

CAROUSEL FRAUD IN FUEL AND ITS SOLUTION FROM THE VIEWPOINT OF THE CZECH VAT ACT

Introduction

Some authors state that Value Added Tax (VAT) is a very good, strong and profitable tax¹ and that VAT revenues make up more than one fifth of global tax revenues². However, recent results have shown that EU Member States are affected by VAT fraud³. Losses to VAT fraud are estimated to be EUR 100-200 billion every year and vary considerably depending on the indicator variables used⁴.

Lazăr⁵ refers to carousel fraud as a specific type of VAT fraud, which is basically a sophisticated system of selling taxable goods. It has a multiple structure in which taxpayers from several countries are involved. Carousel fraud uses complex mechanisms that make fraud and fraudsters hard to spot. As reported by Pfeiffer and Semerád⁶, some tax authorities tried to hold the participants in carousel fraud liable for the lost VAT. However, the key feature of the missing trader is that they either disappear or go bankrupt. A common practice is that tax liability is transferred to an entity that cannot be punished, thus acting as a buffer. Professionally educated and well-organized groups focus mainly on items that are easy to sell and transport and that can be easily mixed up. In the past, carousel fraud was prevalent in sectors such as microchips, mobile phones and sunglasses.

This systematic and widespread fraud prompted the European Commission⁷ to amend Directives governing VAT administration and collection. The measures of Member

States have considerably been weakened since all proposals have to be in agreement with the Directives. Any deviation from the Directives becomes a stimulus for the ruling of the European Court of Justice.

The European Court of Justice (ECJ) has ruled on many issues dealing with national solutions. A limit on excess deductions refund can be used as an example⁸. The Polish tax authorities (C-25/07) refused to refund the excess deduction within the standard period of 60 days and postponed it until 180 days (according to national law). Decisive in this case was the fact that the taxable person started his business less than 12 months ago. The ECJ stressed that *the right to excess deduction refund is an integral part of the VAT mechanism and cannot be restricted*. As previously ruled by the European Court of Justice (C-78/00), the conditions set by Member States for the deduction refund cannot undermine the principle of neutrality, and the refund of excess deduction must be made within a reasonable time and must not involve any financial risk for a taxable person (C-78/00). Although Member States determine processes and develop tools to protect their interests, they must do so in accordance with the principle of proportionality and use tools that impede the objectives and principles of the Community as little as possible. Accordingly, the ECJ ruled that *this is not a special derogation measure whose aim is to prevent certain types of tax fraud*.

Hungary, therefore, chose another process. Article 183 of Council Directive 2006/112/EC allows Member States to carry the excess forward to the following period or

determine conditions for its refund if the amount of deductions exceeds the amount of tax due for the tax period. The outcome was that Hungary did not pay practically any excess deductions. This resulted in the never-ending postponement of excess deductions, which *contradicts the principle of tax neutrality, since the provision of Article 183 cannot serve as a basis for adopting national rules*. According to the Commission, any delay in the refund of the excess reduces the solvency of a taxable person. The same conclusion was also reached by the ECJ.

The Italian Republic was unsuccessful at the ECJ (1991) as well when it tried to advance tax because it set the annual tax period for VAT. The interpretation of Articles 10 and 11 of the Sixth Directive on whether Member States may require payment of VAT on services that have not been rendered and on money that has not been accepted was controversial. Another question was whether a taxable person could invoke the respective provisions at the national court.

The ECJ ruled in its judgement that it is in contradiction to Articles 10, 22(4) and 22(5) of the Council Directive 2006/112/EC to require taxable persons to pay 65% of the previous tax liability in the period which has not yet ended. The taxable persons required to do so may invoke the above-mentioned provisions of the Directive at the national court.

From the above examples it is evident that individual states have desperately wanted to stop carousel fraud. Although the reverse charge mechanism exists in many states, it cannot be applied to all taxable transactions.

Aim and methodology

The aim of this paper is to highlight the concept of the VAT Act that has been amended since 2011 to stop carousel fraud. The VAT Act is structured to meet the requirements of the Directive on tax collection and at the same time to create barriers against fraud.

In the paper standard scientific methods such as analysis and description were employed. Analysis was used to assess particular measures and description helped explain

local specifics with regard to tax collection and anticipated developments.

Czech Law on Value Added Tax

Like most states, the Czech Republic also has its problematic area where huge VAT losses are incurred by carousel fraud. It is just the fuel that has led to a need to change the conditions under which the tax is levied. The government and entities doing business in this field are confident that the reverse charge mechanism should be the right solution in the fight against fuel tax fraud. Therefore, in February 2010⁹ the Czech Republic asked the European Commission for an exception to introduce this instrument for fuel¹⁰. The request was rejected with a recommendation to use some other tools first in both tax and non-tax areas¹¹.

On the grounds that it can be traced, this could contribute to better check and registration of traders selling goods subject to excise duty. Furthermore, it is possible to introduce a rule that customers of missing traders are jointly and severally liable for unpaid tax if they knew or could have known they were participating in VAT fraud, which can partly be presumed by the fact that the trader is a new entity in the market and that the price is lower than the usual price¹².

After its request had been rejected, the Czech Republic started to set out its own rules to combat fraud. Besides the ever expanding and complementary cooperation between the General Financial Directorate (GFD) and the General Directorate of Customs (GDC), Police of the Czech Republic (PCR), Financial Analytical Division (FAÚ) and other interested institutions, there are also new measures aimed at high-risk areas in tax administration.

Liability of the recipient of a taxable supply

Council Directive 2006/112/EC allows Member States to make the person acquiring goods or services¹³ liable to pay tax. Member States may also decide that a person other than the person liable to pay tax¹⁴ will be held liable jointly and severally for payment of VAT. Article 109 of the VAT Act defines the conditions under which liability

is transferred to the recipient of a taxable supply (hereafter referred to as the recipient).

The first condition is directly related to judgments dealing with the consciousness (unconsciousness) of the tax entity that it is being involved in trade which is or will be in a different form affected by fraud, or possibly it could have known about it (Halifax, Kittel, Optigen). If this fact is proved, the joint and several liability rules will be applied. Otherwise, it is impossible to deny the right to deduct because of the principle of neutrality.

Awareness or lack of awareness need not be the only identifier that puts pressure on the caution of the recipient of a taxable supply. Liability passes to another person even if the payment for a taxable supply is (Article 109 (2) a-c VAT Act):

- a) *“without any economic justification and the price is apparently different from the usual price,*
- b) *made wholly or partially by bank transfer to the account of the payment service provider outside the country or*
- c) *made wholly or partially by bank transfer to the account other than the account of the provider of a taxable supply which is published by the tax authorities and can be checked remotely.”*

According to the General Tax Directorate¹⁵ the usual price can be found out by analysing negotiated prices in the segment of the market of comparable property or services at a given time in a given place.

The question of payment into the account published in the country could have been the reason why taxpayers began to favour payment in cash, which exempts them from being held liable for unpaid tax. They can do so when paying for smaller taxable supplies, but also when the price of a taxable supply almost reaches the maximum threshold limit of CZK 350,000 according to the law on the restriction of cash payments. The legal measure of the Senate (Collection of laws no. 344/2013) determined the limit for payments in Article 109 (2) c of the VAT Act for supplies that twice exceed the defined amount, i.e. CZK 700,000. According to the explanatory memorandum (MF ČR, 2013) *“this measure will give rise to liability in cases where there is a need for caution because of the increased*

risk of non-payment of VAT and a potential negative impact on the revenues of public budgets.”

A background check of business partners by recipients must also be performed because recipients are required to monitor whether the person providing a taxable supply is not at the time of delivery identified as an unreliable payer¹⁶.

Article 109(4) of the VAT Act is important in relation to fuel tax fraud because the *“recipient of a taxable supply (fuel delivered by a fuel distributor)¹⁷ is under the fuel regulating law held liable for unpaid tax on this supply unless at the time of supply there is a record published about the supplier which can be remotely verified that he is registered as a fuel distributor under the fuel regulating law.”*

Special way of tax securement

Recipients of taxable supplies may legitimately fear penalties for non-payment of tax by their providers (suppliers). A special way of tax securement defined in Article 109a of the VAT Act states how payment of VAT to the tax authorities should be made. The recipient of a taxable supply eludes future liability for a provider who does not pay tax on a particular supply.

Tax period and change of the tax period

From 1 January 2013 all newly registered taxpayers have a mandatory monthly tax period (§ 99 ZDPH and § 99a ZDPH). Although the quarterly period has not been cancelled, the transition from the monthly to the quarterly period has been tightened. The lawmakers most probably wanted to prevent purposely established payers from carrying on their business and thus generating profit throughout the quarter which will never be taxed in the future. Whereas recipients could have claimed a deduction as monthly taxpayers, providers of taxable supplies, quarterly taxpayers ended up insolvent at the time when they were to pay the tax.

In general, this provision can be circumvented by purchasing an existing company or a company established for the purpose of sale (*shell company*¹⁸) registered as a quarterly taxpayer.

Special record-keeping obligation

On the basis of the decision of the tax authorities (since June 2010) fuel traders are obliged to keep separate records for each individual purchase of mineral oil for the purpose of reselling. Special records are also required for the sale of more than 100 litres of fuel, which was not decanted into the integral vehicle's fuel tank and used to propel the vehicle¹⁹.

The tax administrator meant this as a tool for tracking fuel movement. A similar principle of taxpayer supervision in real time can be found in proposals for electronic book keeping²⁰. Vitek²¹ is, however, against other regulations that may have a negative impact on the market and proposes searching for some other tools. Semerád²² pointed out a possible drawback to these special record keeping obligations. The tax administrator does not require the key information – the number of the bill of lading, which specifies the shipment. Since June 2015 this special record keeping obligation has been under the Customs Administration, which decides about possible deposit reduction. For this activity it needs enough information on the market and individual fuel traders.

VAT control statement

The VAT control statement is one of the innovations that came into effect on 1 January 2016. How does it work? Only VAT-registered taxable persons are obliged to submit the VAT Control Statement (Articles 101c – 101i, VAT Act). The VAT Control Statement does not substitute a VAT return or a Recapitulative Statement for Intra-community supplies. The data are collected from issued and received tax documents. Simplified tax documents (valued at less than CZK 10,000 incl. VAT) are collected as well. The VAT Control Statement has to be submitted electronically and there is no (temporary) exemption from this duty.

The main task of this policy is to check tax liability of all taxpayers in a relatively short time. The VAT Control Statement is to be sent off no later than the due date of tax returns. This enables the tax authorities to match the tax document in which the recipient of a taxable supply claims the excess. If there is such a claim, then the output

tax should have been paid on this supply. If there are any inconsistencies revealed, the tax authorities ask the taxpayer to explain the situation and provide the necessary information. On the basis of this call the right to claim the excess can be delayed. It is quite strange that if the payer is asked by the tax authorities to make corrections, they will automatically be fined. This rather strict penalty should be changed from June 2016²³.

The positive side is that the tax authorities can at least see who the entity does business with. If the tax authorities find a suspected entity or an entity involved in carousel fraud, they can easily trace the other businesses in the chain. Subsequently, they can apply all legal measures to recover the tax from other entities on the basis of liability for unpaid tax.

Conclusions

The paper deals with the problem of carousel fraud on value added tax. The author focuses on the concept of the Czech Value Added Tax Act which has been amended since the year 2011. One of the main motivations is to tackle fraud in the fuel market. The unsuccessful application in the year 2010 to introduce a reverse charge for this problematic commodity triggered the development of other tax and non-tax instruments.

The paper mentions liability for unpaid tax and related conditions for special tax securement. Special attention has been given to fuel distribution. Registration of fuel distributors is one of the non-tax instruments that reduced the market to one-tenth in a very short time. Also, the special record-keeping obligation is not based directly on tax laws. The database enables the monitoring of the movement of goods between individual distributors. Perhaps this has become a model for VAT Control Statement, which is a new responsibility of all VAT payers, not only fuel traders. This is online delivery of documents for tax returns. The tax authorities immediately have all the important data to take a decision about the eligibility of a claim, but also about trade between businesses. If a fraudulent entity appears in the chain, there are filters that can help search for other entities in the chain to which liability for unpaid tax can be applied.

Every solution has a problem with its application. Taxpayers can easily adapt to the new situation and fraudsters are able to circumvent even the best measures. The Czech VAT Act should therefore be looked upon as a set of solutions which if used together can create quite a powerful tool to tackle VAT fraud.

Abstract

The paper deals with the problem of carousel fraud on value added tax. The author focuses on the concept of the Czech Value added tax Act, which has been amended since the year 2011. One of the main motivations is to tackle fraud in the fuel market. The unsuccessful application in the year 2010 to introduce a reverse charge for this problematic commodity triggered the development of other tax and non-tax instruments.

The paper mentions liability for unpaid tax and related conditions for special tax securement. Special attention has been given to fuel distribution. Registration of fuel distributors is one of non-tax instruments that reduced the market to one-tenth in a very short time.

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¹² P. Semerád, *op. cit.*, 2014.

¹³ Article 42 Directive 2006/112/EC.

¹⁴ Article 44 Directive 2006/112/EC.

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¹⁷ *Fuel distributors have to meet relatively stringent criteria for register. The heaviest burden imposed on them is the compulsory deposit or bank security of 20 million CZK. In justified cases the security for small distribution companies can be reduced to 10 million CZK. The precise conditions and set out in Fuel Act. This obligation is effective from 1 November 2013 and had a dramatic impact on fuel distribution companies. After introduction of security as one of the conditions for entry into the registry, of almost 1,950 distributors about 160 of them stayed in business.*

¹⁸ Some authors (e.g. D.G. Baird, *Fraudulent Conveyances, Agency Costs, and Leveraged Buyouts*, “The Journal of Legal Studies” 1991, no. 20 (1), p. 1-24; J.C. Sharman, *Shopping for Anonymous Shell Companies: An Audit Study of Anonymity and Crime in the International Financial System*, “Journal of Economic Perspectives” 2010, no. 24 (4), p. 127-140) also call them shell, especially when they are used for fraud such as concealment of a material fact and transfer of property. Characteristic of them is that they do not have any contact data, they are mostly at virtual addresses, do not have any staff or the same employees are in companies with a similar company name (e.g. Durtschi et al, *The Effective Use of Benford’s Law to Assist in Detecting Fraud in Accounting Data*, “Journal of Forensic Accounting” 2004, Edwards vol. V, p. 17-34.

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²³ *The paper is based on legislation as of 31 March 2016.*