

VAT TREATMENT OF BARTER SUPPLIES

Case C-549/11 Orfey Bulgaria EOOD and Case C-19/12 Efir OOD

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Cases C-549/11 and C-19/12 were heard by the Court of Justice following references for preliminary rulings by the Bulgarian Supreme Administrative Court made in the course of the proceedings between respectively Orfey Bulgaria EOOD (“Orfey”) and Efir OOD (“Efir”) and the Bulgarian tax authorities.

The two disputes which reveal great similarities both concern the interpretation of the VAT provisions regarding barter supplies in the construction sector. Barter supplies imply the existence of two reciprocal supplies of goods or services, each of which is considered as the remuneration for the other supply. Respectively, the supplier in the first barter supply is deemed the recipient in the second supply. In the cases at hand Orfey and Efir were construction companies which received the building rights over plots of land in exchange for the obligation to build and deliver on a turn-key basis certain real estate to the principals of the building right. The two companies were subject to tax audits in the course of which the Bulgarian tax authorities found that Orfey and Efir failed to issue tax invoices and charge the due VAT on the barter supplies upon the earlier of the two barter supplies – the transfer of the building rights. As a result, the construction companies were assessed VAT on the date of the building right transfer on a taxable base which was determined by an expert on the basis of the open-market value of the construction works as per the publicly available information and specialized literature.

Unsure whether the tax Bulgarian VAT Act provisions on the taxable event and taxable base of the barter supplies was compliant with Directive 2006/112/EC (“the VAT Directive”), the Bulgarian Supreme Administrative Court (“SAC”) asked the Court of Justice whether the VAT Directive must be interpreted as meaning that, where a building right is established in favour of a company in order to erect a building, by way of consideration for construction services of certain real property in that building and that company has undertaken to deliver on a turn-key basis to the persons who established that building right, it precludes the VAT on those construction services from becoming chargeable as from the moment when the building right is established and on a taxable base which is determined as the open-market value of the construction works.

The Court of Justice examined the questions referred to it in the light of the existing case law and of the common principle of fiscal neutrality and concluded that the VAT Directive does not preclude the VAT on those construction services from becoming chargeable as from the moment when the building right is established provided that, at the time that right is established, all the relevant information concerning that future supply of services is already known and, therefore, in particular, the services in question are precisely identified, and the value of that right may be expressed in monetary terms. On the other hand, however, the VAT Directive provisions must be interpreted as precluding a national legislation such as the Bulgarian VAT Act provisions under which, when the consideration for a transaction is made up entirely of goods or services, the taxable amount of the transaction is the open-market value of the goods or services supplied.

The interpretation made by the Court of Justice in Orfey and Efir cases helped SAC in adjudging on the Orfey case. In its judgment SAC reconfirmed that the VAT on barter supplies becomes chargeable on the date of the taxable event for the earlier supply. As to the taxable base of the earlier supply, which is considered as advance payment on account for the later supply, SAC came to the conclusion that the only manner to establish the subjective value of that supply is to take into consideration the cost of the construction services because it is only that cost that represents the value which the recipient of the services constituting the consideration for the supply of goods attributes to the services which he is seeking to obtain and which corresponds to the amount which he is prepared to spend for that purpose.

In the meantime, in the period between the events in Orfey and Efir cases and the delivery of the Court of Justice judgments the relevant Bulgarian VAT Act provisions on the taxable event and taxable

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base of barter supplies were amended a number of times. While the amendments to the provisions dealing with the taxable event in cases of barter were very much aligned with the VAT Directive, as interpreted by the Court of Justice, the stipulations on the taxable base are yet to be changed and perfected because they still take the open-market value of the supply as a taxable base.

In view of the above, it looks like the Court of Justice judgments in Orfey and Efir cases would lead to a legislative amendment which would probably also take into consideration the practical conclusions of SAC in Orfey case.

In any case, this would be one more instance where the Bulgarian VAT legislation is improved and changed in compliance with the major VAT principles. What is even more positive is that this change is brought about by the realization of the Bulgarian courts of the imperfections of the Bulgarian laws and their will to seek the assistance and advice of the Court of Justice so that the VAT provisions and principles are interpreted and applied correctly.