

## Removal from VAT register—effect on the right to deduct (*Wind Inovation 1 v Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’*)

05/12/2017

**Restructuring & Insolvency analysis:** Etienne Wong, barrister at Old Square Tax Chambers, discusses the key issues raised in the *Wind Inovation 1* judgment concerning the compatibility of the Bulgarian provisions on the VAT de-registration charge with EU law.

### Original news

*Wind Inovation 1 v Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’*—Sofia Case [C-552/16](#), [2017] All ER (D) 90 (Nov)

[Council Directive 2006/112/EC](#) (the VAT Directive), in particular Article 168 thereof, had to be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which the compulsory removal from the VAT register of a company whose dissolution had been ordered by court decision resulted, even where that company continued to carry out economic transactions whilst being placed under liquidation, in the obligation to calculate the input VAT due or paid on the available assets on the date of that dissolution and to pay it to the state and which, therefore, made the right to deduct subject to compliance with that obligation. The Court of Justice of the European Union so held in a preliminary ruling in proceedings concerning the decision to remove the taxpayer company from the Bulgarian VAT register.

### Briefly explain the background to the case and the issues arising within it that are pertinent to insolvency and tax professionals?

In the UK, a company that is registered for VAT may be removed from the VAT register when it goes into liquidation. On de-registration, a VAT charge (the de-registration charge) would arise, and the company would be required to account for VAT on business assets it holds at the time. The company would not be de-registered at the time it goes into liquidation, however (and the VAT charge would not arise), where its business continues, for example through the liquidator.

*Wind Inovation 1* is a case on the Bulgarian iteration of the provisions that apply in the above scenario.

Under the Bulgarian provisions (which are different from the UK provisions), de-registration is compulsory on liquidation, even where the company is still trading. The de-registration charge, therefore, arises, in effect, immediately on every liquidation.

Although, where the company continues trading, it would be entitled to recover the VAT accounted for under the de-registration charge, it could only do so by re-registering for VAT, and it would only be able to re-register after it had first paid the VAT arising under the de-registration charge to the tax authorities.

The issue in *Wind Inovation 1* was whether the requirement to pay the de-registration charge as a pre-condition to recovery of the same was compatible with EU VAT law and principles.

### What did the Court of Justice of the European Union decide, and why?

The Court of Justice considered two issues:

- whether the Bulgarian provisions were consistent with the de-registration charge as provided for under the VAT Directive
- whether they complied with the general principles on VAT recovery

On the de-registration charge the Court of Justice explained that the main objective of the charge was to avoid situations where goods on which VAT had been recovered went untaxed on final consumption. It should, the court said, only arise where the taxpayer had ceased trading (and no longer carried out transactions that were subject to VAT), and not where the taxpayer continued its business activities.

Turning to the taxpayer company in *Wind Inovation 1*; the Court of Justice observed that although it was in liquidation, it continued to carry out business transactions, generating substantial turnover. In the circumstances, the requirement for it to account for and pay the de-registration charge first before it could recover the VAT was not—with reference to the objective to avoid untaxed final consumption—justified.

As for the right to VAT recovery, the Court of Justice reiterated settled case law as to how such right was an integral part of the VAT system, and how, provided the person seeking recovery was a taxable person (meaning, in the vast majority

of cases in practice, that s/he was registered for VAT), and the VAT incurred was on goods or services acquired for the purpose of (non-VAT exempt) business transactions, the right to recover could not, in principle, be limited.

The Court of Justice also pointed out that whether the VAT on an earlier or later transaction in the goods had or had not been paid to the tax authorities was irrelevant to the availability of the right to recover. In other words, even if the operation of the Bulgarian de-registration charge were consistent with the provisions of the VAT Directive, there should be no requirement for the taxpayer company in *Wind Inovation 1* to pay the VAT first in order to be able to recover it. That such a requirement existed meant that the relevant Bulgarian provisions were not compatible with the VAT Directive.

## **What are the practical implications of this case for insolvency and tax lawyers advising their clients? To what extent is the judgment helpful in clarifying the law in this area?**

As noted above, the UK provisions are different from the Bulgarian provisions, so there is little practical impact in the UK.

Having said that, the case does serve as a helpful reminder of the key provisions that apply on a company going into liquidation (namely, [section 46\(4\), \(5\)](#) and [para 8 of Schedule 4](#) to the Value Added Tax Act 1994 and the Value Added Tax Regulations 1995, [SI 1995/2518, regs 9](#) and [30](#)).

*Interviewed by Susan Ghaiwal.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*

FREE TRIAL