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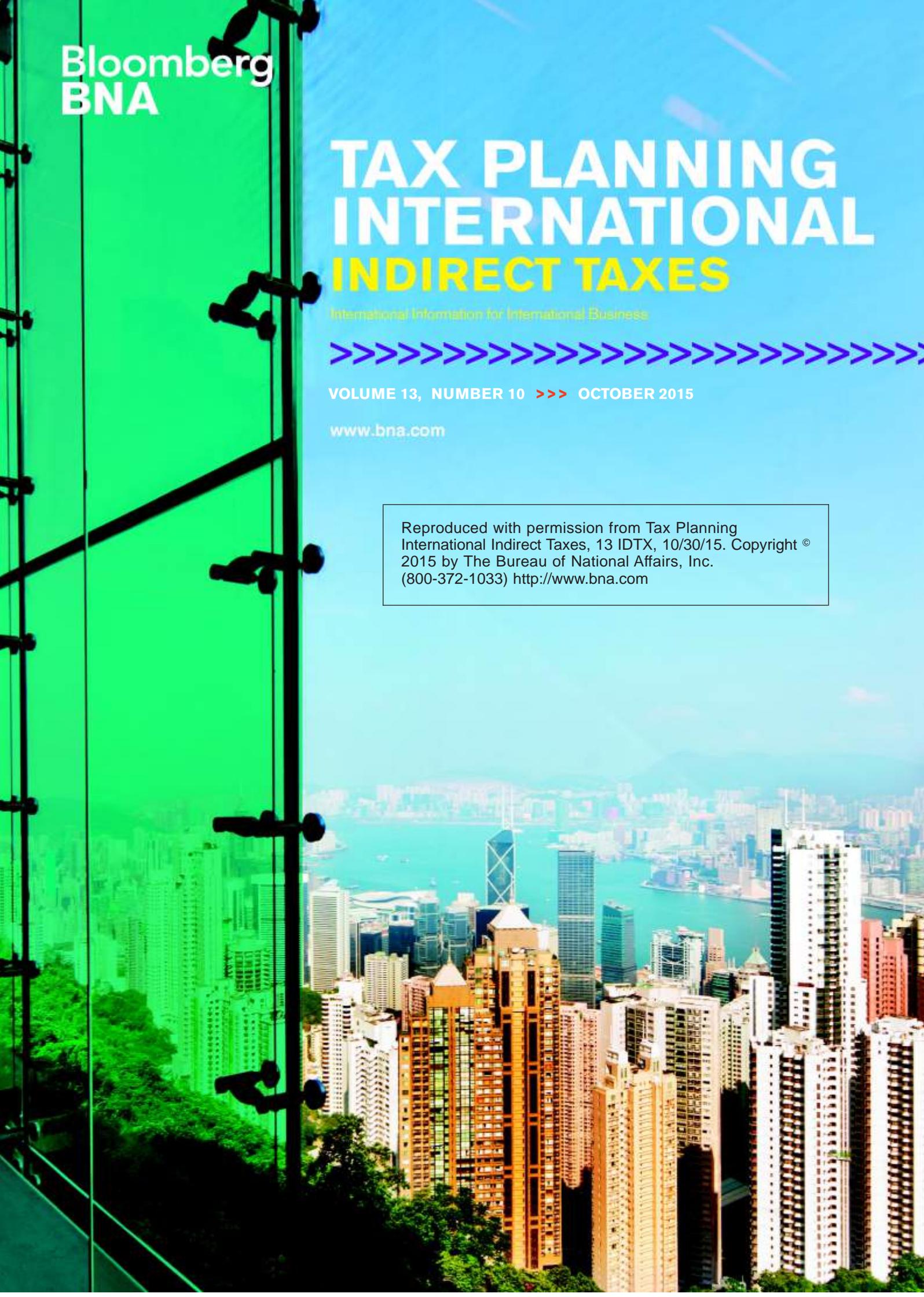
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# VAT on Subscription Consulting Services

**Veselina Petkova**

Delchev & Partners, Bulgaria

Despite its fundamental importance for guaranteeing the neutrality of value added tax (“VAT”), the deduction of VAT has become a real challenge to Bulgarian businesses in recent years, as the denial of tax deduction seems to be the main weapon used by the Bulgarian tax authorities in their fight against alleged tax fraud and avoidance.

In the last few years there has been a marked surge in cases where Bulgarian taxable persons have been denied the right to deduct VAT, the most frequently used argument for this by the Bulgarian tax authorities being the alleged lack of a taxable supply. Thus, it is not surprising that Bulgarian courts have taken full advantage of their right to refer various questions concerning the right of VAT deduction to the Court of Justice of the European Union (“CJEU”) in the course of numerous preliminary ruling procedures. The latest CJEU case in the long chain of Bulgarian preliminary ruling requests, C-463/14, *Asparuhovo Lake Investment Company OOD*, is no exception, although it deals with a different aspect of the VAT deduction right, namely VAT on subscription consulting services.

## I. Background

Asparuhovo Lake Investment Company OOD (“ALIC”) is a Bulgarian company which is mainly engaged in agriculture, cultivating of owned and rented agricultural land and similar activities.

On August 1, 2011 ALIC entered into subscription contracts for consulting services with four service providers, all represented by the same person and some sharing the same personnel, who were engaged to provide to ALIC various services in the field of corporate finance, commercial development, legal advice and information security, on a subscription basis.

Under the subscription contracts the service providers undertook to be available to ALIC for consultation, meetings and commitments, on each working day from 9 a.m. to 6 p.m. and, when needed, outside office

hours, and to obtain, prepare and send to ALIC all necessary information and documents to protect ALIC’s interests efficiently. In addition, the service providers declared their commitment not to enter into similar contracts with any of ALIC’s competitors. In exchange, ALIC undertook to pay the service providers fixed weekly remuneration.

ALIC was subsequently subject to several tax audits covering the overall period from August 2011 to February 2012. During all the audits the Bulgarian tax authorities found that the weekly remuneration had been duly invoiced and booked by the service providers who charged and declared the VAT due on the subscription fee. The latter was paid by ALIC by bank transfer. The service providers were also found to have sufficiently qualified staff to provide the consulting services.

Despite the above, in all three separate tax audits the tax authorities denied ALIC the right to deduct VAT with regard to the consulting services, stating that no proof had been provided as to the type, quantity and nature of the services actually provided due to the fact that no documents were provided by ALIC or the service providers proving the number of hours performed, the formation of the prices and the performance of any actual services (e.g. telephone records for any professional phone calls, copies of e-mail consultations, etc.).

The tax authorities issued three separate tax assessment acts to ALIC denying the company the right to deduct VAT for the services of the service providers, all of which were appealed by ALIC before the competent first-instance court. In two of the court appeals the first-instance court upheld the tax assessment acts, ac-

**Veselina Petkova**  
is Partner at  
**Delchev &**  
**Partners in**  
**Bulgaria**

cepting the tax authorities' claim of lack of any actual taxable supply and denying ALIC's arguments that the real supply of the service providers which was remunerated by ALIC was the availability of the service providers on a subscription basis. In addition, after hearing the legal representative of the service providers, the courts found that the true motive of ALIC in entering into contracts with the said service providers was to take advantage of their legal representative's political contacts and influence, which could not be qualified as a taxable activity.

In the course of the appeal of the third tax notice the first-instance court decided to stay the court proceedings and refer several questions to the CJEU for preliminary ruling.

## II. Questions to the CJEU

By its questions the referring Bulgarian court asked:

1. Whether the term "supply of services" includes subscription contracts for the supply of consulting services (e.g. of a legal, commercial or financial nature), under which a supplier has agreed to be available to the customer during the term of the contract and has undertaken to refrain from entering into contracts with a similar subject matter with the customer's competitors.
2. Whether the chargeable event and the chargeability of the tax regarding subscription contracts for consulting services occur upon the expiry of the period in respect of which the payment has been agreed, irrespective of whether and how often the customer makes use of the supplier's services.

## III. Findings of the CJEU

The CJEU delivered its Judgment without an opinion of the Advocate General.

### A. Are Subscription Services Taxable Supplies?

An interesting fact is that, when they tackle the ALIC case, both the CJEU and the Bulgarian first-instance court analyze the same provisions of Directive 2006/112/EC on the common system of value added tax ("the VAT Directive") and invoke the same previous judgments of the CJEU concerning subscription contracts, but come to completely different conclusions.

Both courts dwell on the fact that consulting services, in principle, fall within the scope of the VAT Directive and that they should be regarded as taxable if there is a direct link between the service supplied and the consideration received in the sense that a legal relationship exists between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.<sup>1</sup>

Both courts go on to cite the judgment of the CJEU in case C-174/00 *Kennemer Golf*, but, while the Bulgarian first-instance court finds it inapplicable to the ALIC case, the CJEU uses it as a guidance and invokes it in support of its conclusion that where the supply of services is characterized, inter alia, by the permanent availability of the service provider in order to supply, at the appropriate time, the services required by the

customer, it is not necessary, in order to find that there is a direct link between that service and the consideration received, to establish that a payment relates to a personalized supply of services at a specific time carried out at the request of a customer.

According to the CJEU the direct link between the supply of services and the consideration received is not nullified if the services are not defined or personalized in advance, or the consideration is paid in several periodic fixed payments, irrespective of the quantity and nature of consulting services actually supplied during the period to which that remuneration relates.<sup>2</sup>

In view of those considerations, the CJEU reaches the conclusion that consulting services, in particular those of a legal, commercial or financial nature, provided under a subscription contract under which a supplier has agreed to be available to the customer during the term of the contract, clearly represent "supply of services" within the meaning of the VAT Directive.

### B. Does VAT on Subscription Consulting Service Become Chargeable Even if no Services Were Provided?

The main argument of the Bulgarian tax authorities for denial of the right to VAT deduction is that no VAT should be charged (and subsequently deducted) if, despite the existence of a subscription contract, no services were actually provided by the supplier during a certain period.

The CJEU, however, points out that, since the object of the subscription contract is not to provide specific advice but to be available to the customer in order to advise it, the service provider makes the supply of services by the very fact of being available during the period set in the subscription contract, irrespective of the quantity and nature of the consulting services actually provided during the period to which that remuneration relates.

As a consequence and given the VAT Directive provisions on chargeable event in case of successive payments, the CJEU finds that the subscription services to ALIC which are remunerated with fixed sums paid periodically, must be regarded as being supplied in the period to which the payment relates, whether or not the service provider has actually provided advice to its customer during that period.

Accordingly, the chargeable event and the chargeability of the tax occur upon the expiry of the period in respect of which the payment has been agreed, irrespective of whether and how often the customer has actually made use of the supplier's services.

## IV. Comments

At a first glance, the referral of the ALIC case for preliminary ruling to the CJEU might strike one as odd given the existing consensus among tax practitioners that services supplied on a subscription basis against a fixed fee undoubtedly represent taxable services irrespective of the exact volume of the services supplied during each period. It may be useful to add that so far the Bulgarian tax authorities seem not to have challenged this view, especially when it comes to various

consulting services (e.g. accounting, legal, tax advice) which are customarily provided on a retainer basis.

If one looks closely at the facts of the case, however, the general feeling one receives is that the tax authorities are in fact challenging the very legitimacy of the contracts between ALIC and the service providers and the nature of their relations which allegedly do not “add up” when looked at more closely in their entirety. At the same time, the tax administration seems to be at a loss for the right grounds to deny ALIC’s right to VAT deduction and tries hard not to mention the existence of any tax fraud or tax avoidance. Instead, it seeks another formal reason to disallow the VAT deduction and finds it in the conveniently vague concept of “lack of actual supply”, so often invoked by the Bulgarian tax authorities when there has been no tax avoidance and the due VAT on a transaction has been in fact reported and paid to the state.

Thus, it seems that the real dispute—whether there is any tax fraud in the case at hand and whether ALIC had known about it, is muddled by shifting the focus

to taxability and chargeability of tax in case of subscription contracts, which, at least in the particular case, seems to be beside the point. The ALIC case becomes just the next in the long line of preliminary ruling cases referred by the Bulgarian courts which are doomed to continue posing basically the same (wrong) questions and receive the same (unhelpful) answers until the real problems start to be called by their real names.

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

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**NOTES**

<sup>1</sup> Case C-16/93, *Tolsma*, EU:C:1994:80, paras 13 and 14, and case C-174/00, *Kennemer Golf*, EU:C:2002:200, para. 39.

<sup>2</sup> See also case C-151/13, *Le Rayon d’Or*, EU:C:2014:185, para. 37.