

# Concept of single supply and ancillary supply

VAT Alert

March 2024

# Judgment of the European Court of Justice no. C-505/22 dated October 5, 2023, Deco Proteste - Editores case

By

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## 1. Introduction

In sentence no. C-505/22 dated October 5, 2023, Deco Proteste – Editores case, the European Court of Justice mainly focuses on the qualification of free supplies of goods with a value not higher than EUR 50 to new customers upon the subscription to a magazine edited by the abovementioned company. In the specific case, these are “magazines and other documents providing information on consumer protection” sold only on subscription; gifts (which can be tablets or smartphones) are sent by courier together with the magazine after the first monthly subscription payment made by new subscribers, who “may keep the subscription gift without incurring any penalty, after the first monthly payment, even if the subscription is cancelled” (ref. point 10).

The Tax Authority in Portugal (where the company has its office) deemed that gifts with a value not higher than EUR 50, should be considered as “gifts” supplied to consumers, but found that their total amount exceeded the ceiling of 0.5% of the turnover of the previous calendar year (according to the Portuguese regulation), and this is a further element supporting the fact that they should be subject to taxation. Moreover, during the tax assessment, the authority noticed that a 6% reduced rate (effective in Portugal) was applied to the invoice issued for the subscription to the magazine, without any mention of gifts to new subscribers.

Based on all considerations made, the Tax Authority deemed that, since gifts fall within the category of goods subject to tax deduction, regardless of the fact that they represent or not goods related to the main business activity, they are subject to the ordinary VAT rate applied on a taxable base made up by the purchase price of goods.

On the other hand, Deco Proteste - Editores believed that gadgets at issue fall within the definition of “low value gifts”, considered their cost lower than EUR 50.

During the proceedings started due to the contrasting opinions of the parties, the referring court substantially asked the European Court of Justice to clarify what is the nature of gifts granted to new subscribers and, in particular, whether they should be considered as: i) supplies of goods made free of charge, regardless of their relationships with the subscriptions they refer to; or ii) part of the principal transaction (subscription); or iii) part of a commercial package “comprising a principal transaction (the subscription to the magazine) and an ancillary transaction (making the gift)”, in which the “gift” should be considered as a “supply for consideration instrumental to the subscription to the magazine”. Further requests are of a limited general relevance and focus mainly on a specific Portuguese regulation, which creates a link, for the purposes of the application of VAT, between the amount of goods supplied free of charge and the exceeding of 0,5% of the turnover realized by the taxable person in the previous calendar year.

## 2. Single supply

As it can be deduced from the questions asked to the Court, the matter to be resolved is that relevant to the relation between the goods supplied free of charge to new subscribers and the supply which they are obliged to receive. In more occasions, the Court was asked to define whether a transaction which comprises several elements is to be regarded as consisting of a single supply or of several distinct and independent supplies, considered that, in sentence no. C-392/11 dated 27 September 2012, FFW case, specifies under point 14 that, according to the provisions of art. 1, para. 2, sentence 2 of Directive 2006/112/EC<sup>1</sup> “every supply must normally be regarded as distinct and independent”.

This implies that the presence of several elements in a transaction requires a careful analysis in order to establish if the several transactions, to be considered as distinct, constitute a single transaction when they are not independent of each other (ref. judgment no. C-425/06 dated 21 February 2008, Part Service case, point 51). Subsequently, a supply shall be considered as a single supply also “where two or more elements or acts supplied by the taxable person to the customer (...) are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split” (ref. judgment no. C-41/04 dated 27 October 2005, Levob case, point 22). This is true even when one or more elements constitute the principal supply and the other element(s) constitute(s) an ancillary supply, regarded as a supply that “does not constitute for customers an end in itself but a means of better enjoying the principal service supplied” (ref. abovementioned FFW judgment, point 17).

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<sup>1</sup>“On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components”.

## 3. The considerations provided in judgment no. C-505/22

First of all, the Court observes that in order to ascertain the presence of a fixed establishment in another member State, the taxable person must not only have a sufficient permanence, but also be able to rely on the human and technical resources of the entity in the other member State as these were their own resources. Also judgment no. C-333/20 dated April 7, 2022, Berlin Chemie A. Menarini case, expresses a similar opinion, i.e.: “the classification of an establishment as a ‘fixed establishment’ cannot depend solely on the legal status of the entity concerned”, nor can it be “deduced merely from the fact that that company has a subsidiary there” (see points 38 and 40).

On the other hand, Cabot Plastics judgment (similarly to what is stated under point 48 of the abovementioned Berlin Chemie A. Menarini judgment) points out the fact that, generally, the concerned taxable person, “even if it has only one customer, is assumed to use the technical and human resources at its disposal for its own needs”. In fact, it provides services to its associated company “at its own risk” and remains responsible for its own human and technical resources, considering that “the contract for the provision of services, while exclusive, does not in itself mean that the provider’s resources become those of its customer” (see point 39).

Moreover, the fact that the provider also offers ancillary and additional services aimed at facilitating the economic activity of the receiver, which consists in the sale of products derived from the tolling, does not impact the qualification of an entity as fixed establishment.

Therefore, the Court of Justice concludes that an entity established outside the EU which receives services in a Member state pursuant to an exclusive tolling contract, besides a series of ancillary/additional services which facilitate the economic activity of the receiver in that Member state cannot be considered as having a fixed establishment in that Member state unless it has “a suitable structure in terms of human and technical resources capable of constituting that fixed establishment”.

The nature of a transaction comprised of several distinct supplies, was also examined by the domestic regulation and approached by the Italian Tax Authorities in circular letter no. 12/E dated 3 May 2013 commenting on the provisions relevant to “stability law” 2013 (Law no. 228 dated 24 December 2012). In Chapter IV, point 5, it analyses the matter concerning “individual portfolio management services” under art. 1, para. 520, letter a), and para. 521 of the abovementioned law where, referring to the provisions of judgment no. C-44/11 dated 19 July 2012, Deutsche Bank case, it states that individual portfolio management services are subject to VAT as they reflect a complex supply that includes not only the negotiation of the investor’s securities – which is exempt from VAT – but also the analysis and safekeeping of wealth, which are functional to and indivisible from the negotiation. This identification of a supply comprised of several elements as a generic supply that implies the application of VAT under the ordinary rate has then become evident in the application of the provisions under Presidential Decree no. 633 dated 26 October 1972.

On the other hand, the treatment of ancillary supplies analysed in limine by the European Court of Justice is more complex, since the domestic regulation only occasionally analysed the concept of ancillary according to the definition of the Court of Justice as a supply that can allow enjoying the principal supply in the best way possible. The domestic system is still focused on the concept of ancillary as defined under art. 12 of Presidential Decree no. 633/72, meant as a transaction being closely related to a principal supply, but which has to occur between the same entities.

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