upon land which were owned by the state. He also undertook to transfer ownership of the properties to the company in the event of a successful bid. On the other hand, the principal undertook to provide the necessary funds for the purchases, to acquire ownership of the properties obtained by Mr Kostov pursuant to the agency contract and to pay him the agreed remuneration of 50,000 Bulgarian leva (approximately 25,500 euros) even if the bids were unsuccessful.

Mr Kostov bid successfully for the properties and, after acquiring them from the state, transferred the ownership of the plots to the principal who, in turn, paid him the agreed remuneration.

Mr Kostov considered his services under the agency contract as only an “occasional transaction” falling outside his usual taxable economic activity as a bailiff and, therefore, did not charge VAT on the remuneration received under the agency contract. The Bulgarian tax authorities, however, issued a tax adjustment notice to Mr Kostov claiming that the transaction in question was a taxable supply and that he carried it out as a taxable person registered for VAT purposes.

Veselina Petkova is Associate at Delchev & Partners in Bulgaria

In the course of the court appeal of the tax adjustment notice the first instance administrative court made a request for a preliminary ruling to the CJEU asking it to ascertain whether a person taxable for VAT purposes in their capacity as a member of a profession is subject to VAT solely in respect of transactions that form part of their usual economic activity, or also in respect of any other economic transaction for which they receive consideration, even in cases where that latter activity is carried out only on a purely occasional basis.

## II. Advocate General's Opinion and Findings of the CJEU

The judgment of the CJEU provides a very important analysis of the fundamental concepts of economic activity, taxable person and occasional transactions in the context of the case.

### A. Agency Contract Services and Economic Activity

According to Article 9(1) of Directive 2006/112/EC of November 28, 2006 on the common system of value added tax ("the VAT Directive") "economic activity" means any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions.

In addressing the question above the Advocate General ("the AG") also invoked the case law of the CJEU according to which for an activity to be subject to VAT it must be carried out with a business or commercial purpose characterised by, in particular, a concern to maximise returns on capital investment<sup>1</sup> and which is likely to be carried out by a private undertaking in a market, organised within a professional framework and generally performed in the interest of generating profit.<sup>2</sup>

In the case at hand Mr Kostov clearly carried out the services under the agency contract in order to generate profit, especially given that the remuneration under the contract was due, regardless of whether he bid successfully for the plots and that its amount was rather significant and was not merely a reimbursement of Mr Kostov's expenses.

In view of the above, Mr Kostov's activities under the agency contract should be interpreted as constituting economic activities within the meaning of the VAT Directive, as they represent "any" activity of producers, traders or persons supplying services.

### B. Economic Activity and Taxable Persons

The main argument of Mr Kostov in the dispute before the Bulgarian court was that he was a taxable person only with regard to his usual activities as a bailiff and that he was not acting as a taxable person when he carried out the services under the agency contract.

As, however, the AG and the CJEU pointed out, a taxable person for VAT purposes is subject to VAT not only for their usual activities but also for any other paid activity which is, within the meaning of Article 9(1) of the VAT Directive, an "activity of producers, traders or persons supplying services", including activities which do not form part of their usual activities.

Any other interpretation could result in taxable persons changing their status in an arbitrary way and being regarded as taxable persons for some transactions, which they claim form part of their usual activities, and as non-taxable persons for other transactions which fall outside their usual activities. Evidently, this would leave the door open for (mis)interpretation and

potential abuse, especially when a taxable person carries out different activities or activities of a broader nature.

Following this logic, Mr Kostov could not cherry-pick which transactions he could be regarded as a taxable person for, depending on the closeness of those transactions to his main occupation as a bailiff, insofar as the activities he carries out constitute taxable supplies within the meaning of Article 9 of the VAT Directive.

### C. Occasional Transactions

Another argument invoked by Mr Kostov during the court proceedings concerned the fact that the transaction under the agency contract was carried out on an occasional basis and, as such, should not be considered as a taxable supply. His claims relied on the provision of Article 3(2) of the Bulgarian VAT Act which states that "independent economic activity shall also mean any activity carried out on a systematic or professional basis for consideration", as well as on the use of the concepts of "continuing basis" and "occasional basis" introduced in Articles 9 and 12 of the VAT Directive.

The concept of "continuing" is used in Article 9 of the VAT Directive which, after defining economic activity as being "[a]ny activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions", provides an example thereof, stating that "[t]he exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

Furthermore, Article 12 of the VAT Directive provides an option for the member states (which Bulgaria did not use) to regard as a taxable person "anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in the second subparagraph of Article 9(1)", citing as examples the supply, before first occupation, of a building or parts of a building and of the land on which the building stands and the supply of building land.

Both the AG and the CJEU, however, offered a different interpretation of the said concepts clarifying that, first, the concept of "continuing" used in Article 9 cannot be construed as excluding the imposition of VAT on activities carried out on an occasional basis and, second, the special provisions of Article 12 should be interpreted as referring only to persons who are not already a taxable person for VAT purposes in respect of their main economic activities. In other words, the VAT Directive does not in principle exempt from VAT the occasional activities carried out by a taxable person, insofar as such activities do not fall within the sphere of their private activities or are not carried out within the scope of the management of their private property.

In fact, as pointed out by the AG in his Opinion, if occasional activities carried out by a taxable person were in principle excluded from liability to VAT, that could undermine the principles of neutrality and equal treatment of economic transactions which require that all taxable persons are subject to VAT in the same way for the same activities.

The Opinion was upheld by the CJEU which ascertained that it would be inconsistent with the objectives of the VAT system to interpret the second subparagraph of Article 9(1) of the VAT Directive as excluding from the term "economic activity" any occasional activity which otherwise falls within the general definition of that term and which is carried out by

a taxable person who also carries out, permanently, another economic activity.

#### D. The Verdict

In view of the considerations made by the AG and the CJEU, the latter found that a natural person who is already a taxable person for VAT purposes in respect of his activities as a self-employed bailiff must be regarded as a “taxable person” in respect of any other economic activity carried out occasionally, provided that that activity constitutes a taxable economic activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive.

Following the judgment of the CJEU in case C-62/12 the Bulgarian courts dismissed Mr Kostov’s appeal against the tax adjustment notice and ruled that the transaction under the agency contract was a taxable supply carried out by him as a taxable person and that it should, therefore, be subject to VAT.

#### III. Comment

The judgment of the CJEU in the *Kostov* case sheds some light on the correct interpretation and application of the concept of a taxable person. The concept poses difficulties mainly in cases where natural persons registered for VAT purposes with regard to one principal taxable activity carry out some occasional different activity, or where a person not registered for VAT purposes carries out an occasional transaction which exceeds the VAT registration threshold.

Furthermore, the AG Opinion in *Kostov* gives some useful guidance on another sensitive aspect of such transactions which appear mainly in cases of transactions in immovable property carried out by individuals where it may sometimes be difficult to distinguish between a non-taxable private activity within the scope of the management of the private property, and a taxable independent economic activity carried out as a trader. In this regard, the AG reviewed related case law and concluded that the transactions become taxable for the purposes of VAT if it is found that, for the purpose of entering into them, that person takes active steps to market the property by mobilizing resources similar to those deployed by a producer, a trader or a person supplying services within the meaning of Article 9(1) of the VAT Directive.

Although not groundbreaking, the judgment of the CJEU in *Kostov* case is certainly of great practical value for taxpayers, tax authorities and courts on the subject of taxable persons and treatment of occasional economic activities for VAT purposes.

*Veselina Petkova is Associate at Delchev & Partners in Bulgaria and can be contacted by email at:  
veselina.petkova@delchev-lawfirm.com*

---

#### NOTES

<sup>1</sup> Case C-142/99 *Floridienne and Berginvest* [2000] ECR I-9567, paragraph 28.

<sup>2</sup> See point 10 of the Opinion of Advocate General Maduro in Case C-8/03 *BBL* [2004] ECR I-10157.