



PRINCIPLES OF LAW IN NATIONAL AND EUROPEAN VAT

Study of judicial principles of law

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4. List of Acronyms

- **JPOL** – Judicial Principles of Law
- **CJEU** – Court of Justice of the European Union
- **VAT** – Value-Added Tax
- **SC** – Supreme Court (Corte di Cassazione)
- **EC** – European Community
- **EU** – European Union
- **c.p.c.** – Codice di Procedura Civile (Italian Code of Civil Procedure)
- **TSIPC** – Tax and Social Insurance Procedure Code (Bulgaria)
- **SAC** – Supreme Administrative Court (Bulgaria)
- **APC** – Administrative Procedure Code (Bulgaria)
- **BGN** – Bulgarian Lev (currency)
- **TPL** – Tax Procedural Law (Sweden)
- **ATR** – Advanced Tax Rulings (Sweden)
- **BATR** – Board for Advanced Tax Rulings (Sweden)
- **CAC** – County Administrative Court (Sweden)
- **ACA** – Administrative Court of Appeal (Sweden)
- **SAC** – Supreme Administrative Court (Sweden)
- **TPA** – Tax Procedural Act (Sweden)
- **APA** – Administrative Procedural Act (Sweden)



5. Introduction

One of the key objectives of the POLINE Project is to conduct both a theoretical and empirical analysis of Judicial Principles of Law (JPOLs) across different legal systems. As explained in the previous deliverables (D2.2), a JPOL is a portion of text, extracted from the argumentative part of a judgement which contains the interpretation of a rule, of the portion of a rule, or of a general principle, the consequences stemming from the interpretation/application of a rule or a principle in a legal system, the subsumption of a fact within a rule, or the qualification of a factual hypothesis as a concept contained within a rule.

These analyses serve a twofold purpose. Firstly, they aim to enhance the understanding of the fundamental features of the tax legal systems of the involved countries, to highlight their similarities and differences. Secondly, they seek to determine whether the concept of JPOLs exists in other jurisdictions and how this concept is understood, with the goal of formulating a common definition of JPOL that can be used for their systematic extraction based on a shared methodological framework.

For the **theoretical analysis**, a structured set of questions was developed to guide the examination of the legal systems under consideration. This approach ensured that the analyses remained focused on comparable elements, thereby facilitating a comparative study.

According to the methodology outlined in the POLINE Project (Part B, para. 2.1), one of the primary objectives is to provide an integrated legal and empirical analysis of the concept of "Judicial Principle of Law" (JPOL) and to assess the function of such principles within both European and national legal systems. From a legal standpoint, the project builds upon theories of judicial decision-making through a comparative lens. In particular, the analysis focuses on:

- The patterns of argumentation (including precedents) and interpretation adopted in the judgments of the Court of Justice of the European Union (CJEU) and the higher national courts.
- Analysis of the concept of "judicial principle of law".
- The impact of CJEU judgments on national case law.
- Cases where national courts have sought preliminary rulings from the CJEU on the interpretation and validity of VAT law.

As for the CJEU, the questions were different: we relied on the same premises, but we chose to analyse the topic taking into consideration the peculiarities of the CJEU and its primary role in the use and development of the JPOL concept itself. To this end, we followed this schema:



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1. Short description of CJEU role in interpreting tax law
2. Analysis of the concept of “judicial principle of law” in CJEU case-law
3. Description of the role of precedents in the EU VAT case-law
4. Impact of the use of JPOLs in CJEU case-law and potential impact on the General Court's jurisdiction

The **empirical analysis** examines court decisions to identify patterns in the use of JPOL, including direct citations from the CJEU and national jurisprudence. Empirical research is essential in this context, as it allows for a systematic examination of judicial reasoning, revealing how principles are developed, modified, or reaffirmed over time. The study highlighted the structural composition of JPOL in judgments, which in Italian case law are sometimes explicitly identified as “*principi di diritto*” (literally, “principles of law”) and, in other cases, embedded within broader legal reasoning.

The findings of this empirical analysis have been instrumental in shaping the set of guidelines aimed at clarifying how JPOL should be identified and extracted (last deliverable).

These analyses were conducted by national experts in tax law from the respective jurisdictions involved in the project (UNIBO for Italy, ORU for Sweden, APIS for Bulgaria). The analysis concerning the European Union was developed by the European University Institute (EUI). Their expertise ensured a deep understanding of the national legal systems, contributing to the robustness of the comparative legal study. The involvement of these experts was crucial in identifying patterns and divergences across legal systems, ultimately aiding in both the manual and automatic extraction of JPOLs.

To achieve these objectives, we have structured the present report as follows: first, we present the findings of both the theoretical and empirical analyses in relation to the three national legal systems examined. Subsequently, we provide a comprehensive summary of the results, highlighting key insights and overarching conclusions derived from the study.



6. Theoretical Analysis

7.1. European Legal System

7.1.1. Short description of CJEU role in interpreting tax law

VAT law is a harmonized field, so the CJEU is responsible for the coherent application of the VAT Directive, namely Directive 2006/112, and it offers the authentic interpretation of the norms therein.

Interestingly, the CJEU in its proposal merely notes that all areas together account for roughly 20 per cent of all preliminary references on a yearly basis. However, among them, two carry almost the entire load while others stand apart. As can be seen in the Court's statistics, of 631 total cases in the six years reference period, VAT (286 cases or 45.3 per cent) and passengers' rights (237 cases or 37.6 per cent) generate more than 80 per cent of the workload, whereas the remaining four areas each generate around 5 per cent or less: excise duties (25 cases or 4 per cent), customs (30 cases or 4.7 per cent), tariff classification (32 cases or 5.1 per cent), and emission allowance trading (21 cases or 3.3 per cent).

The CJEU's role is in many ways similar to that of an administrative law court in a continental civil law country. Its cases often involve a private party challenging government action that burdens one of the four freedoms, or on EC institution challenging the action or inaction of another. The cases before the Court do not normally involve disputes between private parties - on a contract, tort or property question, for example. (A question of treaty, or secondary legislation, interpretation referred to the court under Article 177 may, of course, involve an underlying private law dispute between private parties in a national court). It may be that the character of the court's jurisdiction influences the way precedent operates as a source of law in the Community legal system.

CJEU judgements in referral for preliminary ruling have a quite consistent structure: under the presentation (type of procedure, date, keywords, number of the procedure, name of the parties, Court composition and intervenients, when they are present), the real judgement starts. It is generally made by several recurrent sections: the legal context (both European and national ones). The dispute in the main proceedings and the question referred for a preliminary ruling, Consideration of the question referred (in which the Court expresses its juridical evaluation, and it motivates the reasons why it is going to reach a certain decision), statement about Costs and in the end the Ruling of the Court (to which we also referred ad "dispositive part of the judgement).

The CJEU renders a single composite opinion and judgment, unsigned by any judge; there are no dissenting or concurring opinions. CJEU decisions are decidedly deductive, legalistic and magisterial. After a brief statement of the facts and the procedural posture of the case, the opinion continues syllogistically with the statement of general principles and logical



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deduction from these principles to elements of the final conclusion. The principles or rules cited may come from the TFEU articles or secondary legislation, but increasingly over the last three decades, the Court has cited its own prior cases as the source of the asserted principles. Generally, however, the Court does not discuss the facts of prior cases and makes no attempt to justify the asserted rules and principles. It mentions policy considerations only rarely and more or less obliquely. Considering such a structure, JPOLs should:

- Be in the “argumentative part” of the judgement.
- Exclude the rephrasing of the request, which is generally at the beginning of such argumentative parts.
- Exclude the interpretation suggested by the applicant, even when described by judges in their argumentation.
- Comprehend the ruling.

7.1.2. Analysis of the concept of “judicial principle of law”

The so-called VAT Directive has been modified many times over the years, as long as, before the actual one (2006/112/CE), different versions were identified due to their order of appearance (mainly First, Second and Sixth Directive). One of the differences between such subsequent versions was the increasing presence of binding details in the Directives themselves. Hence, such a development occurred over three decades. In the meantime, the CJEU played a fundamental role in defining some essential concepts of the VAT system, stating also some general principles (such as neutrality, proportionality, and effectivity) for which there is no legal provision.

That said, the development of the VAT Directives' structure does not entail only the number of definitions directly offered by the legal provision, but also the wideness of the application of such directive (e.g., the second directive does not prescribe any exemption, other than those connected with EU import/export, and already the sixth directive contains a well-detailed list of operation that should be exempted). Thus, the development of CJEU case law in the field of VAT followed the development of the rules that are supposed to be interpreted through preliminary rulings. Indeed, there is a not considerable number of judgments interpreting the second directive, whereas there are many more pronouncements about the sixth directive.

It is also important to underline that CJEU has been asked to interpret a provision of the Sixth Directive for a significant amount of time after Directive 2006/112 entered into force since Member States presented the requests for a preliminary ruling about the EU law applicable at the time of the event, which could be much early. However, the Court of Justice always pays attention to the consistency of its interpretation, underlying that any time there is a correspondence between the sixth Directive and the new one, its statement should be considered applicable and useful for the interpretation of EU law.



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Such historical consideration clarifies the role played by CJEU interpretative principles in the VAT system. Over the years the Court acted along three main directions: the first one is the interpretation of existing concepts of the Directive, like the notion of “exemption of public interest”, the notion of “consideration”, the notion of “supply of services”, the notion of “public body”, etc. The second one is the expression of general principles that govern the VAT legal system: both identified moving from the preamble of the Directive (e.g. the neutrality principle) or identifying elements of common legal tradition (e.g. the proportionality principle). The third one is the creation of new VAT concepts, built by the application of JPOL of the first two model: the most relevant example is the notion of “Abuse of Right” in VAT.

The presence of JPOLs in CJEU case law is a sort of natural one since preliminary rulings aim to make explicit, knowable, and available the correct interpretation of EU law in a harmonized field. The expected impact of such a case law is to improve harmonization and to guarantee as much coherence as possible in the implementation and application of VAT in member States.

A key feature of the Court's interpretative method is the so-called teleological approach, an expression frequently used in academic writings, arguments before the Court, and occasionally by Advocates General, though rarely by the Court itself. The Court's preferred interpretation method remains close to the formulation in *Van Gend en Loos*, which states that interpretation must consider "the spirit, the general scheme, and the wording" of the law. This was later supplemented by the need to consider "the system and objectives of the Treaty". More recently, the concept of "context" has been added, with the prevailing formulation stating that a provision of EU law should be interpreted "not only in light of its wording but also in the context in which it appears and the objectives of the rules it is part of." This concept is often referred to as the scheme, in line with the *Van Gend en Loos* reasoning.

Over the years, the CJEU has provided numerous key definitions in VAT law, such as supply of services (*Tolsma*), supply of goods (*S. Shipping and Forwarding Enterprise Safe BV*), and consideration (*Apple and Pear Development Council*). The Court has also built extensive case law on VAT exemptions. In this regard, it has consistently emphasized the need for a uniform interpretation of the notion of exemptions, ensuring proper control over derogations from the general VAT mechanism. For example, in Case C-228/20 (para. 34), the Court reaffirmed that VAT exemptions must be interpreted strictly, as they deviate from the general principle that VAT applies to all taxable supplies. However, it also stressed that strict interpretation must not deprive exemptions of their intended effect, in line with the principle of fiscal neutrality.

Several fundamental principles of European VAT law have emerged from CJEU case law, including the principles of neutrality, proportionality, and substance over form. Many of these principles were first introduced in early rulings, and in more recent judgments, the Court has either refined their application or used them to develop new legal concepts.



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In some cases, the CJEU has introduced entirely new concepts in VAT law. The most notable example is the Abuse of Rights doctrine (*Halifax*), but other innovations include the concept of European economic interest (*Webmind Licence*) and, to some extent, the role of good faith in VAT operations.

The Court often employs a step-by-step argumentative technique, progressively building its interpretation by citing principles established in previous rulings. This approach reinforces the authority of its decisions and ensures consistency and continuity in the application of EU law, particularly in VAT matters.

Due to this method of reasoning, the concept of obiter dictum does not hold the same meaning in CJEU case law as in other legal systems, such as the Italian one. If a JPOL appears in the Court's reasoning, whether as a core argument or a clarification, it cannot be dismissed as unnecessary. Therefore, in legal analysis, every JPOL should be extracted, whether new or previously established, even if it appears to be secondary to the main issue of the case.

JPOLs could pertain to matters such as court procedure (limits and jurisdiction), essential concepts (explanation and creation), or general principles (definition and effect). However, they should not merely restate legal provisions or rephrase interpretations suggested by applicants.

A JPOL may be new or cited from precedent. If it is old, it is assumed to appear in the text as a referenced precedent (see D2.2). If it is new, it should introduce a fresh interpretative statement, though it is common for new JPOLs to be framed as logical extensions of previously established principles.

7.1.3. Description of the role of precedents in the EU VAT case-law

Both Advocates General and scholars use the concept of *precedent* when discussing the Court's past decisions, but they rarely define the exact meaning they attribute to the term. Sometimes, it simply refers to a past decision of the CJEU, which may have persuasive rather than binding authority.

There is significant debate over whether the concept of binding precedent or the rule of stare decisis exists in EU law. Some argue that CJEU case law is not binding and, therefore, does not constitute a formal source of law. Others take a middle-ground view, asserting that while not formally binding, the case law is at least de facto binding due to the Court's consistent adherence to its own decisions.

At the other end of the spectrum, some believe that CJEU decisions are binding on all European courts except the CJEU itself, drawing a parallel to the status of the House of Lords' decisions in England. This perspective suggests that the CJEU considers its own judgments authoritative and expects national courts to treat them as binding as well. Notably, former CJEU judges and Advocates General have supported this view.



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The CJEU frequently cites its previous decisions, a practice that has increased over the decades. However, such references generally serve as sources of legal principles rather than detailed analyses of previous cases' facts or ratio decidendi. The Court is also known for issuing rulings that depart from prior decisions without explicitly acknowledging the change.

Thus, a citation of precedent is assumed to be a JPOL whenever the Court refers to it as an expression of an established interpretation.

It is also important to consider how the Court incorporates precedent into its judgments. Since its early rulings, the Court has numbered each paragraph for clarity. According to the CJEU's citation policy, references to previous judgments should specify the paragraph(s) cited. Over the past decade, this practice has become more formalized, improving both the consistency and recognizability of JPOL citations. This could help JPOLs extraction.

7.1.4. Impact of the use of JPOLs in CJEU case-law and potential impact on General Court's jurisdiction

The CJEU in using precedent (quoting literally passages of previous decisions and never admitting a distinguishing or an overruling) has been described as inspired to the logic of LEGO bricks, and it creates a paradoxical effect: decisions multiply while maintaining an apparently unchanged structure, yet at the same time, they gradually extend judicial competence without giving the impression of a radical transformation. The Court, perhaps deliberately, has constructed a mechanism of apparent stability that, without evident ruptures, enables a silent expansion of European law. Jurisprudence continuously references itself, consolidating JPOLs without explicitly declaring a shift.

This method of judicial development produces a dual effect. On one hand, it ensures a high degree of continuity and predictability, making rulings easily recognizable and replicable. On the other, it introduces a gradual shift that, while not openly creating uncertainty, leaves room for a crucial interpretative process. Without an active role of the judge in the hermeneutic operation, the outcome could significantly diverge from the original meaning. This phenomenon will be particularly relevant in the new competence framework of the General Court, which will inherit not only VAT-related cases but also a jurisprudential drafting method that will inevitably shape its interpretative approach.

The abovementioned change in competencies has been motivated by the high level of clearness and certainty present in the interpretative framework of the CJEU in the field of VAT. To this end, we expected the importance of JPOLs, both the new one and those cited as precedent, will increase since the recalled certainty relies on the JPOLs and their consistency.

7.2. The Italian Legal System



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7.2.1. Short description of your national tax legal system

7.2.1.1. *The sources of law in the field of tax justice*

The current structure of the tax judiciary is the result of the 1992 reform that established an autonomous tax judiciary, which was implemented as of April 1, 1996. The tax judiciary has competence on tax issues. Tax issues are considered as such, 1) when they concern a tax and, 2), when the applicant challenges one of the acts listed in the relevant provisions regulating the tax process.

The most important tax justice regulation is contained in:

- Legislative Decree No. 545 of December 31, 1992, which provides the regulation concerning tax courts (composition, structure, etc.).
- Legislative Decree No. 546 of December 31, 1992 which provides the regulation of the tax process (content of the appeal, rules concerning competence, etc.). For matters not contained in Decree 546/1992, the rules of the Code of Civil Procedure apply.

Law No. 130 of August 31, 2022, introduced a reform of the tax judiciary which impacts both the composition of tax courts and tax process. One of the most important innovations is the introduction of the figure of the "tax judge" selected through a public exam.

7.2.1.2. *The Italian Tax Courts*

The tax justice system currently consists of courts of first instance ("Corti di Giustizia Tributaria di Primo Grado") and courts of second instance ("Corti di Giustizia Tributaria di Secondo Grado"). The first instance Courts are located in each provincial capital, while the second instance Courts are located in each regional capital.

A judge is at the head of each tax court. Each court consists of several chambers. Each chamber is composed of a president, who presides over the first chamber, a vice-president, and not less than four tax judges. When a case is assigned to a chamber, decisions are adopted by a panel of three judges belonging to that chamber or by a monocratic judge for judgments up to 5,000 euros (Article 2 Legislative Decree 545/1992).

The composition of tax courts is evolving. Traditionally, tax judges were not full judges but honorary judges. Law 130/2022 provided that, from 2024, tax judges must be selected through a public exam, similar to that used to select full judges. The full tax judges would have the same economic treatment as ordinary judges. Both law graduates and business graduates can sit the exam.

The administrative support function for judicial activity is carried out by the staff of the Secretarial Office of the Tax Justice Courts, which belongs to the Department of Tax Justice of the Ministry of Economy and Finance (MEF). Hence, in Italy administrative support to tax courts is not provided by the justice ministry but by the finance ministry.



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The self-governing body of the tax judiciary is called the “Consiglio di Presidenza della Giustizia Tributaria” (Article 16 Legislative Decree 545/1992).

7.2.1.3. The structure of the tax process

The tax process is divided into two levels of judgement: a first level before the Tax Courts of First Instance and a second level before the Tax Courts of Second Instance. Pursuant to Article 111 of the Italian Constitution, an appeal to the “Corte di Cassazione” (Italy's Supreme Court) is allowed against second instance judgments.

The tax process starts with the taxpayer challenging a tax act (e.g., an assessment notice) through serving an appeal (“ricorso”) to the Tax Court of First Instance. The tax process thus has an appeal structure and is aimed at verifying the validity and legitimacy of the contested act.

Appeals against the judgments of the Tax Courts of First Instance can be taken to the Tax Courts of Second Instance. In the court of second instance, the judge decides again on the merits of the matter. However, the judge can decide only on the requests alleged by the appellant.

The judgments of the Tax Courts of Second Instance may be appealed in the “Corte di Cassazione” on the grounds provided for in Article 360 para. 1 of the Code of Civil Procedure (violation of the rules on jurisdiction, violation or wrong application of the rules of law, nullity of the judgment and of the proceedings, failure to examine a decisive fact for the judgment that was the subject of discussion between the parties). The judgement before the Corte di Cassazione is brought by means of serving an appeal to the counterparty/resistant.

According to Article 62 para. 2. Legislative Decree 546/1992, the rules of the Code of Civil Procedure apply to the case before the Corte di Cassazione. However, tax disputes are referred to a specific section of the court (Section n. 5).

7.2.1.4. The role of the Italian Corte di Cassazione in the tax field

In Italy, the Corte di Cassazione is the court of last instance. It is composed of several chambers (three chambers deal with general civil law decisions, one with labour law decisions, and six with criminal law decisions). Decisions are taken by panels composed of five judges. A special panel of seven judges, the so called “Sezioni Unite”, decides on: matters of jurisdiction; cases decided in conflicting ways by the ordinary chambers; and cases of special importance. The Corte di Cassazione is composed of around 500 full judges who enter the court at the height of their judicial careers. They are neither chosen nor elected: they are appointed based on the rank they have reached in their career.



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The main functions attributed to the Corte di Cassazione by the Fundamental Law on the Judiciary No. 12 of January 30, 1941, ensure: "the exact observance and uniform interpretation of the law, the unity of national law, and respect for the limits of the different jurisdictions". The crucial role of the Corte di Cassazione within the Italian legal system is related to its nomofilactic function, i.e., ensuring certainty in the interpretation of the law. For this purpose, the provisions in force do not allow the Corte di Cassazione to know the facts of a case except when they result from the documents already acquired in the stages preceding the trial and only to the extent that it is necessary to know them in order to carry out its role.

Hence, the Corte di Cassazione is a court of legitimacy and not of merit and its decisions concern the legitimacy and correctness of the appellate judgement. This means that the claimant could, for example, argue that the judgement misapplied a rule because it misinterpreted a provision or that the second instance decision is affected by a procedural defect that resulted in its nullity. However, they cannot ask for a review of the facts.

The final decision of the Supreme Court may be to uphold or dismiss the second instance decision. The upholding may be with or without referral to the Tax Court of Second Instance. In the case of upholding without a referral, the Supreme Court both eliminates and substitutes the previous decision with a new one. This happens when no further factual findings are necessary. When the Supreme Court decides with referral, the Court only rules on the legitimacy of the appellate judgment. It is up to the Tax Court of Second Instance to decide on the merits of the case.

A recent reform introduced the possibility for the tax courts to make the so-called "national reference for preliminary ruling" (Article 363 of the Code of Civil Procedure). In this procedure, the referring court may ask the Corte di Cassazione which is the correct interpretation of a certain provision. The national reference for preliminary ruling is possible if: the resolution of the case depends merely on the interpretation of the law; the question has not already been decided by the Corte di Cassazione; there are interpretative difficulties at stake; and the question is likely to arise in many judgments. In this case, the Corte di Cassazione answers with a principle of law, clarifying how to interpret a legal provision. This is interesting for our purposes because it shows the importance of the judicial principles of law for courts of first (or second) instance.

7.2.2. Analysis of the concept of "judicial principle of law"

7.2.2.1. The nomofilactic function and the Massimario Office

In the Italian legal system, the concept of "judicial principle of law" is closely related to the nomofilactic function of the Corte di Cassazione.



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Within this court there is an office that plays a key role in ensuring the correct and uniform interpretation of the law: the *Massimario Office* (Ufficio del Massimario). The Office's task is the identification of principles of law. This identification takes place through the drafting of so-called "*massime*". The dissemination of *massime* is ensured by adding them to a national database (Italggiure) created and updated by the C.E.D. (Centro Elaborazione Dati) of the Corte di Cassazione. So, in Italy there is an official body within the Corte di Cassazione which collects the most important principles of law developed by case law.

The process leading to the publication of *massime* begins with the selection of the most significant decisions. The selection process consists in reading all the decisions of the Civil and Criminal Sections of the Corte di Cassazione (except for the Orders of the Seventh Section) in order to extract the decisions containing principles of law with a nomofilactic nature, i.e. principles of law that are necessary to ensure the uniform application of law in the country (see para. 2.3).

The selection is followed by drafting, reviewing, and verifying the correctness of the *massime*. Each stage is performed by judges belonging to the Massimario Office. The final verification is carried out by the Directorate of the Massimario Office.

7.2.2.2. *Massime*: definition, drafting, and types

A *massima* can be defined as a concise statement of the principle of law affirmed by the Court on which a decision is based.

Massime are different from summaries and abstracts of judgments published, for example, by journals or databases. These summarise the facts of the case and the court's decision but do not focus on the extraction of principles of law. Furthermore, a *massima*, to be considered as such, must include the principle of law, cannot be the summary of the decision, and cannot be the mere reproduction of argumentative passages of the court's decision.

To pursue the objective of granting the uniform application of law, the drafting of the *massime* is performed following some rules, which can be classified into three different types: *formal rules* to ensure the uniform drafting of *massime*; *selection rules* for the uniform identification of the principles of law that are used to build a *massima*; and *linking rules* to build a network of consistent precedents in the Italggiure database. The latter create relations between *massime* (e.g. the tags "conforming" and "dissenting" show that a *massima*, respectively, coheres with or differs from another).

In addition, the drafting of *massime* must be performed through following some general principles: adherence to the decision; synthesis in the enunciation of the principle; and clarity and precision of the final text.

There are various types of *massime*:

- Ordinary ones: *massime* which contain only a new nomofilactic principle of law.



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- Conforming ones: *massime* which reproduce an already maximised principle.
- Massime with facts: in addition to the judicial principle of law, they refer to the concrete case on which the Supreme Court has decided by applying a general principle. The case is usually added in brackets at the end of the principle.

The *massima* consists of two parts:

- (a) the preamble, which identifies the subject matter and the topic of the decision;
- (b) the enunciation of the principle.

As for letter (a), the first part of each *massima* is a summary consisting of: a numerical code which refers to a classification scheme by subject matter and the keywords representing the content of the maximised principle. The keywords follow a specific order as they must represent the logical argumentation of the decision.

7.2.2.3. Judicial principles of law: definition, function, and selection

The core part of a *massima* is the statement of the principle of law. It represents the generalisation of the interpretation and application of the rule to a concrete case. The judicial principles of law are not a source of law in the Italian legal system. Their formulation is the result of an interpretative. This action consists of the extraction from a specific case of a general rule that can apply also in future similar cases.

A principle of law is not an abstract principle, but a principle governing the law applied to the case. Even if it is the criterion for deciding the concrete case that can be applied to similar or equal cases, the principle of law is different from the *ratio decidendi*. The *ratio decidendi* is the logical path (i.e. a series of logical steps) which justifies the adoption of a certain decision in one decision. It cannot be generalised, nor replicated in future cases. Hence, we can argue that the *ratio decidendi* is an abstract concept pointing at the essential passages of the argumentation of the judge, which are needed to pursue a certain conclusion in relation to a specific case. The principle of law is a statement which shortly gives evidence of the way in which the law has been interpreted and applied to a scenario and can be applied to similar cases in the future.

The principle of law aims at universalising the individual decision, i.e., creating a statement which can be applied to future similar cases. Hence, the formulation of the principle of law has the objective to give hermeneutic indications to interpreters. The selection and publication of principles of law ensures the foreseeability of decisions, the coherence of the system, and a deflation/reduction of litigation. The final aim is to guarantee stability, predictability, and legal certainty.

Foreseeability in civil law systems is linked to the stability of precedents: the existence of "deep and persistent" case-law divergences within national courts of last instance has a direct impact on fair trial.

The Corte di Cassazione does not collect all the principles of law. As anticipated it creates *massime* only when the decision contains important principles of law. These are considered



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“important” when they comply with substantive criteria and temporal criteria. As for substantive criteria the Supreme Court focuses on decisions including principles of law which solve a conflict of case-law or a question of particular importance; new principles of law; principles of law which are divergent from precedents; principles of law which concern relevant cases, also because of the particular social impact of the issue.

However, the publication of a principle is excluded when it consists in the: mere repetition of a norm; definition of a notion; intermediate step functional to the statement of the *ratio decidendi*; incidental enunciation of principles; digressions from the *ratio decidendi* (*obiter dictum*); the formulation of general and abstract principles that are completely outside the subject-matter (for example, statements used to build parallelisms, distinctions, and analogies).

7.2.3. Description of the role of precedents in the national tax case-law

7.2.3.1. The use of the term precedent in Italy

The concept of precedent is typical of common law countries, where *stare decisis* applies, i.e. where courts and judges should be consistent with decisions, rulings, and opinions from prior cases. In these countries, a precedent is any prior decision dealing with the same legal issue as a later decision, with the former providing a model for the latter (MacCormick and Summer, 1997).

Notwithstanding this definition, in the Italian system, the word “precedent” is mainly used in a very broad sense, meaning any prior decision possibly relevant to a case. In this broader meaning, previous judgements of the Corte di Cassazione are often considered as precedents because they should be taken into account (= analysed, read) when deciding a case. Judgements of courts of merit, however, are usually not considered to be precedents, neither in the strict nor in the broad sense of the term.

The Italian system usually refers to the proper meaning of the term *precedent* (= a previous decision which is used as a model for a new one) in respect of the judgements of the Constitutional Court and Sezioni Unite of the Corte di Cassazione. These are usually considered to be judgments whose argumentation should be respected in a later case.

There is another situation in which the Italian system refers to the term 'precedent'. In this case a precedent is either the judgment that decides a new legal issue for the first time, or a judgment that decides a legal issue in a new way or in an especially original way. Thus, here the term *precedent* is used to emphasize that the decision at stake is relevant.

7.2.3.2. The general trend: no binding precedent but growing importance of precedents

In our legal system there is no codification of the principle of binding precedent in the strict sense (*stare decisis*), nor has the Corte di Cassazione ever decided that it should be an



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inherent principle of our legal system. Nonetheless, there is a trend in Italian legal courts not to deviate from an established interpretation of the Corte di Cassazione if there are no strong reasons to do so.

The legal basis for this trend is commonly found in Articles 360-bis, 384(1) and (2), 388 of the Code of Civil Procedure, as well as in Articles 610, 618, 627(3), 628(2) of the Code of Criminal Procedure.

There are three main reasons for this trend towards respecting precedents even if they are non-binding.

First, legislative sources of law are undergoing a crisis which is caused by several factors: the time taken by the legal procedure when compared with the rapidity of the phenomena it regulates; the poor quality (complexity, vagueness, etc.) of recent laws; the importance of courts in the process of European integration; the welfare state and globalisation, which mean that citizens frequently ask courts for the protection of new or implicit rights. These factors are common to all the legal systems of European countries. Hence, the trend towards case law in Italy is coherent with the trend in other civil law legal systems such as France and Germany. There are several national and supranational studies which show that case law is becoming increasingly important, and courts tend to rely on and follow previous case law (Koopmans, Cappelletti, Zaccaria, Galgano, Cassese etc.).

Second, the procedural reforms that have taken place in Italy in recent years were inspired by the strengthening of the principle of binding precedent, compatible with Article 101, paragraph 2, of the Constitution, which claims that the judge is subject only to the law (e.g. reforms concerning art. 374 and 618 para. 1-bis of the Code of Civil Procedure).

Third, stable case law is defined in Italy as “living law” and lower courts usually conform to the living law produced by higher courts because of its persuasive/authoritative value. The existence of 'living law' does not exclude a subsequent evolution of case law. However, this is infrequent.

Especially in recent years, in the tax field the legislature frequently referred to “living law” or to “stable case law” when introducing its reforms (see Reform of the Statute of Taxpayers Rights 2023). This means that the legislature frequently codified principles which were first stated in case law, or topics in relation to which there were contrasting opinions in case law. This is also quite frequent in the field of VAT. For example, in the 2023 tax reform the Italian legislature introduced some principles which were codified first by the CJEU and recognised by the Corte di Cassazione's case law after some years of contrasting opinions (e.g. the right to be heard during the tax procedure; *ne bis in idem*).

The same also happened in other fields, such as the Regulation of the Administrative Process (Legislative Decree No. 104, July 2nd, 2010) and the Code of Public Tenders (Legislative Decree No. 150, April 18th, 2016).

It is worth mentioning that the trend that has been described mainly concerns the Corte di Cassazione. Indeed, there is a difference in the use of precedents by Italian courts between the different levels of the administration of justice. Courts of merit often pay a lot



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of attention to the facts of the case and there are some national decisions which contain very few citations of previous case law. In contrast, since appellate courts and supreme courts deal mainly with legal issues, precedents play a greater role in the justification of their judgments.

7.2.3.3. The important role of Sezioni Unite with respect to precedents

Within the Corte di Cassazione, the case may be decided by a special panel of seven judges, in some cases. This happens when the chairman of the court finds that the case deals with especially important issues of law, or in case of conflicting judgements. The 'especially important legal issue' should be interpreted as meaning that there is an issue in relation to which it is crucial to set an authoritative precedent. The case of conflicting judgments means that different chambers of the Corte di Cassazione adopted different decisions on the same issue. This creates problems in relation to precedents since conflicting or inconsistent judgments on the same issue cannot represent an effective precedent.

In the above-mentioned cases, the special panel is expected to solve the conflict with a judgment that, being uniform and authoritative, amounts to a precedent for future cases. Other courts or other chambers of the Corte di Cassazione are not formally obliged to comply with the judgment delivered by the Sezioni Unite. However, their judgments are usually deemed as particularly authoritative, and they are normally used as precedents in the strict meaning of the concept.

Hence, for the purposes of our project, interpretative principles which are enshrined by the Sezioni Unite have a special value, and we can consider keeping track of this origin.

7.2.4. Existence of a national debate on the creative role played by judges in the tax domain

7.2.4.1. The non-creative role of the Court in terms of the argumentative structure of the judgements

The decisions of the Italian Supreme Court have two main features. First, they follow the normal structure of higher courts' judgments, which is deductive. The objective is to present the final decision as a conclusion stemming from a chain of consistent logical steps, moving from given premises and arriving at a necessary conclusion. The theoretical model that inspires the logical structure of the judgment is syllogistic deduction. Even when the actual structure of the judgment is more complex and not a mere logical syllogism, the prevailing tendency is to shape the justification of the judgment as a series of logical passages.



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Second, judgments delivered by the Corte di Cassazione are perceived as answers to the 'grounds of appeal' that the party has stated. Therefore, the judgment is also structured as a sequence of answers that the court gives to the issues raised by the parties.

The drafting style of higher court judgments has the following features:

- Legalistic: legal professional jargon is normally used; legal technicalities are always used; opinions are often written as if they were doctrine; the writing judge tries to demonstrate their legal and scientific culture; and choices of policy and discretionary evaluations are usually hidden behind technical legal arguments and formal reasoning concerning the meaning of the statutory rules involved. N.B. This does not apply to orders.
- Magisterial: it is the court that formally delivers a judgment; there are no single judges expressing their own personal opinions about the case.
- Importance of interpretative role: the arguments supporting judgements deal with the interpretation of the principles and laws involved. In many cases the court states in its decision that its interpretation is the 'proper and correct' interpretation of a statutory rule.

Apart from the formal features and structure of decisions, the Corte di Cassazione has adopted some decisions concerning the creative role of case law. For example, in the judgments (Sezioni Unite) of 15 July 2003, No. 11091, and 25 November 2009, No. 24763, the court said that this creative role does not cause an excess of jurisdictional power. The idea that a judge could trespass on the terrain of legislative power is premised on the assumption that there is a clear distinction between the activity of normative production and interpretative activity. In this scenario, the former would amount to an appropriation of the powers of the legislature. However, according to the court, interpretation does not have a merely heuristic function. On the contrary, it is a creative work of applying of law to the case at hand. Hence, the judge's activity is always creative. Thus, the excess of power cannot be invoked.

This decision seems to support the idea that since any interpretative activity entails a margin of creation, only in extreme cases would courts' decisions be so creative as to violate the division of powers. We believe that the statements of the court should be interpreted in relation to the specific cases.

7.2.4.2. The national debate on the creative role of judges

Notwithstanding the above-mentioned decisions, there is an ongoing debate in Italy concerning the creative role of case law. This debate mainly concerns the Corte di Cassazione.

It is worth emphasizing that Italian doctrine does not make a consistent use of the term 'creative jurisprudence' (or 'creative role of the judge', or 'judge-made law'). Indeed, sometimes these terms are used to refer to the legitimate choice made by a judge to pick the most plausible judicial interpretation within the framework of the possible meanings of



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a rule. Other times, it is used to refer to the choice of normative meanings that are outside this framework and, therefore, are illegitimate.

The debate on the creative role of case law mainly spread in Italy through post-positivist doctrines. In particular, the judge's creative role has been widely debated in Italian legal theory since the 1980s (Losano, Guastini, Viola, Zaccaria, Tarello, Ferrajoli, Barberis, Jori, etc.). Many experts on constitutional, administrative, and private law also dealt with this issue (Rodotà, Cassese, Galgano, Grossi, Cappelletti, etc.). However, the debate is especially important in criminal matters because, according to the Italian Constitution, criminal regulations must take the form of laws of the Parliament (Fiandaca, Contento, Stortoni, Insolera, Vogliotti, etc.).

In the discussion regarding the creative role of jurisprudence, we can identify three orientations.

The first orientation focuses on epistemological arguments to stress the importance of judge-made law. According to this orientation, whose most important representative at the supranational level is Gadamer, to adopt a 'right' decision it is sometimes necessary to disregard the law. Moreover, the objective of interpretation is to make law real in relation to the case at hand (H.G. Gadamer, *Truth and method*, 1960). This activity necessarily creates a certain distance between the literal interpretation of the rules and how they are applied in practice. In Italy, this perspective is taken up by Zaccaria (criminal lawyer). He argues that the judge chooses between multiple 'interpretations that are all legitimately sustainable' within the perimeter drawn by the principle of legality. Moreover, in contemporary legal systems it is necessary to review and re-analyse the role of the principles of legality and of the prohibition of analogy. These principles were crucial in western legal traditions for several decades but a strict interpretation of them would no longer be appropriate to the current social and economic environment (G. Zaccaria, *La giurisprudenza come fonte di diritto*, 2007).

The second perspective is that of neo-constitutionalism. According to this theory, the existence of constitutions in most Western countries led to the distinction between rules and principles. Rules have a more precise meaning than principles. The existence of principles in national legal systems had an impact on interpretation. While rules are applicable either in their entirety or not at all, principles work differently. The growing importance of principles means that judges frequently do not apply the law but rather balance different principles in relation to the case at hand. This is especially evident in the case of the Italian Constitutional Court. For example, this Court frequently has to balance between the 'balanced budget' and 'equality' principles, when deciding whether to extend specific tax benefits to certain categories of taxpayers. In addition, the rules must be interpreted and applied by national judges in light of the existing principles of their legal system. For example, the existence of the principle of proportionality could result in a less burdensome interpretation of the rules concerning the application of sanctions. This interpretation could be very distant from the literal interpretation of the rule. Hence, in



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general, the existence of principles leads to judges having more discretion. This perspective builds on the theories of Dworkin and Alexy. In Italy, these topics were analysed by Zagrebelsky, Modugno, Baldassarre, Bin, etc.

The third perspective is that of neo-pandettism, whose main Italian referent is Paolo Grossi. He argues that the law is the 'expression of the will' of the sovereign. From this perspective, the judge is legitimised to produce law because it represents the social conscience. Moreover, 'absolute faith' in the principle of legality, as well as the subjection of the judge to the law, must be overcome because of the crisis of law which characterises most western legislatures in the 21st century.

Regardless of their perspectives, the above-mentioned doctrines seem to agree on the increased importance of jurisprudence in Italy. The causes of this increased importance are usually found in:

- The responsibility of politics: disruption of legislative production through obscure, tortuous, and vague legal language; crisis of the general and abstract forms of legal norms; de-regulation, de-legification, and privatisation.
- The multilevel structure of current legal systems: existence of constitutions implying that the judge has the power to review the constitutionality of laws; European legal integration; dialogue between national and supranational courts, such as the Court of Justice of the European Union or the European Court of Human Rights.
- The rapid development of new economic models and the emergence of new needs/rights: because of globalisation and cultures based on state-provided welfare, new needs frequently emerge before the legislature can intervene. When cases are brought to courts, judges must decide on the issues brought by plaintiffs even in the absence of a specific law. This led to the tendency of the judiciary to expand its role and to develop a system of rights of jurisprudential origin.

7.2.4.3. Judge-made law and the principle of legality in the tax field

In the tax field, many authors stressed the growing importance of case law. However, not many of them analysed the topic in light of the above-mentioned studies carried out by legal philosophers and constitutional lawyers. Some of the authors who have dealt with the creative role of judges in the tax field are Sacchetto (C. Sacchetto, *Le fonti del diritto internazionale tributario e dell'ordinamento fiscale europeo*, in ID., *Principi di diritto tributario europeo e internazionale*, Torino, 2016, 21), G. Bizioli, (G. Bizioli, *Building the EU Tax Sovereignty: Lessons from Federalism*, in *World tax journ.*, 2022, 407) and L. Carpentieri (L. Carpentieri, *Riserva di legge e consenso al tributo*, in Enc. Treccani online, 2015).

In the tax field, the topic of judge-made law is often treated in conjunction with that of the crisis of the law (see above, para. 4.2.).



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This topic is particularly important in tax matters as, according to Article 23 of the Italian Constitution, tax matters must be regulated through laws. This principle, called '*riserva di legge*', is interpreted as meaning that Parliamentary Law (or Legislative Decrees, or Law Decrees) must provide the most relevant regulations of taxes, e.g. regulations of taxable persons, taxable events, taxable bases etc. Nonetheless, specific aspects can be regulated by secondary sources. The principle 'no taxation without representation' can also be found in the constitutions of many European states. In fact, this principle is strictly related to the democratic legitimacy of taxation.

However, in recent years, researchers underlined that this principle is frequently derogated in practice. The reasons are the emergency nature of decisions concerning taxation (they are frequently found within Budget Laws which must be adopted at the end of each year within three months); an excessive and improper use of Law Decrees and general administrative acts; and European legal integration and the growing importance of European rules within tax law.

The existence of European secondary law is not considered by the Italian Constitutional Court to be a violation of Art. 23. When Italy signed the Treaty on the Functioning of the European Union (TFUE) it attributed competence on indirect taxation to the EU. Nonetheless, Italian tax researchers frequently stress that European case law can be used as a source of law in harmonised matters (such as VAT). It is necessary to assess whether the creative role of the CJEU could amount to a violation of the Italian Constitution. To answer this question, we need to analyse the case law of the Italian Constitutional Court which deals with the relationship between EU law and national constitutional law.

7.2.5. Analysis of the role of case-law for correct interpretation of national tax law

7.2.5.1. Italy and EU integration

The autonomy of EU law is guaranteed by fundamental principles such as primacy and direct effect. According to the principle of primacy, the provisions of EU law prevail over the domestic law of the Member States. Although primacy is, in principle, accepted by all EU legal systems, the relationship between constitutional and EU law is controversial. On this issue, the positions taken by the Member States differ widely: in some countries, EU law enjoys full supremacy over constitutional law; in others, it is limited by constitutional law; and in others, constitutional law has supremacy over European law.

In Italy (Corte costituzionale, sentenza dell'8 novembre 1973, n. 183), as in Germany (Entscheidungen des Bundesverfassungsgericht 37, 217, 279, Solange I), Denmark (Højesteret del 6 aprile 1998, I 361/1997), and Belgium (decision del 16 ottobre 1991, Journal des Tribunaux, 6670), EU law is limited by constitutional law.



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Italy was one of the first countries in which the constitutional court created boundaries to European integration. This happened in the 70s. According to the Italian Constitutional Court, EU law cannot be implemented or applied when it violates the fundamental principles of the national legal system. This statement of the Italian Constitutional Court is called '*teoria dei controlimiti*'. In the field of taxation, the *teoria dei controlimiti* could be invoked in relation to the principles of 'riserva di legge' (Art. 23) and of ability to pay (Art. 53). These are the only principles concerning taxation which are explicitly mentioned within the Italian Constitution. For example, the Italian Constitutional Court could claim that a European regulation in the field of taxation cannot be implemented because it does not comply with the ability to pay principle.

Nonetheless, the opposition to the EU that had led the national constitutional court to place external limits on European integration in the 70s has weakened with the progress of juridical integration. The doctrine of 'controlimiti' has never been applied in the field of taxation and EU law has a leading role in this field. Moreover, national courts, including the Corte di Cassazione, frequently refer to the case law of the CJEU. This is more frequent in the field of indirect taxation (customs duties, VAT, and excise duties). The Corte di Cassazione has made many references to the CJEU case law since 2012. Before this date, it referred to EU case law much more rarely.

7.2.5.2. The role of the case law in the field of VAT

In the field of taxation, the importance of case law differs depending on whether we are considering harmonised taxes or non-harmonised taxes. For harmonised taxes the CJEU is competent to provide the correct interpretation of EU law. When national judges have doubts concerning the application of EU law, according to Art. 267 TFEU, they must (if they are courts of last instance) or can (if they are not) ask the CJEU for a preliminary ruling. Hence, the role of case law is more important in harmonised taxation.

Many Italian scholars argue that the CJEU's interpretative activity in the field of taxation has reached its maximum intensity with respect to VAT, as this tax has comprehensive European legislation. Its harmonisation started in the 60s and so CJEU case law is very extensive. Moreover, it has developed over time, and the CJEU feels "more confident" to adopt decisions in which the court has a significant margin of creation and discretion.

The CJEU has an interpretative method which differs from the national method (e.g. it uses interpretation by principles much more than the Italian Supreme Court, and it uses comparative interpretation, and interpretative criteria, such as economic reality, which are not used in the national legal system). Some of these features are the result of the wording of the European legislation, which is characterised by conciseness, vagueness, (sometimes) non-coincidence of translations, and explicit references to the function of the legislation (in particular in the recitals). Moreover, the CJEU provides definitions of terms which are not defined by the legislation.



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The use of these new interpretative methods, criteria, and concepts also influences national case law in the long run. For example, national courts in the field of harmonised taxes started to refer to concepts and criteria (e.g. economic reality) which did not exist in the Italian legal system. Moreover, national case law concerning harmonised taxes increasingly relies on the concepts and categories which have been developed at the EU level. The national courts frequently refer to the definition of concepts of the VAT Directive which are provided by the CJEU.

Finally, also the Italian legislature in the recent reform of taxation paid attention to the case law of the CJEU. Law 111/2023 for the reform of tax law emphasises the need for a revision of the definition of the taxable operations and exemption rules 'in order to make them more consistent with European Union legislation'. In particular, with regard to exemptions (one of the focuses of the POLINE project), the Law 111/2023 provides for a review of the provisions governing exempt transactions in order to ensure greater consistency with Court of Justice case law. The fact that even the legislature is modifying national VAT legislation to make it more consistent with EU case law shows the crucial role of case law in this field.

7.2.5.3. Italy and preliminary rulings in the VAT field

Italy is one of the EU countries which make the highest number of preliminary references to the CJEU. In 2022, the German (98), Italian (63), Bulgarian (43), Spanish (41) and Polish (39) courts made the highest number of requests for a preliminary ruling to the Court of Justice.

The total number of references for preliminary ruling made by Italy in the field of VAT is 44 (the total number of preliminary rulings in the field of VAT is 982). The countries which made a similar number of preliminary references are Belgium (44); Bulgaria (42); Portugal (37); Romania (40) and Hungary (37). The countries which made much more preliminary references are Germany (155); The Netherlands (87); Poland (60).

Year	N of preliminary rulings in Italy
2024	1
2022	1
2020	1
2019	2
2018	2
2017	4
2016	3



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2015	1
2014	3
2012	2
2011	1
2009	3
2008	2
2007	2
2006	4
1996	2
1995	1
1993	2
1992	1
1990	1
Previous	5

7.3. The Bulgarian Legal System

7.3.1. Brief analysis of the VAT system in Bulgaria

7.3.1.1. Implementation of tax monitoring

The proceedings for the ascertainment of obligations for taxes and compulsory social-insurance contributions, as well as for securing and collecting public claims, assigned to the revenue authorities and public enforcement agents, are governed by the Tax and Social Insurance Procedure Code (TSIPC), which is one of the main legislative acts in the field of tax law in Bulgaria.

Within the remit of their competence, the revenue authorities exercise tax and social-insurance control by means of conduct of **audits and examinations**. Audit proceedings are initiated and should be conducted in accordance with all relevant codes and regulations and within a certain period (in general up to three months from the date of service of the assignment order), after which the auditing revenue authority is obliged to draft an audit report. Mostly the report contains a description of the performed procedural steps, the established facts and circumstances and the evidence thereon. After drafting the said report, it should be served on the auditee, who can lodge a written objection and present evidence before the authorities that have conducted the audit. The proceeding ends with



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the issuance of an audit instrument, which can ascertain, modify and/or offset obligations for taxes and for compulsory social-insurance contributions; refund refundable results for a particular tax period, where so provided for by a law; refund amounts which have been unduly paid or collected.

7.3.1.2. Administrative appeal

The regulatory framework is contained in Art. 152-155 TSIPC. The legality and appropriateness of administrative acts can be challenged within an administrative appeal procedure. The appeal should be brought before the immediately superior administrative body. Administrative acts can also be challenged within a judicial procedure, and the general rule is that the appellant can choose whether to appeal the act first before the administrative body and then by judicial procedure, or to submit the appeal directly to the court, i.e. the administrative appeal is optional. However, this rule does not apply to acts issued pursuant to the Tax and Social Insurance Procedure Code (TSIPC). The law requires that audit instruments and other types of acts of the revenue authority must be challenged first before the administrative body as a prerequisite for their subsequent appeal before the court.

The audit instrument can be appealed before the administrative body, in whole or in particulars parts thereof, within fourteen days after service. The proceedings have a revising nature, since the matter is re-examined in substance by the institution that issued the act, which can itself revoke it. In these cases, the decision-making authority is the relevant Director of the Appeals and Tax and Social Security Practice Directorate at the Head Office of the National Revenue Agency.

The decision-making authority should consider the appeal on the merits and issue a **reasoned decision** that may uphold, modify or revoke the audit instrument in whole or in part with respect to the appealed part thereof. It is important to note that the audit instrument may not be modified to the detriment of the appellant by the decision. This principle (the prohibition of *reformatio in peius*) also applies when administrative acts are challenged before court.

7.3.1.3. Judicial appeal of audit instrument before the Administrative Court

Challenging administrative acts before the relevant public body is not always as effective as a judicial appeal. This is so because the **ex officio** principle has been strengthened in the court proceedings, which is why the court is not limited to only discussing the grounds stated by the appellant but is obliged ex officio, based on the evidence presented by the parties, to check the legality of the contested audit instrument of all grounds.



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Unlike the administrative review, in the judicial one, the audit instrument can be appealed only regarding its legality, but not regarding its appropriateness. In addition, the audit instrument can be appealed to the administrative court only in the part in which it was confirmed, i.e. not revoked by the decision-making body under the administrative appeal procedure. The audit instrument cannot be appealed according to a judicial procedure in its part in which it has not been appealed according to an administrative procedure. The decision of the Director of the Appeals and Tax and Social Security Practice Directorate cannot be challenged, and such an appeal would be inadmissible. The appeal against the audit instrument is filed through the territorial directorate of the National Revenue Agency. The case should be heard by the administrative court in whose judicial district is the permanent address or registered place of business of the applicant at the time of carrying out the first action on the implementation of the tax-insurance control by the revenue bodies.

The single-judge administrative court considers the appeal with the participation of the parties, with the possibility for a prosecutor to join the proceeding when deemed necessary, in order to protect a State or public interest. The court should adjudicate in the case on the merits, being competent to revoke the audit instrument in whole or in part, to modify the said act in the appealed part, or to reject the appeal.

Usually, the judgments of the administrative courts follow a certain structure, which can be tentatively presented as follows:

- **Defining the procedural order of the judicial review** – the judicial appeal of audit instruments regulation is contained in Chapter Nineteen of the TSIPC.
- **Requests of the parties** - the court next presents the requests of the parties to the case as stated in the appeal and the answer to the appeal, their arguments and objections, as well as the opinion of the prosecutor (if one is involved in the case), which, however, is not binding on the court.
- **Ruling on the admissibility of the appeal** - whether it was submitted within the statutory period by a legitimate party and after the possibility of an administrative appeal has been exhausted.
- **Description of the facts of the case** – next, in its decision, the court sets out the facts of the case and the evidence that testify to them - written and physical evidence, testimony of witnesses and expert examinations. It should be pointed out that the first instance court has no duty to ex officio collect evidence, i.e. without the express motion of the parties to the case. However, this rule does not apply to expert examinations. If clarification of certain matters that have arisen requires special knowledge in the sphere of science, art, the crafts and others, the court is obliged, even without an explicit request from a party in the proceeding, to assign an expert examination.
- **Motivation of the court** – based on the facts of the case in the legal reasoning the court assess the legal conformity and justification of the audit instrument, assessing whether the said instrument has been issued by a competent authority and in due form,



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whether the rules of adjective and substantive law for the issuance thereof have been observed.

- **Decision of the court** – with the decision on the merits, the court also rules on the litigation costs (state fee, legal attorney's fee, legal adviser's fee, etc.), ordering the prevailing party to be awarded payment by the unsuccessful party of these costs.

According to the provision of Art. 160(7) of the TSIPS, the judgement of the administrative court can be subject to cassation appellate review according to the procedure established by the Administrative Procedure Code (APC). On the date of making public the court decision, the first instance proceedings are terminated, the court is dismissed from the case and the right of appeal arises. As long as it is still appealable, the first instance decision does not have the potential of producing the binding legal effect of the judicial act. This happens when the decision enters into force and cannot be challenged. Non-appealability makes the decision final and puts an end to the pending process. According to Art. 160(7) of the TSIPS, the decision of the administrative court is final in cases of appeal established by audit instrument public claims a total of up to BGN 750, which does not include the accrued interest on arrears, when the audit instrument is issued to individuals, and a total of up to BGN 4000 shall not include accrued interest on arrears, when the audit instrument is issued to legal entities.

7.3.1.4. Cassation appeal before the Supreme Administrative Court (SAC)

The cassation proceedings before the Supreme Administrative Court are regulated in Chapter Twelve of the APC. According to the provisions of this Chapter, the first instance judgment can be subject to cassation contestation in whole or in separate parts thereof within fourteen days of its drafting by the relevant administrative court.

The case is examined by a three-judge panel of the SAC. The appeal or protest shall be left without examination, and the cassation proceeding instituted shall be dismissed, where:

- the said appeal or protest has been lodged by an individual or organization which did not participate in the court proceeding;
- the judgment or the appealed part thereof is non-existent;
- the said appeal or protest has been lodged after expiry of the time limit referred to in Article 211 of the APC;
- the said appeal or protest has been lodged against a judgment which is not subject to cassation contestation;
- the said appeal or protest is withdrawn or abandoned by a written application.

The cassation instance limits itself to considering the defects of the judgment as indicated in the appeal or protest, but the court should furthermore see to the validity, admissibility and conformity of the judgment to the substantive law *ex officio*, i.e. and on



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grounds not stated in the appeal or protest. The Supreme Court of Cassation assesses the application of the substantive law on the basis of the facts established by the court of first instance in the contested judgment. It is important to note that new written evidence is allowed before the Supreme Administrative Court but only for establishment of the grounds for cassation. No evidence is admissible for establishment of any circumstances irrelevant to the grounds for cassation.

According to Art. 221(2) of the APC the Supreme Administrative Court can leave in effect the judgment or reverse the judgment in the contested part thereof if the said judgment is incorrect. When the SAC leaves in effect the judgment, it provides reasons thereof and may also refer to the reasons given by the court of first instance. According to Art. 223 of the APC the cassation judgment is final.

When reversing the judgment, the Supreme Administrative Court adjudicates in the case on the merits. The case could be referred for re-examination by another panel of the court of first instance where:

- the Supreme Administrative Court finds a material breach of the rules of court procedure;
- facts must be established, for which collection of written evidence is not sufficient.

In these cases, the orders and instructions of the Supreme Administrative Court on the interpretation and application of the law are binding upon a further examination of the case. Failure to comply with the instructions of the Supreme Court given under Article 224 of the Administrative Procedure Code is a material breach of the rules of court procedure¹. The court of first instance examines the case according to the standard procedure, with the proceeding commencing from the first legally non-conforming procedural action which served as grounds for the referral of the case back to the said court. Where the judgment of the court of first instance is reversed again, the Supreme Administrative Court does not remand the case for a new review but adjudicates on the substance of the matter.

7.3.1.5. Exclusive jurisdiction of the Supreme Administrative Court for annulment of final judicial acts

Res judicata is one of the effects of a judgment, which becomes apparent once the judgment has entered into force. What is decided on the legal and factual matters is final and binding to the parties on the case. The provisions of Articles 237-249 of the APC govern the annulment of judgments which have entered into force in the administrative procedure. Annulment of final judgments is a remedy against judicial malpractice and constitutes "an independent, extra-judicial, review and revocation proceeding which is not part of the main legal proceedings³". Only non-appealable and *res judicata* court judgments can be subject to annulment.



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The law exhaustively lists the grounds for annulment under Art. 239 of the APC. According to the mentioned provision, the judicial act can be subject to annulment when:

- upon discovery of new circumstances or new written evidence of material relevance to the case, which could not have been known to the party upon the adjudication in the case;
- upon establishment, according to the duly established court procedure, of falsity of the testimony of witnesses or of expert findings on which the act is based, or of a criminal act by the party, by the representative thereof or by a member of the court panel in connection with the adjudication in the case;
- where the act is based on a document which has been pronounced forged according to the duly established judicial procedure, or on an act of a court or of another of State which was subsequently revoked;
- where another effective judgment has been rendered in respect of an identical motion, between identical parties and on identical grounds and the said judgment is contrary to the judgement whereof the reversal is motioned;
- if, consequent to the breach of the relevant rules, the party was deprived of the possibility to participate in the administrative proceeding or was not duly represented, as well as where the party was unable to appear in person or through an authorised representative by reason of an irremovable obstacle;
- if the European Court of Human Rights has found, by judgment, any violation of the Convention for the Protection of Human Rights and Fundamental Freedoms.

According to Interpretative Judgment No. 6 of 25.11.2010 of the Supreme Administrative Court⁴ these statutory grounds "cannot in principle be applied extensively, since on their basis the *res judicata* effect of the judicial act is infringed". Legitimacy may belong both to a party to the case, for whom the judgment is adverse, and to a third party, against whom the judgment has effect and is adverse, although he/she was not a party to the case. The Prosecutor General or the Deputy Prosecutor General heading the Supreme Cassation Prosecution Office may motion for the reversal of effective judicial acts on the grounds and within the time limits ruled for the parties. If the request for annulment is admissible, the Supreme Administrative Court should hear the case in accordance with the provision of Article 243 of the APC and may reject the request or annul the judgment in whole or in part. When reversing the judgment, the Supreme Administrative Court refers the case back to the competent court for re-examination by a different panel, specifying the point from which the re-examination must commence. The judgment on the motion for annulment is unappealable and irreversible.

7.3.2. The concept of "judicial principles of law" from the perspective of Bulgarian legal theory



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From a theoretical point of view, first of all, the content of the concept of "legal principles", and thus of "judicial principles of law", should be clarified. In Bulgarian legal science, these concepts are studied within the framework of the General Theory of Law. Among the recent academic works on this subject, it is worth mentioning the monograph by Prof. Dr. Yanaki Stoilov⁵ "Legal principles: theory and application". In it, the author proposes a comprehensive concept of legal principles (definition, functions, forms, validity), examining their place in the jurisprudence of the Bulgarian courts. The general thesis is presented that the principles enter the law through its sources, which are characteristic of the relevant historical era and legal system. According to the researcher, the principles can serve for reasoning and resolution of cases by the court even in the continental legal system, which is not characterized by the judicial precedent. The case law of the Constitutional Court and the Supreme Courts is cited as an example of the direct effect of the principles.⁶ Reflecting on the place that principles occupy in contemporary legal systems, Stoilov observes that one of the manifestations of globalisation is the increasing contact and mutual influence between the main legal families. In this interaction, "case law" enters continental law, and the positive legislative principle enters common law. Such convergent processes are particularly clear in European Union law. Hence, the role and effect of legal principles in our domestic law is being reinforced. However, the author concludes that Bulgaria, as a country belonging to the continental legal tradition, should preserve and develop the most important legacy of this legal system - abstractness of the legal system, codification and systematicity, distinction between the creation of norms and the application of norms.⁷

As for the specific concept of "judicial principles of law", it is found in the monograph cited above when considering the various ways of establishing legal principles.⁸ According to this criterion, the author divides legal principles into statutory, jurisdictional (mainly judicial) and jurisprudential (doctrinal).⁹ And he points out that the continental legal tradition is more favourable to legislatively enshrined principles than to judicially derived ones. Incidental invocation of the latter, especially when it is for the first time, often causes considerable controversy in society and in legal circles. However, judicially derived principles also have a role to play in law enforcement in Bulgaria, especially in complex cases that cannot be resolved by explicitly formulated rules. He considers that in these cases the role of the court comes closest to that of the legislator.

Finally, Professor Stoilov's study ends with an appendix in the form of a catalogue in which over 100 fundamental legal principles of the continental legal system are systematised. This list contains special sections listing the principles of public law (including tax law), procedural law and EU law.¹⁰ In summary, it can be said that this scholarly work on legal principles has, alongside its theoretical contribution, important practical significance and could assist the work of legal practitioners.

Next, a question that is invariably related to the extraction of principles from judicial practice is the question of the interpretation and ways of interpreting legal norms. The term



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"judicial interpretation" is found in Bulgarian legal theory and practice. In particular, legal theorists¹¹ consider various classifications of the means of interpretation and according to one of them, interpretation, with regard to the subject who performs it, is of two types - official and unofficial. For its part, official interpretation can be authentic, legal and, last but not least, judicial interpretation. The term "official judicial interpretation of a normative act" is also used by the Supreme Court of Cassation itself when referring to interpretative judgments as a source of binding law.¹²

The rules of interpretation to be observed by all bodies carrying out official interpretation of legislative acts are laid down in **Article 46 of the Statutory Instruments Act**:

"Article 46. (1) (Amended, SG No. 46/2007) Provisions of statutory instruments shall be applied according to the exact meaning thereof; should the said provision be not clear, they shall be interpreted in the meaning closest to other provisions, to the objectives of the instrument interpreted, to the general principles of the law of the Republic of Bulgaria.

(2) (Amended, SG No. 46/2007) Where a statutory instrument is incomplete, cases not provided for thereby shall be governed by the provisions applicable to similar cases, provided that is in compliance with the objectives of the instrument.¹³ Should any such provisions be missing, relations shall be settled conforming to the general principles of the law of the Republic of Bulgaria.¹⁴

(3) Criminal, administrative or disciplinary liability cannot be justified according to the previous paragraph".

7.3.3. Principles of judicial decision-making. Limits of discretion. Limitations in the matter of tax law

7.3.3.1. The judge is bound only by the statutory law

Bulgaria, as already stated, belongs to the continental legal system, which implies that the main source of law for us is the written Constitution and the corresponding legislative acts. That is why the judge, when passing judgments, is bound only by the statutory law. In this sense is also the provision of Article 117(2) of the Constitution: "The judiciary shall be independent, and judicial power shall be vested primarily in the court. (...) In the performance of the functions thereof, all judges, jurors, prosecutors and investigating magistrates shall be subservient only to the law". This is the main difference between our legal system and the "common law" system, where the judge is guided by binding case law established by "judicial precedents". Conversely, in Bulgaria, the judge is not bound by "judicial precedent", i.e. he has autonomy and can take an independent decision without being obliged to refer to previous decisions of other judges. Moreover, it is characteristic of our legal system that a court decision cannot establish new rights and obligations for citizens. This situation requires the judge to interpret and apply the existing legislation as it



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stands. In this way, the objectivity, impartiality and fairness of the judicial proceedings are believed to be guaranteed.¹⁵ The judge applies the law equally and to all. Case-law, of course, has its significance, but it cannot be regarded as a direct source of law, which in our national legal system is only the statutory law.

7.3.3.2. Inner conviction of the judge

In addition to the above-mentioned principle, it is also necessary to point out the inextricably linked principle of decision-making on inner conviction. This basic principle is enshrined in the Bulgarian Code of Civil Procedure (CCP) as well as in the Criminal Procedure Code (CPC). It also applies to administrative procedure and, consequently, to tax cases. Pursuant to Article 144 of the Code of Administrative Procedure (CAP), the Code of Civil Procedure applies subsidiarily to proceedings before an administrative court. And Article 12 CCP states that: "The court shall evaluate all evidence in the case and the arguments of the parties, guided by its inner conviction". The acts of the judge are legal expression of his/her inner conviction, formed by assessing the facts and evidence in the case. A judge may not be held liable to disciplinary or other action for a judgment which he/she has given on the basis of his own free inner conviction. Thus, to the question of the margin of appreciation of the court, it must be answered that the judge is free to take the decision which he/she considers right and just, having regard to the rules of law.¹⁶

7.3.3.3. Principle of the legislative basis of tax regulation

While the above two principles apply to all judges, judges who hear administrative (including tax) cases are additionally bound by certain specific limitations arising from the public law nature of tax matters. Under Article 60(2) of the Constitution, tax reliefs and surtaxes may be established solely by a law. This means that in its judgments the Court may not interpret the provisions of tax laws expansively.

7.3.3.4. Inapplicability of interpretation by analogy in tax law

It is also inadmissible for a Court to apply an interpretation by analogy when considering a tax cases. Pursuant to Article 46(3) of the Statutory Instruments Act, it is not permissible to apply provisions by analogy to justify administrative liability. Detailed considerations in this regard can be found in the article by Stefan Tiholov - "On the *ex officio* application of the statute of limitations for tax obligations - principles of the Tax and Social Insurance Procedure Code or analogy of the Obligations and Contracts Act?"¹⁷. In this article, the author, who is a lawyer and researcher with a number of publications in the field of direct and indirect taxation and the tax proceedings, advocates the thesis that the provisions of tax procedural legislation (Tax and Social Insurance Procedure Code - TSIPC) should not be



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interpreted by analogy with the provisions of the civil legislation (Obligations and Contracts Act - OCA), but an interpretation should be applied in view of the principles applicable to the tax matter and in view of the purpose of the TSIPC itself:

"3. The application by analogy of the tax law, even if it is assumed that the statute of limitations under the TSIPC is not a purely substantive institute, is extremely limited. I find unacceptable such an application, which takes legal situations regulated in private law "off the shelf", applying them with ease in a public branch of law, such as tax law.

(...) The claim for the absolute collectability of the tax is opposed by the claim for the exemption of the tax debtor in case of long inaction of the tax administration. The balance between the two lies in the principles of legality, objectivity, and inquisitorial proceedings. I think that the application of those very principles precludes, if not absolutely categorically, the application of Article 120 of the OCA by analogy, because the purpose of the tax procedural law is not only to collect the tax claim without taking into account the other circumstances.

(...) Article 120 of the OCA, applied by analogy to the cases not covered by the TSIPC, satisfies only one objective - the achievement of collectability through the non-application of the statute of limitations *ex officio*, ignoring, however, all other objectives of the law. This undoubtedly upsets the balance of values, and it is particularly dangerous in a process in which the parties are not equal. It seems to me, therefore, more appropriate to give priority to the principles of the TSIPC rather than the analogy with Article 120 of the OCA".

- Prohibition of placing the appellant in a worse position as a result of the appeal (*reformatio in peius*)

The prohibition of "*reformatio in peius*" means that the Court may not place the auditee in a worse position for having exercised its right to appeal against the audit instrument issued by the administrative authority. The normative expression of this principle is the provision of Article 160(6) of the TSIPC: "The judgement may not modify the instrument to the detriment of the appellant". Thus, another limit is drawn to the discretion of the judge to rule on the specific tax case.

In summary, it can be concluded that under Bulgarian legal system judges have a wide margin of discretion in so far as they are not constrained by previous incidental interpretation, but this discretion still extends to the limits of the legislation in force. At the same time, legislative power is exercised by Parliament. In line with the separation of powers doctrine, legislative activity is clearly distinguished from the distribution of justice. And just as Parliament has no right to interfere in the consideration of claims, so the Court has no right to create legislation. In the field of tax law, the principle of a legal basis for taxes is particularly important, because it is considered that otherwise citizens and legal entities would not have legal certainty and there would be a risk of arbitrary imposition of tax obligations.



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7.3.4. Binding force of judgments

In examining the binding effect of judgments of the Bulgarian courts, two types of effect should be distinguished: 1) effect between the parties within a particular dispute (*inter partes*), and 2) effect towards all (*erga omnes*).

7.3.4.1. Effect between the parties within a particular dispute (*inter partes*)

In the Bulgarian civil and administrative procedure, a final judgment binds only the parties involved in the case with *res judicata* effect, in relation to the specific request and the specific ground. Within those limits, it is binding on the court which gave it and on all courts, institutions and municipalities in the Republic of Bulgaria. Judgments ruled by the highest courts (Supreme Court of Cassation and Supreme Administrative Court) as courts of last instance in a specific case do not have the force of binding instructions for the lower courts, as is the case in the common law system. Under the explicit provision of Article 290(3) CCP, judgments pronounced on cassation appeals do not constitute binding case-law.

Specifically, as regards judgments given in a procedure for challenging an individual administrative act, their effect and binding force is regulated by **Article 177 CAP**:

"Article 177. (1) The judgment shall be effective *inter partes*. If the contested act is revoked or amended, the judgment shall be effective *erga omnes*.

(2) Any acts and actions performed by the administrative authority in contravention with an effective judgment of court shall be null. Each party concerned may always invoke the nullity or motion the court to declare it.

(3) A judgment whereby a contestation claiming revocation of an administrative act has been rejected shall be an impediment to the contestation of the said act claiming nullity, as well as to the contestation of the said act on other grounds."

There are specific cases in which a cassation judgment of the SAC on a specific dispute may be binding on another court, but this is again related to the course of the case. In the hypothesis of **Article 224 CAP** - when the SAC returns a case for a new examination by another panel of the court of first instance, then the instructions of the SAC on the interpretation and application of the law are binding in the further examination of this case.

It should also be said that, in the interests of legal certainty, the judgments of the administrative courts are recognised by the civil courts. In that sense, the provision of **Article 302 CCP**: "An enforceable judgment on an administrative dispute shall be binding upon the civil court regarding whether the administrative act is valid and legally conforming".



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7.3.4.2. Effect towards all (*erga omnes*)

The binding effect of judicial acts will be considered here, which concerns everyone - other courts, state bodies and citizens.

Judgments of the SAC repealing secondary delegated legislation

In addition to appeals against individual and general administrative acts, the SAC also has jurisdiction to hear appeals against secondary regulations issued by ministers or other authorised bodies. Pursuant to Articles 193-195 of the CAP, these judgments have effect for all and are promulgated in the Official Gazette. The SAC may declare the contested act or part of it null and void, repeal it in whole or in part or reject the challenge. The revocation takes effect from the day of entry into force of the judgment of the SAC. The legal consequences which have arisen from any statutory instrument of secondary legislation which has been declared void or which has been revoked as voidable shall be settled *ex officio* by the competent authority within a period that may not exceed three months after the entry into effect of the judgment of court.

In the practice of the courts, certain difficulties have been observed with regard to the consequences of this type of annulment, including with regard to the recognition by the civil courts. Interesting considerations are set out in this regard in an article by Judge V. Petrov - (Non)Recognition of the Judgments of the Supreme Administrative Court by the Supreme Court of Cassation and the Civil Courts.¹⁸

Decisions of the Constitutional Court

The Constitutional Court of the Republic of Bulgaria is not part of the system of courts included in the chapter of the Constitution on the judiciary, but it is regulated in a separate chapter. Its decisions, however, have binding effect according to Article 14(6) of the Constitutional Court Act: 'The decisions of the Court shall be binding on all state bodies, legal entities and citizens'. Among the acts adopted by the Constitutional Court, it is important to highlight:

- Decisions providing a binding interpretation of the Constitution (Article 149(1) of the Constitution);
- Decisions establishing the unconstitutionality of laws and other acts adopted by the National Assembly (Article 149(2) of the Constitution).

The Constitutional Court acts on the initiative of at least one fifth of the members of the National Assembly, the President, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court and the Prosecutor General. In addition, the latest amendment to Article 150(2) of the Constitution, which was adopted in December 2023, also provided for the possibility for any court, at the request of a litigant or on its own



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initiative, to refer to the Constitutional Court a request for a declaration of inconsistency between a law applicable to a particular case and the Constitution.

Interpretative judgments

The Supreme Administrative Court exercises supreme judicial supervision as to the accurate and uniform application of the laws in administrative justice. Where the law is interpreted and applied in conflicting or incorrect case-law, an interpretative judgement shall be adopted by the General Assembly of the Chambers of the Supreme Administrative Court (Article 124(1)(4) and (5) of the Judicial System Act). Where there is conflicting or incorrect case-law between the Supreme Court of Cassation and the Supreme Administrative Court, the General Assembly of judges of the respective colleges of the two courts shall adopt a joint interpretative decree (Article 124(2) of the Judicial System Act). Pursuant to Article 130(2) of the Judicial System Act, interpretative judgments and interpretative decrees shall be binding on the judicial and executive authorities, on the local self-government bodies, as well as on all bodies issuing administrative acts.¹⁹

The need to adopt an interpretative judgment arises when a normative act or individual provisions thereof are unclear or incomplete and are therefore interpreted differently by the administrative courts. The Chairperson of the Supreme Court of Cassation, the Chairperson of the Supreme Administrative Court, the Prosecutor General, the Minister of Justice, the Ombudsman or the Chairperson of the Supreme Bar Council, the Council of Ministers, a minister or a collective body of power established by law, when they have the authority to apply the relevant act may request the adoption of an interpretative judgement. What is specific to this type of acts of the SAC is that they are not ruled on a specific case but are formulated **in** the abstract in order to give a uniform interpretation of the legal provisions. Interpretative decisions follow a certain structure:

- **Question** - first of all, it is stated which of the actively legitimated bodies has requested the opening of the interpretative case and what is the specific content of the inquiry;
- **Conflicting case-law** - secondly, a description of how the disputed issue has been decided by the administrative courts so far; a listing of the court decisions giving alternative interpretations and constituting conflicting case-law;
- **Motivation** - which of the opinions is accepted as correct by the General Assembly of the Chambers of the SAC; the actual meaning and purpose of the normative provision in question is revealed by means of different types of interpretation (logical, systematic, historical, teleological, functional);
 - **Operative part** - a definitive and concise answer to the question(s) raised;
 - **Dissenting opinion** - optional part; when one or more judges dissented from the majority, their arguments are appended at the end of the judgment.



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The Supreme Administrative Court has established a special Unit for Analysis and Interpretation. One of the main objectives of the Unit is to examine the signals received about conflicting or incorrect case law. Such signals may also be submitted by citizens and their organisations, lawyers, judges from different levels of the judiciary and other legal professionals.

Particularly in the field of interpretation of the legal provisions in the field of VAT taxation, a number of questions have arisen in the practice of the administrative courts in recent years, which have led to the adoption of several interpretative judgments of the SAC: Interpretative Judgment No. 3 of 6.06.2008 in case No. 2/2008; Interpretative Judgment No. 1 of 11.02.2010 in case No. 3/2009; Interpretative Judgment No. 6 of 15.04.2021 in case No. 6/2019; Interpretative Judgment No. 4 of 10.05.2022 in case No. 2/2020.

The last of this series of judgments, Interpretative Judgment No. 4 of 10.05.2022, can be given as an example of the SAC's creative interpretation of provisions of the national VAT Act. The question which has been raised concerns the scope of joint and several liability under Article 177 of the VAT Act and, in particular, whether that liability also includes default interest. In its reasoning, the SAC applies a systematic interpretation of the provisions of the VAT Act in conjunction with the provisions of the Tax and Social Insurance Procedure Code. The SAC finds support for its opinion by citing its previous interpretative judgments. It also cites provisions of Directive 2006/112/EC on the common system of value added tax and refer to case-law of the Court of Justice of the European Union on request for a preliminary ruling, in particular, Judgment of the Court (First Chamber) of 20 May 2021, „ALTI“ LTD v Director of the "Appeals and Tax Social Insurance Practice" Directorate, responsible for the city of Plovdiv, within the Central Administration of the National Revenue Agency, Bulgaria. Thus, finding support for its arguments in national and EU legislation and case-law, the SAC concludes in the operative part of the judgment as follows: "The scope of the joint and several liability under Article 177 of the VAT Act includes the liability for default interest on the tax due by the liable person".

This judgment will have significant practical implications – as a result of the interpretation given, the persons liable under Article 177 of the VAT Act will also have to pay default interest. It can be seen from the text of the judgment that the Supreme Administrative Court aims to clarify the meaning of the provision of the tax law in an interpretative way, without "rewriting" it, but seeking support in its previous interpretation and referring to the CJEU case-law.

Established (constant) case-law of the SAC

Unlike interpretative judgments, the judgments of the SAC as the last instance in a particular dispute (incidental practice), as already noted, are not binding. It is considered that the interpretation applied in these cases is casuistic and therefore cannot be automatically applied to similar cases. However, in theory and judicial practice, the term



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"established", "settled" or "constant" case-law is used to refer to a series of SAC judgments on a given issue which have been ruled in the spirit of the same interpretation of the statutory law.

An analysis of the appeals brought before the SAC relating to the application of the VAT Act shows that the parties and their lawyers often refer to constant case-law of the SAC. The first instance administrative courts themselves also rely on and cite such SAC case-law. For example:

"Judgment No. 6058 of 4.11.2020 of the Administrative Court, Sofia City, in Administrative Case No. 3000/2020"

[...] Consequently, the real estate which the audited person has disposed of is not an element of the independent economic activity of the person within the meaning of Article 3(2) of the VAT Act [...], i.e. it may be used both for the performance of business activity and for personal needs. In this sense is also the case-law of the Supreme Administrative Court, objectified in Judgment No. 164 of 05.01.2012 in Administrative Case No. 2642/2011, VII Department; Judgment No. 5935 of 26.04.2013 in Administrative Case No. 7552/21012, I Department, etc. [...].

When considering cassation appeals, the SAC judicial panels also often cite and refer to previous cassation judgments rendered by other SAC panels as an argument in support of their findings. For example:

"Judgment No. 9320 of 24.06.2013 of the SAC in Administrative Case No. 177/2013, VIII Department, Rapporteur Judge Emilia Mitkova"

[...] The extent to which the registered entity will benefit from the exception granted by the law by choosing these supplies to be taxable depends on its free will. In this sense is the Judgment No. 15412/15.12.2009 of the Supreme Administrative Court, ruled in administrative case No. 7436/2009, whose findings are shared by this Chamber. [...].

The academic debate about the role of judicial practice has been going on in Bulgaria for years. Among legal researchers, there are both advocates of the opinion that judicial practice cannot be considered a direct source of law, and supporters of the opposite opinion. It is worth mentioning in this context the article "Judicial practice as a source of law" by one of the most authoritative Bulgarian legal scholars in the field of civil law - Prof. Zhivko Stalev.²⁰ In this paper prof. Stalev puts forward a new opinion that the long-established case-law, which is formed in several court decisions containing the same interpretation of the same provision, should be considered as a source of law. The proposed thesis is that the statutory provision, together with its interpretation, constitutes a single indivisible normative unity – "law" in a broader and more general sense. Prof. Stalev sees the normative function of the Court in its power to fill gaps in the law. He supports his view with a comparative law argument from Article 1(2) of the Swiss Civil Code, which states that:



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"In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator".

The author's final conclusion is that the settled interpretation of a normative act motivates both the addressees of the act and the court to comply with it as everyone complies with the normative act itself and concludes that case law is not only a source of law in itself, but is also a factor in the effectiveness of other sources of law, among which normative acts occupy a central place. Prof. Stalev's opinion is not widely accepted, but it is gaining more and more supporters, including practicing judges.²¹ In the period between 2010 and 2017 in Bulgaria there was even an attempt to make the cassation judgments of the Supreme Court of Cassation adopted under Article 290 of the Civil Procedure Code binding. Subsequently, however, the objections of legal practitioners against the so-called "seeds of case-law", as these judgments were often called, were taken into account by the legislator and explicit amendments to the CCP consolidated the situation that these judgments do not constitute binding case law. However, "contradiction with the case-law of the Supreme Court of Cassation" remained one of the grounds for allowing cassation appeals against appellate judgments.

V. Publication and access to the judgments of the SAC on tax matters. Online sources of information and expert materials

- **Official website of the Supreme Administrative Court**

Online resources on the judgments of the Supreme Administrative Court and specifically on tax cases can be found on the SAC website. In particular, the following sections of the website should be mentioned:

- "Interpretative Activity" is the annual bulletin of the Supreme Administrative Court, which includes all interpretative judgments that have been ruled by the General Assembly of the Chambers of the SAC year by year. The Bulletin is freely available in pdf format on the SAC website. It contains the full texts of the interpretative judgments of the SAC, but no summaries or additional comments.

- SAC Annual Reports - uploaded annually on the SAC website and freely available. These documents contain summarized statistics on the cases handled by the SAC divisions (number of cases initiated/pending/resolved), classification by subject matter, information on the workload of the judges, etc.

- News section - announcements of SAC judgments in cases of great public interest are published, which briefly summarize the facts and conclusions of the court in the specific case.

- Search engine for interpretative judgments of the SAC and case-law of the SAC – provides searching by act number, case number and case type. Provides free access to all SAC case-law in full text, with anonymized personal data and sensitive information. Allows finding a specific decision, but no option to display all court decisions in a list; no filtering. Contains information on the subject of the appeal, but no summaries of the acts.



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- **Journal of Administrative Justice**

Official publication of the Supreme Administrative Court since 1998, which publishes articles, analyses, commentaries, texts of interpretative judgments, judgments on preliminary references to the CJEU, judgments and rulings of the Supreme Administrative Court on specific cases.

In the permanent columns of the journal can be found articles on topical issues of substantive administrative law and administrative procedure. The authors are notable legal theorists and practitioners. The main place in the journal is occupied by the judgments of the three- and five-member chambers of the SAC, which are important for the improvement and unification of judicial and administrative practice. The journal is included in the National Reference List of Contemporary Bulgarian Scientific Publications with Scientific Peer Review. A table of contents of each issue is published on the website of the SAC: https://sac.justice.bg/pages/bg/magazine_no. The journal is available in libraries and bookstores in Bulgaria.

- **Initiatives of the professional legal community**

There are a number of such initiatives, but here we could give as an example two of them that have been implemented as publicly accessible websites:

- СЪДЕБНО ПРАВО (JUDICIAL LAW) – the website was created within the project "Establishing an Enabling Environment for Independent Judiciary in Bulgaria", implemented with the cooperation of the Dutch Association for the Judiciary (Nederlandse Vereniging Voor Rechtspraak, NVvR). The Bulgarian project partner was the Bulgarian Judges Association. The website publishes original articles by Bulgarian legal academics, judges, junior judges and law students, as well as translations of articles and reports by European researchers and organisations. The role of the jurisprudence of the supreme courts is significantly presented in the topics of the publications. In 2020, the website published a translation into Bulgarian of the report of the Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union (ACA-Europe): "Functions of and Access to Supreme Administrative Courts".²² This report contains summary information for 29 European countries on: the functions performed by the supreme administrative courts; the workload of judges; the systems for filtering cases admissible on appeal; the structure, content and binding force of the acts ruled by these courts.

- Сигнализирай: Правото! (Signal the Law!) - a specific focus of the initiative is conflicting case law as a reason for referring to the highest courts of the Republic of Bulgaria. It brings together legal researchers and practitioners. So far, 39 written signals have been submitted to the Supreme Court of Cassation and the Supreme Administrative Court, in which arguments have been presented on the need for interpretation on certain controversial issues, including application of tax laws.²³

- **Commercial legal and tax information platforms**

Legal and tax practitioners in Bulgaria actively use legal and financial information systems to support their work with case law. Most of these systems offer functionalities to: search



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and filter case law according to different criteria; annotations and key provisions; full text of court decisions with internal links and useful references. Some of these platforms contain an overview of the Supreme Administrative Court's case law on the application of tax laws, as well as various expert studies in the field of financial and tax law.

VI. Interactions between the Court of Justice of the EU and national courts. The role of the Supreme Administrative Court and administrative courts in Bulgaria.

The preliminary ruling mechanism established by Article 247 of the Treaty on the Functioning of the European Union (TFEU) outlines the interaction between the national courts of the Member States and the CJEU. Its purpose is to ensure that Community law has the same effects in all EU countries by preventing differences in interpretation. The opportunity (and in some cases even the obligation²⁴) thus given to national courts is a means of overcoming the difficulties and doubts they may encounter in their practice as to the interpretation or validity of EU law and in determining whether a national law or practice is in conformity with EU law.

The unique nature of this proceeding has no analogue in modern legal systems and has acquired not only theoretical but also great practical significance. An expression of this is the effect of the judgment on the preliminary ruling - it has a binding force and the national jurisdiction is obliged to comply with the given interpretation when deciding the dispute pending before it. The judgment of the Court of Justice is binding on other national courts before which an identical issue is raised. At the national level in Bulgaria, this mechanism is regulated in Article 628 et seq. of the Code of Civil Procedure (CCP, applicable in civil and administrative cases). Article 633 of the CCP proclaims the binding force of the CJEU judgments on preliminary rulings: "The judgment given by the Court of Justice of the European Communities shall be binding upon all courts and institutions in the Republic of Bulgaria".

In his article²⁵, published on the website of the Association of Bulgarian Administrative Judges²⁶, Nikolay Angelov - a judge in the Administrative Court Sofia - city, commented on the indisputable effect of the judicial activity of the Supreme Administrative Court and the administrative courts established in 2007 in Bulgaria regarding the application of EU Law in the country. He emphasised on the positive effect of the requests for preliminary rulings from the Supreme Administrative Court and the administrative courts, in particular regarding the uniform and consistent application of EU law in our country. As noteworthy, Judge Angelov points to some rulings of the CJEU, which gave the opportunity to both the national legislator and the European Parliament to amend and correct their legislative acts so that they correspond to the effectiveness of Union law. Such cases have resulted in amendments to the Social Insurance Code²⁷, the Health Insurance Act (but also to Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems)²⁸, as well to the Act on the Liability for Damage Incurred by the State and the Municipalities²⁹ and the introduction of the



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procedural right of the possibility of engaging the responsibility of the State as a result of a violation of EU law by its bodies.

In this regard, the tangible contribution of the national administrative courts in their interaction with the CJEU through the preliminary ruling mechanism in the field of taxation should also be noted. A reference to the official website of the CJEU³⁰ shows that the case-law on preliminary rulings referred by Bulgaria and related to VAT issues includes **forty-three judicial acts**. Some of the more significant ones comment on the issues of joint and several liability of the recipient of a taxable supply which has exercised its right to deduct VAT knowing that the person liable for payment of that tax would not pay it – the obligation of such a recipient to pay the VAT³¹, as well as the meaning of “supply of services” and the need for proof of the actual supply of services³². These statistics are indicative of the active role of national administrative courts in the dialogue between them and the CJEU on tax matters. The legal effect of these preliminary rulings is inevitably positive in view of the uncontroversial resolution of similar cases, the legislative amendments on national level where inconsistency is established and the strengthening of the importance of the central role of national judges, who increasingly monitor the correct and uniform application of the provisions of the EU law and its correspondence with the national legislation in the individual Member States. Last but not least, it should also be noted that it is common in the practice of the Supreme Administrative Court and the administrative courts in Bulgaria, and also inherent in the parties to the proceedings and their representatives, to refer to CJEU rulings in their argumentation, with the most cited cases being C-576/15³³ and the joined C-80/11 and C-142/11³⁴, which is another indication of the familiarity with the case-law Court in order to ensure the full effect of the rules of Community law.

7.4. The Swedish Legal System

7.4.1. Short description of national tax legal system

7.4.1.1. *The sources of law in the field of tax justice*

The principal legislative framework governing the taxation process within Sweden is encapsulated in the Tax Procedural Law (Sw: *Skatteförfarandelagen (2011:1244)*) (TPL). This statute, despite undergoing numerous modifications and additions, principally derives its foundation from the comprehensive tax reform of 1991, which significantly altered the taxation process at that juncture. Historically, procedural directives pertaining to Value Added Tax were also embedded within the Value Added Tax (VAT) Act, yet these were relocated subsequent to a substantial overhaul of the tax procedural regulations in 1997. Additional legislation relevant to the tax procedure includes the Administrative Procedural



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Law (Swedish: *Förvaltningsprocesslagen* (1971:291)) and the Law on Advanced Tax Rulings (Sw: *Lag* (1998:189) *om förhandsbesked i skattefrågor*) (ATR).

7.4.1.2. The tax courts

Fundamentally, Sweden does not establish specialized tribunals exclusively for tax-related disputes. The entity most akin to this concept is the Board for Advanced Tax Rulings (sw: *Skatterättsnämnden*) (BATR), which operates as an autonomous segment within the Swedish Tax Agency (sw: *Skatteverket*). BATR stands as the initial adjudicator for advance ruling applications pursuant to the Advance Tax Rulings (ATR) framework. Although the Tribunal is not officially designated as a court, it issues compulsory preliminary decisions on fiscal matters, inclusive of Value-Added Tax (VAT) dilemmas. Decisions rendered by the BATR are subject to appeal directly to the Supreme Administrative Court, bypassing the requirement for preliminary leave to appeal.

7.4.1.3. The structure of the tax process

Disputes concerning taxation are adjudicated by the standard administrative courts, County Administrative Court (CAC), the Administrative Court of Appeal (ACA) and the Supreme Administrative Court (SAC). Should an individual wish to contest a tax determination, the grievance is directed either to the Swedish Tax Agency (or the respective authority that issued the initial decision). Said authority is obliged to reevaluate its decision; failing amendment in favor of the appellant, the dispute is escalated to CAC. Subsequent to the CAC's verdict, an appeal can be lodged with the ACA. Decisions from the ACA, contingent upon obtaining review permit, be further contested before the SAC. A review permit is conferred solely under circumstances wherein the adjudication holds the potential to serve as a significant precedent, thereby furnishing jurisprudential guidance for the evaluation of analogous matters, or in the presence of extraordinary justifications. Merely demonstrating an erroneous judgment by the ACA does not suffice as grounds for the SAC to undertake a review of the case. The aforementioned can be compared to appeals against advance rulings issued by the BATR which may be directly contested to SAC without the necessity of obtaining a preliminary review permit.

The regulatory framework governing taxation processes encompasses both the TPA and the APA. However, these statutes do not comprehensively address all conceivable scenarios that may emerge during procedural adjudications. Notably, the tax reform of 1991 marked a pivotal shift from an "amount process" to a "substantive process." Previously, the process predominantly focused on the final assessed income as the core subject of litigation, with judgments specifying determined taxable amounts. Conversely, the substantive process entails judicial examination of specific factual matters, including the applicability VAT on



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particular transactions. Consequently, judgments resolve these factual inquiries, obligating the Swedish Tax Agency to adjust tax assessments in accordance with judicial findings.

This evolution towards substantive proceedings, initially conceptualized with litigation in mind, implies that the General Code of Judicial Procedure (sw: *Rättegångsbalk* (1942:740)) — traditionally applicable to litigation and criminal proceedings — also holds relevance for the administrative court's handling of tax disputes.

7.4.2. Analysis of the concept of “judicial principle of law”

In Swedish, juridical principles of law exist. They are referred to as general principles of law, Sw. *allmänna rättsprinciper* or *allmänna rättsgrundsatser*, or just *principer*. Examples of principles used are the principle of legality, Sw: *legalitetsprincipen*, the principle of legal certainty, Sw: *rättssäkerhetsprincipen*, and *proportionalitetsprincipen*, Sw: *proportionalitetsprincipen*. Some principles are codified, and some are developed by the legislature in the preparatory works of legal acts or by the courts. The principles are more or less the same, even though some principles can be more or less important over time. One such example is the principle of legitimate expectations, which has increased in importance in the field of VAT. Since principles are characterized by a certain extent of vagueness, their content can change over time.

7.4.3. Description of the role of precedents in the national tax case-law

In the realm of Swedish taxation law, precedents hold a pivotal role as a fundamental source of legal authority. This significance is further accentuated in the context of substantive procedural processes, where the reliance on precedential decisions is primarily utilized to determine the admissibility of appeals before the SAC. Distinctions arise, notably in the domain of advanced rulings, wherein the necessity for appeal permission is obviated, contingent upon the satisfaction of formal prerequisites, thereby warranting SAC review.

The binding nature of SAC decisions is nuanced; while a decision in an advanced ruling is binding for the specific case at hand, its general applicability across broader legal interpretations remains non-obligatory. Despite this, there exists a pronounced adherence to SAC precedents within the Swedish legal framework, underscored by instances of deviation by inferior courts, which occasionally dispute the supreme court's jurisprudence based on divergent legal interpretations or considerations of human rights protections.

The SAC exercises discretion in the valorization of its judgements, differentiating between pivotal decisions as “*ref*”, and those of lesser significance, conveyed through “*not*”. This stratification, however, does not diminish the legal gravitas of note judgements, particularly when they collectively indicate a consistent legal stance.



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Legal scholarship and discourse typically reference SAC judgements in a structured format, highlighting the precision in legal argumentation and the importance of specific rulings. Normally a case is referred to as HFD [year] ref or not and [number]. In recent years, the SAC has initiated the practice of assigning a specific number to each paragraph in their judgments, starting from 1. This methodological advancement facilitates more precise references to particular segments of the judgment.

7.4.4. Existence of a national debate on the creative role played by judges in the tax domain

Within the Swedish legal discourse, scant attention has been devoted to scrutinizing the judiciary's role. Predicated on the axioms of legality, impartiality, and consistency as delineated in public administrative guidelines and judicial mandates, it is postulated that the judiciary does not engage in legislative creation. The foundational premise maintains that the SAC is tasked with the interpretation and application of existing statutes rather than participating in the evolution of legal frameworks. Notably, critiques have emerged regarding the SAC's previous proclivity for excessive reliance on legislative preparatory materials, positing that such dependence could inadvertently foster de facto legislative outcomes through interpretative acts, thereby straining the principle of legality. Despite these critiques, the past three decades have witnessed an absence of substantive discourse regarding methodological approaches or an examination of the SAC's normative functions.

7.4.5. Analysis of the role of case-law for correct interpretation of national tax law

While the corpus of Swedish jurisprudence may not be voluminous, its significance in legal application is incontrovertible. Rulings from the SAC are generally regarded as authoritative, commanding widespread adherence. The Swedish Tax Agency diligently amends its Legal Guidance, accessible online, to incorporate decisions emanating from the SCA, thereby reflecting the evolving legal landscape. Conventionally, once a matter is adjudicated by the SAC, it establishes a precedent considered reliable, barring extraordinary circumstances that necessitate a deviation from established jurisprudence.

Moreover, Swedish judicial entities, including the Swedish Tax Agency, exhibit substantial alignment with European Union legislation and the jurisprudence of the CJEU. It is a prevalent practice for the SAC to engage with CJEU case law, not only by referencing these judgments but also through direct citations, underscoring the integration of EU legal principles within the Swedish legal framework.

An illustrative instance of the SAC aligning with the jurisprudence of the CJEU is evidenced in HFD 2023 ref. 45. This case concerned the entitlement to deduct input VAT on general business expenses, when the taxpayer carried out mixed activities (i.e. partly VAT taxable operations and partly VAT non-taxable activities). The Swedish VAT Act provides for



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a method whereby the deductible amount of input VAT is estimated on a reasonable basis. Conversely, the VAT Directive of the European Union mandates the application of a precise pro-rata calculation for such deductions. In resolving this discrepancy, the SAC invoked the EU Directive alongside CJEU case law to ensure the interpretation of Swedish national law was in accord with the directives of the VAT Directive, thereby harmonizing domestic legal provisions with EU norms.

7.4.6. Final remarks about legal principles in Swedish VAT context

Within the scholarly discourse on Swedish tax law, a number of examinations of various legal principles is undertaken. Nevertheless, the invocation of these principles within the ambit of case law is sporadic, with notable exceptions such as RÅ 2003 ref 29, where the SAC deliberately applied the principle of neutrality to justify its decision. The accession of Sweden to the EU has notably augmented the significance of EU law and interpretative principles within Swedish legal procedures, particularly in domains like VAT that are subject to EU harmonization. This integration has ostensibly elevated the influence of legal principles when the law is applied, including regulatory bodies and judiciary. Notwithstanding, the realm of taxation, VAT included, predominantly remains legislatively driven based on the principle of legality. Sweden boasts of a contemporarily structured VAT framework, extensively revised to align with the EU directives. Efforts have been comprehensive to sculpt the legislation in congruence with the foundational legal principles underpinning the VAT system. However, it warrants mentioning that the application and recognition of legal principles within Swedish legal practice and jurisprudence do not achieve the prominence observed in several other jurisdictions.

7.5. Overall results of the theoretical analysis in national legal systems

1. The tax legal systems of Italy, Sweden, and Bulgaria exhibit both commonalities and differences in their structure, processes, and judicial hierarchies. In Italy, the tax judiciary is autonomous and structured into courts of first and second instance, with the Corte di Cassazione serving as the court of last instance. This court focuses on the legitimacy and correctness of appellate judgments rather than re-deciding the merits of cases. The Italian system emphasizes a nomofilactic function, ensuring uniform interpretation of the law. In contrast, Sweden does not have specialized tax courts; tax disputes are handled by standard administrative courts, culminating in the Supreme Administrative Court (SAC). The SAC can re-decide the merit of a case if it serves as a significant precedent or under extraordinary circumstances.

The Swedish system also includes the Board for Advanced Tax Rulings, which provides preliminary decisions on fiscal matters, directly appealable to the SAC. Bulgaria's tax system



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is governed by the Tax and Social Insurance Procedure Code (TSIPC), with tax disputes initially handled by revenue authorities and subject to administrative appeal before reaching the judicial system.

The Bulgarian Administrative Court reviews the legality of audit instruments, and its decisions can be further appealed to the Supreme Administrative Court (SAC) on cassation grounds. Unlike Italy, where the Corte di Cassazione cannot review facts, the Bulgarian SAC can reverse judgments and remand cases for re-examination. Common features across these systems include a multi-tiered judicial structure and the possibility of appealing decisions to higher courts. However, differences arise in the specialization of courts, the role of administrative bodies, and the extent to which higher courts can re-evaluate the merits of cases. Italy's system is more rigid in separating the review of legal interpretation from factual re-evaluation, while Sweden and Bulgaria allow for more substantive re-examination at higher judicial levels.

2. In comparing the concept of “judicial principle of law” within the tax legal systems of Italy, Sweden, and Bulgaria, several commonalities and differences emerge. In Italy, the judicial principle of law is intricately linked to the nomofilactic function of the Corte di Cassazione, with the Massimario Office playing a pivotal role in identifying and disseminating these principles through *massime*. These *massime* are concise statements of legal principles derived from significant court decisions and are stored in a national database. The Italian system emphasizes the extraction of these principles from specific cases to guide future similar cases, thereby promoting legal certainty and predictability.

In contrast, the Swedish system is deeply rooted in the legality principle, which mandates that taxation must be legislatively endorsed and cannot be delegated to the government or judicial entities. Hence, there is not a specific legal tradition on JPOLs, even if the courts make general assertion that can be considered such.

The Bulgarian approach, as elucidated by Prof. Dr. Yanaki Stoilov, aligns with the continental legal tradition, which favors legislatively enshrined principles over judicially derived ones. However, judicial principles do play a role, particularly in complex cases where explicit rules are lacking. Bulgarian legal theory recognizes the importance of judicial interpretation and the role of courts in deriving principles from case law, although this practice can be controversial. The Bulgarian system also emphasizes the abstractness, codification, and systematicity of the legal system, maintaining a clear distinction between the creation and application of norms.

In summary, while all three countries recognize the importance of judicial principles of law, their approaches differ significantly. Italy has a structured system for identifying and disseminating these principles through the Massimario Office, ensuring uniform application of the law. Sweden emphasizes the legislative basis for taxation, with less focus on judicial principles. Bulgaria, while favoring legislatively enshrined principles, acknowledges the role of judicially derived principles in complex cases and emphasizes the importance of judicial



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interpretation. These differences reflect the varying legal traditions and frameworks within which each country operates.

3. The role of precedents in the national tax case-law of Italy, Sweden, and Bulgaria reveals both commonalities and distinct differences rooted in their respective legal traditions. In Italy, the concept of precedent is not formally binding as in common law systems, but there is a growing trend towards respecting previous decisions, especially those from the Corte di Cassazione and the Constitutional Court. This trend is driven by the need for legal certainty and consistency, particularly in light of the complexities and rapid changes in legislative sources. The Italian system acknowledges the persuasive authority of higher court decisions, often referred to as “living law” (*diritto vivente*), which lower courts tend to follow despite the absence of a formal doctrine of *stare decisis*.

In contrast, Sweden places a significant emphasis on precedents, particularly those set by the Supreme Administrative Court (SAC). While SAC decisions in advanced rulings are binding for the specific case, their broader applicability is not obligatory. However, there is a pronounced adherence to SAC precedents within the Swedish legal framework, with lower courts generally respecting these decisions. The SAC also differentiates between pivotal decisions and those of lesser significance, yet both types of judgments hold considerable legal weight. The structured citation of SAC judgments underscores the importance of precise legal argumentation and the role of specific rulings in shaping legal interpretations.

Bulgaria, adhering to the continental legal system, emphasizes statutory law as the primary source of legal authority. In tax law, Bulgarian judges are further constrained by specific limitations, such as the prohibition of interpretation by analogy and the principle of non-worsening of the appellant's position (*reformatio in peius*). These principles ensure that judicial decisions remain within the bounds of statutory law, maintaining objectivity and fairness in judicial proceedings.

In summary, while Italy and Sweden exhibit a trend towards the increasing importance of precedents, with Sweden showing a more structured and binding approach, Bulgaria maintains a strict adherence to statutory law with limited reliance on judicial precedents. These differences reflect the varying degrees of influence that common law principles have on these civil law countries, highlighting the unique ways in which each legal system balances the need for legal certainty with judicial independence.

4. In comparing the legal systems of Italy, Sweden, and Bulgaria regarding the creative role of judges in the tax domain, several commonalities and differences emerge. In Italy, there is a robust national debate on the creative role of judges, particularly within the Corte di Cassazione. Italian legal theory acknowledges the inherent creativity in judicial interpretation, with various schools of thought debating the legitimacy and extent of this creativity. The Italian Constitution mandates that tax matters must be regulated through



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laws, yet the judiciary often plays a huge role in interpreting these laws, especially in the context of European legal integration and the rapid development of new economic models.

Sweden, on the other hand, exhibits a more restrained approach. The Swedish legal discourse largely assumes that the judiciary does not engage in legislative creation, focusing instead on the interpretation and application of existing statutes. Critiques have emerged regarding the Supreme Administrative Court's (SAC) reliance on legislative preparatory materials, which some argue could lead to de facto legislative outcomes. However, there has been little substantive discourse on the judiciary's normative functions over the past three decades, indicating a general acceptance of the judiciary's limited creative role.

Bulgaria presents a different scenario, where the binding force of judgments is categorized into *inter partes* and *erga omnes* effects. The Bulgarian legal system does not generally recognize judgments as binding case law, except in specific instances such as interpretative judgments and decisions of the Constitutional Court. The Supreme Administrative Court (SAC) in Bulgaria has the authority to issue interpretative judgments that provide uniform interpretations of legal provisions, which are binding on all judicial and executive authorities. This indicates a more structured approach to judicial creativity, where the SAC's interpretative judgments play a significant role in shaping the application of tax laws.

5. The role of case law in the interpretation of national tax law and the interaction between national courts and the Court of Justice of the European Union varies significantly across Italy, Sweden, and Bulgaria, reflecting both commonalities and distinct national approaches. In Italy, the principle of primacy of EU law is acknowledged, but it is limited by constitutional principles, a stance that has evolved since the 1970s. The Italian Constitutional Court's "teoria dei controlli" claims that EU law cannot be applied if it contravenes fundamental national principles, although this doctrine has not been invoked in taxation matters. Italian courts, particularly the Corte di Cassazione, frequently refer to CJEU case law, especially in the field of VAT, indicating a strong alignment with EU jurisprudence. This is evidenced by the significant number of preliminary references made by Italian courts to the CJEU, highlighting the importance of EU case law in shaping national tax law.

In Sweden, the Supreme Administrative Court plays a pivotal role in ensuring the correct interpretation of national tax law, with its rulings being highly authoritative. The Swedish Tax Agency updates its legal guidance to reflect SAC decisions, ensuring consistency in legal application. The SAC frequently references and directly cites CJEU case law, demonstrating a robust integration of EU legal principles within the Swedish legal framework. An example of this is the SAC's alignment with CJEU jurisprudence in cases involving the deduction of input VAT, where the SAC ensures that national law is interpreted in harmony with EU directives.



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In Bulgaria, the SAC's interpretative activity is documented in annual bulletins and reports, which are freely available online. The Bulgarian SAC also engages with CJEU case law, as evidenced by the publication of judgments on preliminary references to the CJEU. Legal practitioners in Bulgaria utilize commercial legal and tax information platforms to support their work, which include functionalities for searching and filtering case law, as well as expert analyses.

Despite these differences, a common feature across all three countries is the significant role of CJEU case law in the interpretation and application of national tax law, particularly in the domain of VAT. National courts in Italy, Sweden, and Bulgaria frequently refer to and cite CJEU judgments, ensuring that national tax laws are interpreted consistently with EU directives. This practice fosters uniform application of EU law across member states.



7. Empirical Analysis

8.1. Court of Justice of the European Union

In the empirical analysis concerning EU case law we conduct an in-depth empirical analysis of European case law to examine the emergence and characteristics of JPOLs. As anticipated in other deliverables (First Draft of the Guidelines) in the EU legal system these principles represent interpretative statements by the Court of Justice of the European Union that add new dimensions to the understanding of EU law. Unlike mere restatements of legislative provisions or references to prior case law, JPOLs provide substantive judicial interpretations that influence taxpayers, tax administrations, national judges, and other stakeholders navigating the complexities of EU legal frameworks.

Our analysis identified common patterns in the formulation of JPOLs and distinguished them from other judicial statements. These evidence were the basis for drafting the guidelines. We observe that JPOLs often arise in specific contexts, including when the Court interprets exemptions, balances principles such as fiscal neutrality, and defines the limits of national courts' interpretative obligations. Additionally, JPOLs frequently appear in sections of judgments where the Court precludes or does not preclude certain national legislative measures, reinforcing their normative impact.

One key methodological insight from our study is that JPOLs are sometimes distributed across multiple paragraphs. This necessitates an approach that considers lexical indicators such as "therefore," "hence," and "in this respect," which signal logical connections between statements. In cases where subsequent paragraphs explicitly clarify or build upon an initial JPOL, they should be considered together to preserve the full interpretative significance.

Furthermore, we identify instances where JPOLs are reinforced by references to precedents. While citations of prior case law often support a new principle, not all references indicate a JPOL - particularly when the precedent is used to contrast the present case rather than establish a novel interpretative rule. Similarly, references to AG opinions play a crucial role when the Court aligns with the AG's reasoning, thus contributing to the development of a JPOL.

Another category we identify is factual JPOLs, which interpret EU law in direct relation to specific case events. These statements often form part of the answers to preliminary ruling questions but can also appear within the broader argumentative structure of a decision. In contrast, purely factual observations or restatements of case details do not constitute JPOLs.

Through this systematic examination of case law, our study provided a structured approach to identifying JPOLs and understanding their role in EU judicial interpretation. The following paragraphs specify more in detail these features with examples.

8.1.1. Examples of JPOL in European case law

C-228/20



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34 *In that regard, it should be borne in mind that the terms used to specify the exemptions laid down in Article 132 of the VAT Directive are to be interpreted strictly, as they are a departure from the general principle that VAT is to be paid on each supply of services made for consideration by a taxable person. However, the interpretation of those terms must comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT and be consistent with the objectives underlying those exemptions. Accordingly, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 must be construed in such a way as to deprive the exemptions of their intended effect (judgment of 15 April 2021, Administration de l'Enregistrement, des Domaines et de la TVA, C846/19, EU:C:2021:277, paragraph 57).]*

2. C-326/15

42 *In addition, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law contra legem (judgment of 15 April 2008, Impact, C268/06, EU:C:2008:223, paragraph 100).*

8.1.2. Citations or reformulations of legislation

Statements in which the CJEU rephrases the legislation or recalls what it says in a previous paragraph of the same decision are not JPOL.

C-228/20

62 *Furthermore, as pointed out in paragraph 42 above, the discretion conferred by Article 132(1)(b) of the VAT Directive is limited by the requirements arising from the principle of fiscal neutrality.*

C-228/20

80 *Next, it follows from the objective of the exemption provided for in Article 132(1)(b) of the VAT Directive, as noted in paragraph 78 above, that the costs of the services supplied by private hospitals which remain payable by patients must be taken into account.*



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C-236/15

33 *As regards the aim of Article 132(1)(f), within Directive 2006/112, it is necessary to recall the purpose of all of the provisions of Article 132 of that directive, which is to exempt from VAT certain activities in the public interest with a view to facilitating access to certain services and the supply of certain goods by avoiding the increased costs that would result if they were subject to VAT (judgment of 5 October 2016, TMD, C412/15, EU:C:2016:738, paragraph 30 and the case-law cited).*

8.1.3. Principles in different paragraphs

Sometimes a JPOL can be found in two different paragraphs of the same decision.

C-228/20 - first line excel exemptions

29 *In that regard, it should be borne in mind that, in proceedings under Article 267 TFEU, the Court is only empowered to rule on the interpretation or validity of EU law in the light of the factual and legal situation as described by the referring court, in order to provide that court with such guidance as will assist it in resolving the dispute before it (judgment of 17 December 2020, Onofrei, C218/19, EU:C:2020:1034, paragraph 18 and the case-law cited).*

30 *Thus, it is for the Court to answer the national court's questions as they have been framed and within the limits set by the national court.*

Lexical indicators to make the system understand when to join two paragraphs are "therefore", "hence", "in this respect". In such cases the two paragraphs may be joined. The general rule might be that when there is an expression in the second paragraph that explicitly specifies the statement in the following para. to explain the statement in the preceding para. ("such an element", "such an acknowledgement "such a condition") the two should be kept together.

C-228/20

40 *In that regard, the Court has previously held that it is, in principle, for the national law of each Member State to lay down the rules according to which the recognition of an establishment for the purposes of granting the exemption laid down in Article 132(1)(b) of the VAT Directive may be given to establishments which request it. The Member States enjoy a discretion in that regard (see, to that effect, judgment of 10 June 2010, CopyGene, C262/08, EU:C:2010:328, paragraph 63 and the case-law cited).*



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41 *Such recognition does not presuppose a formal recognition procedure and need not necessarily be derived from national tax law provisions (see, to that effect, judgment of 10 June 2010, CopyGene, C262/08, EU:C:2010:328, paragraph 61).*

This criterion may also lead to the inclusion of paragraphs that merely refer to reformulations of the preliminary ruling questions or the fact. Thus, in the prompt to be used for the extraction of JPOL, we could insert the indication that when the following para. refers to the fact or the rephrasing of the preliminary ruling questions, it can be ignored and there is nothing to join.

C-228/20

30 *Thus, it is for the Court to answer the national court's questions as they have been framed and within the limits set by the national court.*

31 *The first question should therefore be examined having regard to the matters of law described by the referring court, which poses that question in the light of the conditions laid down in Paragraph 108 of the SGB V. The administrative circular referred to by the German Government does not affect the relevance of that question, particularly since that government does not dispute the applicability of the conditions thus mentioned by the referring court, but, at most, refers to additional alternative conditions which were not mentioned by that court.*

When the Court provides a list of conditions needed to produce a certain legal consequence, the JPOL is one.

C-228/20

37 *In accordance with the wording of that provision, two cumulative conditions must be satisfied for hospital and medical care and closely related activities offered by an entity other than a body governed by public law to be eligible for exemption from VAT. The first condition relates to the services supplied and requires that they be undertaken under social conditions comparable with those applicable to bodies governed by public law (see, to that effect, judgment of 5 March 2020, Idealmed III, C211/18, EU:C:2020:168, paragraphs 20 and 21).*

38 *The second condition relates to the status of the establishment supplying those services and requires the operator to be a hospital, a centre for medical treatment or diagnosis or another duly recognised establishment of a similar nature.*



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Where the JPOL of a subsequent paragraph relates to a specific part of a provision (e.g. Art. Y para. 1 lit. A) while the JPOL of a previous paragraph relates to the entire provision, the two JPOLs are not to be joined.

C-326/15

35 In addition, it must be recalled that the scope of the exemptions referred to in Article 132 of Directive 2006/112 is to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see, to that effect, judgment of 5 October 2016, TMD, C412/15, EU:C:2016:738, paragraph 34 and the case-law cited).

36 It follows, therefore, that the supply of services which do not contribute directly to the exercise of activities in the public interest referred to in Article 132, but to the exercise of other exempt activities, in particular those referred to in Article 135 of that directive, cannot come under the exemption provided for in Article 132(1)(f) of Directive 2006/112.

8.1.4. JPOL and citations of precedents

An indication that we have a JPOL is when the sentence is followed by the citation of a precedent. However, this is not always the case.

C-228/20 - first line excel exemptions

48 In the present case, since, in order to qualify for the exemption, 'other establishments' must be 'of a similar nature' to 'hospitals and centres for medical treatment or diagnosis', the condition for the recognition of an establishment must be understood as applying to all the establishments mentioned in Article 132(1)(b) of the VAT Directive.

49 That interpretation is supported by the context and objective of Article 132(1)(b) of the VAT Directive.

When the CJEU cites a precedent to say that the case at stake is different from that precedent, this statement is not a JPOL.

C-326/15

38 In that regard, it should be pointed out that, unlike what it is doing in the present case, the Court, in the judgment of 20 November 2003, Taksatorringen (C8/01, EU:C:2003:621), did not resolve the question whether the exemption



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provided for in Article 13A(1)(f) of the Sixth Directive (corresponding to Article 132(1)(f) of Directive 2006/112) was limited to the services provided by an IGP whose members carried on activities in the public interest.

8.1.5. Reference to the AG Opinion

When the CJEU quotes the AG Opinion and shares what the AG said concerning the interpretation of the law, this is a JPOL.

C-449/17

23 In that regard, it must be noted, as the Advocate General observes in point 35 of his Opinion, that, in accordance with that settled case-law, activities which are not purely recreational are likely to be covered by the concept of 'school or university education' as long as the tuition is provided in schools or universities.

8.1.6. Precludes/does not preclude

The way the CJEU judgments are structured, there is always a part at the end of each argumentative thread relating to individual preliminary questions in which it is said that the correct interpretation of a certain rule X precludes/does not preclude a national rule/practice which prescribes something. This is a JPOL.

C-228/20 - first line excel exemptions

70 Therefore, the answer to the first question is that Article 132(1)(b) of the VAT Directive must be interpreted as precluding national legislation which – by stipulating that the provision of medical care by a private hospital is to be exempt from VAT if that establishment is approved in accordance with the national provisions relating to the general health insurance regime, following its inclusion in a Land-level hospital plan or the conclusion of care supply contracts with statutory health insurance or substitute funds – results in comparable private hospitals which supply similar services under social conditions comparable with those applicable to bodies governed by public law being treated differently as regards the exemption laid down in that provision.

8.1.7. Non-VAT principles



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In the CJEU there are many principles concerning the interpretation of law which do not concern VAT. If they fall within the definition of JPOL, they must be considered such (we kept track also of non-VAT JPOLs)

C-326/15 - second line excel exemptions
29 *However, according to settled case-law, it is necessary, when interpreting a provision of EU law, to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgments of 26 April 2012, Able UK, C225/11, EU:C:2012:252, paragraph 22, and of 4 April 2017, Fahimian, C544/15, EU:C:2017:255, paragraph 30 and the case-law cited).*

8.1.8. Factual JPOLs in CJEU

When the JPOL, even if it interprets an EU rule, refers to the facts of the case (e.g. if a certain agreement between two parties can be qualified as a certain operation), this is a factual JPOL. Frequently these JPOLs are the answers to the questions referred by the national judge with the preliminary reference.

C-449/17
30 *In the light of the foregoing, the answer to the first question is that the concept of 'school or university education', within the meaning of Article 132(1)(i) and (j) of Directive 2006/112, must be interpreted as not covering motor vehicle driving tuition provided by a driving school, such as that at issue in the main proceedings, for the purpose of acquiring driving licences for vehicles in categories B and C1 referred to in Article 4(4) of Directive 2006/126.*

However, sometimes, these JPOLs are not at the end of the decision or of the argumentative path necessary to answer a specific preliminary question.

C-717/19
[...]
42 *The Court held, in paragraph 46 of the judgment of 20 December 2017, Boehringer Ingelheim Pharma (C-462/16, EU: C:2017:1006), that Article 90(1) of the VAT Directive must be interpreted as meaning that the discount granted, under national law, by a pharmaceutical company to a private health insurance company results, for the purposes of that article, in a reduction of the taxable amount in favour of that pharmaceutical company, where it supplies medicinal products via wholesalers to pharmacies which supply persons covered by private health insurance that reimburses the purchase price of the medicinal products to*



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persons
[...]

it

insures.

8.2. Italian Supreme Court¹

This section explores the role and application of JPOL within Italian case law, specifically in relation to decisions of the Supreme Court of Cassation (Corte di Cassazione). The analysis focuses on how JPOL is formulated, cited, and distinguished within Italian jurisprudence.

First, we identify some examples of JPOLs. Next, the concepts of overruling and distinguishing are discussed. Unlike the CJEU, which does not engage in explicit overruling or distinguishing, the Italian Supreme Court makes such jurisprudential shifts transparent. This practice reflects the evolving nature of Italian case law and its interaction with EU legal standards.

The section further examines how the Supreme Court incorporates JPOL from both national and European case law, often quoting CJEU rulings *verbatim*. Such citations reinforce the authority of EU jurisprudence while demonstrating the extent to which national courts align with or differentiate from European legal interpretations. Frequently, citations of CJEU case law are JPOLs.

Additionally, JPOL statements in VAT-related decisions often extend beyond tax law, encompassing broader legal principles such as direct effectiveness and the hierarchy of legal norms. This highlights the multifaceted role of JPOL in shaping judicial reasoning.

Finally, the analysis considers the structural composition of JPOL in judgments, noting that such principles are sometimes dispersed across multiple paragraphs rather than being confined to a single, numbered section. Moreover, the Supreme Court frequently designates specific statements as “*principi di diritto*,” a classification that aligns with but does not fully encompass the broader concept of JPOL. However, “*principi di diritto*” are always JPOLs.

The following paragraphs provides insight into the shape and features that we just mentioned in more detail.

8.2.1. Example of JPOL in Italian case law

Cass. civ., Sez. V, Sent., (data ud. 24/05/2023) 28/09/2023, n. 27549
2.6.2. It follows that it is unreasonable to make the benefit of the VAT exemption, of direct Union origin, dependent on the issuance of a ministerial regulation governing its implementation, since the teaching of the Court of Justice summarised above, which reserves it to qualified persons in possession of the necessary qualifications, irrespective of their enrolment in a professional register, precludes this.

8.2.2. Overruling and distinguishing

¹ The translation of case law into English is made by the Authors.



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One of the differences between the case law of the Supreme Court and the CJEU is that the CJEU never allows *overruling* or *distinguishing*. On the contrary, when the Italian Supreme Court makes a *revirement*, a *distinguishing* or an *overruling*, it makes it explicit.

Cass. civ., Sec. V, Sent., (date of hearing 24/05/2023) 28/09/2023, n. 27549

2.2. Precisely because of the failure to issue the implementing ministerial decrees, for a long time the case law of the Supreme Court was oriented in the direction of disallowing the VAT exemption to the activity performed by chiropractors. In particular, Supreme Court of Cassation No. 11085 of 30/05/2016, pointed out that the univocal orientation was that "the exemption provided for by Presidential Decree No. 633 of 1972, Article 10, paragraph 1, No. 18, applies only if the service is performed by persons with a special qualification for the exercise of the corresponding health profession (Cass. No. 4987 of 2003; Court of Cassation No. 5084 of 2001; Court of Cassation No. 7411 of 2001: Court of Cassation No. 7422 of 2001; Court of Cassation No. 21703/2010)", so that chiropractors' services cannot be included among the healthcare services that benefit from the exemption from the tax, given that L. No. 244 of 2007, art. 2, par. 335, even though it classifies the chiropractor among the first-class health professionals, refers to an implementing regulation, which has never been adopted and is indispensable to identify the type of services provided and to regulate the profiles of the profession, along the lines indicated by Presidential Decree No. 633.P.R. No. 633 of 1972, Article 10(18), and Article 13 of the Sixth Directive, as amended by Article 132(1)(e) of the VAT Directive (thus, substantially, Cass. nos. 22812, 22813 and 22814 of 28/10/2014).

2.2.1. This orientation was, likewise, confirmed by Cass No. 8145 of 22/03/2019 and Cass No. 34169 of 20/12/2019.

2.3. Recently, however, the S.C. has substantially revised this orientation, stating that "On the subject of VAT, the recognition of the exemption, provided for by Presidential Decree No. 633 of 1972, Article 10, paragraph 1, no. 18), to the chiropractor who renders a personal care service, requires the verification that the service guarantees a sufficient level of quality and that the person rendering it is adequately trained. 18), to the chiropractor who renders a personal care service, requires the verification that the service guarantees a sufficient level of quality and that the person rendering it is provided with adequate training, administered by teaching institutions recognised by the State, even in the absence of the institution of the register of doctors of chiropractic and the activation of the relevant degree course' (Court of Cassation no. 21108 of 02/10/2020, then followed also by Court of Cassation no. 6868 of 11/03/2021).



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8.2.3. Citations of previous European and national decisions

The Supreme Court often quotes in full, with a copy-paste, the JPOL of the CJEU. These are relevant statements in law, which should be kept track of (it is interesting to see when and how much the Supreme Court quotes the CJEU *verbatim*) when they fall within the definition of JPOL. They are frequently JPOLs although not always.

Cass. civ., Sec. V, Sent., (date of hearing 24/05/2023) 28/09/2023, no. 27549

2.4. According to Court of Justice 27 June 2019 in Case C-597/17 Belgisch Syndicaat van Chiropraxie and Bart. Vandendries and Others, under Article 132(1)(c) of the VAT Directive, medical services carried out in the exercise of the medical and paramedical professions as defined by the Member States concerned are exempt from value added tax.

2.4.1. In particular, "a service must be exempted if it satisfies two conditions, that is to say, on the one hand, if it constitutes a healthcare service to the person and, on the other, if it is carried out in the context of the exercise of the medical and paramedical professions as defined by the Member State concerned" (par. 19). It is not considered, moreover, that 'the European Union legislature did not intend to require the Member States concerned to reserve the benefit of that exemption solely to the professions regulated by their legislation', the Member States having a wide discretion on that point, which, in any event, must be exercised in order (a) to ensure that the exemption applies exclusively to healthcare services provided to the person by providers who possess the necessary professional qualifications, and (b) to respect the principle of fiscal neutrality (paragraphs 22-25).

2.4.2. Compliance with condition (a) does not necessarily imply that the exempted providers exercise a profession governed by the legislation of the Member State concerned, since other effective means of checking their professional qualifications may be taken into consideration, depending on the organisation of the medical and paramedical professions in that Member State (point 27). Moreover, it cannot be ruled out, in a general and absolute manner, that those who provide such services outside the scope of that profession have the qualifications necessary to ensure care of a sufficient standard to be regarded as similar to that offered by members of such a category, in particular where they have followed training offered by teaching establishments recognised by that Member State (paragraph 29).

2.4.3. It follows that "the regulatory framework of the Member State concerned constitutes only one element among others to be taken into consideration in order to determine whether a taxable person possesses the professional qualifications



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necessary for that exemption to apply to him, with the result that the fact that those who practise medical care belong to a regulated profession cannot constitute a prerequisite which the Member States must necessarily lay down for that purpose" (paragraph 30).

2.4.4. Compliance with condition (b), on the other hand, implies that similar supplies, which are thus in competition with each other, are not treated differently for VAT purposes (para. 28).

2.4.5. In conclusion, according to the Court of Justice, "Article 132(1)(c) of Directive 2006/112 must be interpreted as not reserving the application of the exemption provided for therein to services performed by persons exercising a medical or paramedical profession regulated by the legislation of the Member State concerned" (par. 31).

Cass. civ., Sec. V, Sent., (date of hearing 24/05/2023) 28/09/2023, no. 27549
3.5. That being so, the Court observes that those Articles 13 and 73 are extremely broad indications as to the content of the taxable amount for VAT purposes, as must be inferred from the expressions used: "total amount of the consideration due" in the first provision and "all that which constitutes the consideration" in the second. It follows, on the one hand, that the taxable amount is to include in the taxable amount all the consideration due to the supplier on the basis of the terms of the contract, with the exception of the elements provided for by the legislation (Art. 79 Directive 2006/112/EC - in this sense, Court of Justice, judgment of 5 December 2013, TVI - Televisao Independente SA, in joined cases C-618/11, C-637/11 and C-659/11, par. 33, which refers to the judgments of 1 June 2006, De Danske Bilimportører, C-98/05, ECR p. I-4945, par. 15, and of 28 July 2011, Lidl & Companhia, C-106/10, ECR p. I-7235, paras. p. I-7235, paragraphs 30 and 31), and, on the other hand, that the taxable base tends to be unitary in nature, with no possibility of applying different rates for the individual services of a single contract, when, as in the present case, the integration of the consideration provided for by the contract between the parties is not attributable to any of the elements identified by the legislation, and the economic service is, therefore, single, inseparable and only artificially divisible (in this sense, Court of Justice, judgment of 11/02/2010 in case C-88/09; Cass. No. 13312 of 2013).

8.2.4. Non-VAT JPOL



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In the decisions on VAT there are also JPOL not directly concerning VAT (e.g. related to the scope of the law, the relationship between legal systems, direct effectiveness). If they fall within the definition of JPOL, they are JPOL.

Cass. civ., Sec. V, Sent., (date of hearing 15/11/2019) 30/09/2020, no. 20827

Irrespective of legislative provisions of conventional origin, given the nature of VAT as a harmonised tax, it is clear that the reference framework of interest here, as is well known, is primarily that of EU law.

Cass. civ., Sec. V, Sent., (date of hearing 15/11/2019) 30/09/2020, no. 20827

2.6. Recalling on this point Cass. no. 28080 of 2019 (in motivation), the defect referred to in Article 360 c.p.c., paragraph 1, no. 3 consists in the deduction of an erroneous recognition, by the contested measure, of the abstract normative case and, therefore, necessarily implies an interpretative problem of the same, while the allegation of an erroneous reconstruction of the concrete case by means of the findings of the case, which can be raised, in the court of legitimacy, only under the aspect of the defect of motivation and whose examination, unlike the complaint for violation of the law, is mediated by the contested assessment of the findings of the case (see Cass, ord., 5 February 2019, no. 3340; Cass., ord., 30 April 2018, no. 10320; Cass., ord., 13 October 2017, no. 24155). The expressions violation or false application of the law, referred to in Art. 360 c.p.c., paragraph 1, no. 3, describe the two moments in which the judgement of law is divided: that concerning the search for and interpretation of the rule deemed to regulate the concrete case and that concerning the application of the rule itself once correctly identified and interpreted; - whereas the breach of law immediately concerns the rule of law, resulting in the denial or erroneous affirmation of the existence or non-existence of a rule or in the attribution to it of a content it does not possess, having regard to the case outlined therein, the defect of misapplication of the law consists either in assuming the concrete case judged under a rule that does not suit it, because the abstract case envisaged by it - albeit correctly identified and interpreted - is not suitable to regulate it, or in drawing from the rule, in relation to the concrete case, legal consequences that contradict its interpretation, albeit correct (cf. Cass, ord., 14 January 2019, no. 640; Cass. 26 September 2005, no. 18782).

8.2.5. JPOL composed by statements to be found in different paragraphs

There are JPOLS that are made up of statements to be found in different paragraphs of the same judgment. Moreover, Supreme Court judgments do not always (but sometimes do) have numbered



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paragraphs. If possible, the length of a JPOL should coincide with a paragraph. However, in Italian case law this is not always the case. In our opinion, a good rule for Italian case law is that the length of a JPOL coincides with the portion of text between the capital letter and the point in which the judge starts a new line. Defining the length of a JPOL remains one of the key challenges of our project.

Cass. civ., Sec. V, Sent., (date of hearing 15/11/2019) 30/09/2020, no. 20827

The reference made by the Union legislature provides that the exemption must necessarily be applied by the Member States (the use of the indicative 'exempt' leaves no room for doubt as to the existence of a real, directly enforceable obligation and not of a mere option on the part of the States themselves) when the benefits in question are provided by public bodies or by bodies 'of the same nature duly recognised'.

The Community legislator thus directly lays down the exemption regime, so that implementing rules in the individual Member States are not indispensable: and not only that, it does so regardless of any subjective considerations, as it then specifies more precisely - for example - with regard to medical treatment and related benefits.

8.2.6. Explicit qualification as JPOL or similar terms

In most of the judgments, new JPOLs are expressly identified as "principi di diritto". This concept, which exists in the Italian legal system, does not coincide with our definition of JPOL (all "principi di diritto" are JPOL but not viceversa). "Principi di diritto" are mainly to be found at the end of the judgments. Each judgement can have one or more than one "principi di diritto".

Cass. civ., Sez. V, Sent., (data ud. 13/10/2020) 17/12/2020, n. 28940

The plea should therefore be rejected, and the following principle of law affirmed:

"On the subject of VAT, an exemption must be recognised in respect of services consisting of laboratory tests carried out by a facility accredited with the national health service on behalf of patients of another accredited facility and on the latter's behalf".

8.3. Bulgarian Supreme Administrative Court



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8.3.1. Overruling and distinguishing

When there is inconsistency in the case-law of the SAC on the same matter (mainly that is the case where legislative provisions are interpreted conflictingly by the different panels of the Court) the General Assembly of the Chambers of the Supreme Administrative Court can adopt an interpretative judgment to ensure uniform application of the laws in administrative justice. The interpretative judgement gives answer to the question in what sense the conflicting legal provision(s) should be interpreted (the actual meaning and purpose of the law). With that being said, “overruling” with regards to conflicting case-law of the SAC is made **only explicitly** (by the interpretative judgement since in a way it gives favor to the most accurate Supreme Court judgments that resolve the matter similar to the adopted opinion given in the interpretative judgment). It is the same with “distinguishing” – that is the case when a judgment is signed with a dissenting opinion by one of the Supreme Administrative Court judges (his/her opinion on the matter dissents from the majority of the panel and the argument therefor are given at the end of the judgment). There is no established practice of the Supreme judges in terms of “overruling” and “distinguishing” made implicitly. However, there are not a lot of interpretative judgements in the VAT field (only four), and approximately sixty SAC judgments signed with dissenting opinion (VAT may not be the main legal issues in all of them though and most likely very few (if any) on the topics of exemption and consideration). These cases should not be included in the database.

8.3.2. Citations of previous European and national decisions

It is very common in Bulgarian VAT case law that it often quotes in full, with a copy-paste, the principles and statements of the CJEU. These are relevant statements in law, which should be kept track of, but it must be taken into account that the statement comes from the CJEU and not the Supreme Administrative Court. In this regard, it makes perfect sense to have an attribute to the tag indicating that the cited JPOL is a CJEU JPOL.

Judgment No. 9738 of 2.11.2022 of the Supreme Administrative Court in administrative case No. 10639/2021

*The right to a refund of VAT paid in breach of EU law is, as the CJEU has consistently held, not governed by the rules of the VAT Directive, but is **"a consequence of and in addition to the rights which legal persons derive from the provisions of EU law"**, and in principle each Member State is obliged to refund taxes collected in breach of EU law. In the absence of a provision in Community law, it is for the Member States to regulate the modalities under which this right is to be exercised, in compliance with the fundamental principles of equivalence, effectiveness and legal certainty (e.g. CJEU Judgment of 14 June 2017 in Case C-*



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38/16, paragraphs 29 and 30, and the case-law cited therein, and the more recent CJEU Judgment of 2 July 2022 in Case C-835/18, paragraphs 24 and 26, and the case-law cited therein, to which, incidentally, the defendant in cassation also refers).

Or, by submitting a claim for repayment (in accordance with the procedures and conditions adopted by each Member State for doing so), the right to repayment of the undue payment (including, as in this case, of the VAT unduly paid) is exercised, the purpose of which, as defined in the cited case-law of the CJEU, is **"to remedy the consequences of the incompatibility of the tax with EU law by neutralising the economic burden unjustifiably imposed on the operator in which it was ultimately borne"** /in this sense the CJEU Judgment of 2 July 2022 in Case C-835/18, cited above, para. 24 and the case-law cited therein/.

Finally, the CJEU has repeatedly ruled to the effect that it is compatible with the EU law to set reasonable limitation or prescription periods in the interests of legal certainty, in order to protect both the taxpayer and the administration which periods, although, by definition, leading to a partial or total rejection of the right, do not in principle lead to a breach of the principle of effectiveness, but should not make it practically impossible or excessively difficult to exercise the right (see also CJEU Judgment of 11 July 2002 in Case C-62/00, para. 35 and the case-law cited therein, CJEU Judgment of 21 January 2010 in Case C-472/08, CJEU Judgment of 2 July 2022 in Case C-835/18, paragraph 32 and the case-law cited therein, etc.).

8.3.4. Non-self-standing JPOL (subject = pronoun or other)

It is important to assess the extent to which the JPOL is formulated clearly enough to be presented as an independent legal conclusion (sometimes detached from the context). As a rule, the more concisely worded JPOL is preferable, but when determining the textual scope, it should be taken into account whether the conclusion is in relation to a cited specific legal norm or court decision in a preceding sentence/paragraph. For example, when the Court quotes the interpretation of a rule or a previous pronouncement without saying so explicitly because this is already clear from the preceding para. (e.g. there is a first para. saying "Art. Y should be interpreted as meaning that...", followed by a second para. starting with "according to that rule...." or "according to the mentioned decision"), it would make sense to have the LLM extract JPOLs in a broader textual scope, this way determining the "implied subject" in order to make the individual principles self-standing.

Judgment No. 9738 of 2.11.2022 of the Supreme Administrative Court in administrative case No. 10639/2021



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“The objection of the applicant that the case is not similar to the facts of the case is also justified, therefore the interpretation of the substantive law given by the Judgment No. 12541 of 19.10.2017 in Administrative Case No. 13130/2016 of the SAC is inapplicable and the first instance court has wrongly referred to it. As regards Judgment No. 13834 dated 15.11.2017 rendered in Administrative Case No. 9317/2016 of the SAC and Judgment No. 2683/6.03.2017, as stated above, the present formation of the Court does not share the view that the national legislature has not introduced a time-limit for the exercise of the right to recover taxes collected in breach of EU law and, therefore, unduly paid. Apart from that, the said judgments have commented only on the absence of time limit introduced by Article 116 of the VAT Act and not on the application of Article 129(1)(a) of the VAT Act. 1, second proviso to Article 129(1) of the VAT Code for exercising the right to refund, separately even in the grounds of Judgment No. 13834 of 15.11.2017, No. 9317/2016 of the Administrative Court of the Supreme Administrative Court, it was expressly held that "From the very issuance of the invoice, which was recognized as fictitious, its issuer knew that there was no basis for charging VAT and there was no justification for filing a claim for refund five years after the issuance of the invoice and more than two years after the final court decision confirming the denial of tax credit to the recipient.”

8.3.5. Non-VAT JPOL

In Bulgarian VAT judgments there are JPOL not directly concerning VAT which should be included in the platform. It would make sense, though, to make clear to the user that these JPOL are more general and not necessarily directly connected to VAT.

Judgment No. 5716 of 16.04.2019 of the SAC in Administrative Case No. 1109/2019, 1st Chamber, Rapporteur - Chairman Yordan Konstantinov

„The Court does not share the arguments of the first instance court, related to the correspondence of the provisions of Art. 44, para. 2 Value Added Tax Act (VATA) and Art. 132, para. 1, let. "o" from Directive 2006/112/EU. In this case, Art. 44, para. 2 VATA literally reproduces the quoted text from the directive, which is why the administrative court's statement of an admitted violation in the transposition of the directive contradicts basic principles of European Union law. Whether the country will exercise its right to derogate from the provisions of the directive cannot be seen as incorrect transposition. In this case, there is no evidence of a violation of the competition rules by treating the process supplies as exempt, insofar as the principle has been introduced in VAT taxation that the assessment of exemption from tax assessment should be carried out insofar as this does not lead to a violation of the principles of tax neutrality and of the competition.”



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8.3.6. One JPOL composed by statements to be found in different paragraphs

The judgments of the Supreme Administrative Court of Bulgaria **do not have** numbered paragraphs. It is possible (and common) to not have full correspondence between JPOLs and different paragraphs of the judgment.

Judgment No. 3558 of 14.03.2011 of the Supreme Administrative Court in Administrative Case No. 9779/2010, First Chamber, Judge Miroslav Mirchev, Rapporteur

“The second disputed issue is whether the performance of clinical trials constitutes an exempt supply in the hypothesis of Art. 39, para. 1 of the VAT Act.

On the basis of the quoted text an exempt supply is the provision of health (medical) services and directly related services provided by health institutions under the Health Act and by medical institutions under the Medical-Treatment Facilities Act (MTFA).

The text of Art. 19, p. 6 of the MTFA stipulates that a hospital care facility is an establishment in which doctors, with the help of other specialists and support staff, carry out clinical trials of medicines and medical devices in accordance with the legislation in force in the country. Paragraph 1, p. 24 from the Additional Provisions of the Medicinal Products in Human Medicine Act defines the term clinical trial of a medicinal product as “any study on humans intended to discover or confirm the clinical, pharmacological and/or other pharmacodynamic effects of one or more medicinal products tested, and/or to determine the adverse reactions to one or more medicinal products tested, and/or to study the absorption, distribution, metabolism and excretion of one or more medicinal products tested for the purpose of establishing their safety and/or efficacy”.

The appellant argues on the basis of an analysis of Art. 99, para. 1 of the Health Care Act, that research activity is not equated with a medical service. On the basis of an argument derived from the norm of Art. 86 para. 3 of the Medicinal Products in Human Medicine Act, however, the conclusion is that during the clinical trial, medical care is provided to the participants and medical decisions are made for which a suitably qualified doctor is responsible. In addition, clinical trials within the meaning of Article 90 of the Medicinal Products in Human Medicine Act imply expected therapeutic benefits. Pursuant to Art. 104 para. 1 of the Medicinal Products in Human Medicine Act, the committee referred to in Article 103 shall examine and evaluate the scientific, medical and ethical aspects of the proposed clinical trial.



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Notwithstanding the determination by the present Cassation Chamber that the clinical trial is a medical service, the Court considers that the provision of such a service in the case under consideration does not constitute an exempt supply within the meaning of Art. 39, para. 1 of the VAT Act.

The above provision imperatively requires that the services must be provided by health establishments under the Health Care Act and by medical establishments under the Medical-Treatment Facilities Act.”

8.3.7. Explicit qualification as JPOL or similar terms

It is a concept not applicable to Supreme Administrative Court judgments (with exception of the adopted interpretative judgments) since this instance can decide on the merits of the case. At the end of the Court judgment is the final conclusion of the court whether or not the appeal should be rejected or not, but this decision is applicable only to the case in question and is not general.

Judgment No. 4815 of 17.04.2024 of the Supreme Administrative Court (SAC) in Administrative Case No. 820/2024, Eighth Chamber, Rapporteur Chairperson Biserka Tsaneva

„Given all of the above, the first instance decision does not suffer from the vices indicated in the cassation appeal and, as valid, admissible and correct, should be upheld.”

Judgment No. 13454 of 10.12.2015 of the SAC in Administrative Case No. 5152/2014, VIII Chamber, Judge Dimitar Parvanov, Rapporteur

“In view of the interpretation made in the cited case-law of the ECJ, the present Court of Cassation considers that in the present case the medical services rendered should not be subject to VAT, therefore the audit act as unlawful should also be annulled in this part.”

8.4. Swedish Supreme Administrative Court

8.4.1. Overruling and distinguishing

There are approximately 670 cases concerning VAT from the Swedish Supreme Administrative Court.



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In matters of taxation, including those related to VAT, the Supreme Administrative Court undertakes a review, assessing both the substantive aspects of the case and the conformity of prior judgments with constitutional principles, pursuant to Chapter 11, Section 14 of the Instrument of Government (sw: *regeringsformen*). This court adjudicates two principal categories of tax disputes. It serves as the ultimate arbiter for both conventional tax disputes arising from decisions on tax assessments and for so-called advance rulings. Although the case law of the Supreme Court isn't strictly binding, it still carries significant persuasive authority, and lower courts are normally following its rulings.

According to 36 § of the Administrative Court Procedure Act (sw: *Förvaltningsprocesslagen*), ordinary cases can gain admissibility to the Supreme Administrative Court in two ways. One way is if the case is of importance for future legal applications, (i.e. as sw: *prejudikatvärde* or precedential value). Cases based on new legislation are often accepted to provide guidance on interpretation. Cases may also gain admissibility when a clarification of earlier judgments of the Supreme Administrative Court is needed. It should further be noted that the Supreme Administrative Court is not particularly explicit in indicating whether its decisions constitute a change in precedent (overruling) or merely clarify existing practices (distinguishing). However, Section 5 of the Act of Administrative Courts (sw: *lag (1971:289) om förvaltningsdomstolar*) provides that the Supreme Administrative Court may decide that a matter should be adjudicated in plenary session, that is, with all judges participating in the decision. It is important to recognize that this rule is not mandatory, but the Supreme Administrative Court often adheres to this principle. Additionally, it is noteworthy that historically, when it was known as the Administrative Court of Appeal (sw: *Regeringsrätten*), the court sometimes employed the technique of publishing a number of cases as notes (indicating them being less important), which shifted the application of law, before ultimately deciding a reported case (sw: *referat*) through which new precedent was established. During the 21st century, the Supreme Administrative Court has become more meticulous in convening in plenary session when the issue concerns a change in precedent.

An advance ruling may be solicited either by a taxpayer or by the Swedish Tax Agency, submitted to the Board of Advanced Rulings (BAR, sw: *Skatterättsnämnden*), an independent judicial body, see 2 and 22 §§ Advanced Ruling Act (sw: *lag (1998:189) om förhandsbesked i skattefrågor*). Conversely, appeals pertaining to advance rulings necessitate mandatory review if the matter holds significance for the taxpayer personally, or if it is crucial for ensuring a consistent application of the law. It is also a requisite that the event under consideration has not yet transpired.

In cases that refers to real estate taxation an advance ruling may be issued upon application by the public representative (sw: *Allmänna ombudet*) at the Swedish Tax Agency only if the matter concerns an individual and relates to a claim or application they have submitted to the Tax Agency. Additionally, the Tax Agency must have made a decision in the matter that was unfavorable to the individual, and it must be of importance for ensuring uniform legal interpretation or application of the law to issue an advance ruling.



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Similarly, in cases of special duties and Value Added Tax, an advance ruling may be granted under the same conditions. The matter must concern an individual, and a decision must have been made either by the Tax Agency or, in cases related to the movement and control of certain excise goods under the Act (1998:506), by the Swedish Customs Authority. Furthermore, the decision must have been unfavorable to the individual, and issuing an advance ruling must be necessary for maintaining consistency in legal interpretation and application.

Moreover, it should be emphasized that, according to the CJEU, the BAR is not considered a court with respect to the matter of seeking preliminary rulings from the CJEU, as established in Case C-134/97, Victoria Film A/S.

The following is an illustration of how the Supreme Administrative Court articulates its reasoning when referencing earlier precedents.

HFD 2023 ref 24

The question of precedent

14. The Court of Justice of the European Union has ruled that Member States which make use of the option provided for in Article 137(1) of the VAT Directive to adopt national rules allowing taxable persons to choose whether or not to tax the letting of immovable property have a wide margin of discretion in determining the scope of those rules. However, Member States must take particular account of the principle of tax neutrality and the need for a correct, simple and uniform application of the exemptions from tax. The principle of neutrality prevents similar and therefore competing services from being treated differently for VAT purposes (judgement of the Court of Justice of the European Union in Case C-246/04, Turn- und Sportunion Wald- burg, EU:C:2006:22, paragraphs 27-33 and references made therein).

15. The purpose of voluntary tax liability is to avoid cumulative tax effects when premises are used in a taxable activity. If the property owner chooses to become liable for tax on the use, neutrality can be achieved between taxpayers who conduct business in their own and leased premises (Government Bill 1978/79:141, p. 67 ff.).

16. As a preliminary point, the Supreme Administrative Court notes that the meaning of the requirement of permanent use is not entirely clear. When it was introduced, the preparatory works stated that the purpose was to avoid situations where the tax liability constantly changes. It was also stated that the requirement of permanent use should be assessed on the basis of the property owner's intention with the letting (Bill 1985/86:47 p. 40).



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17. The Supreme Administrative Court has previously examined the applicability of these rules and found that the provisions on voluntary tax liability may also be applicable when the property owner intends to lease premises continuously but for several shortterm rental periods for use in taxable activities (HFD 2015 ref. 62). However, the Court has found that voluntary tax liability can only be granted for a certain property or certain part of a property (premises) and that it is therefore not possible to grant such tax liability for a percentage of the same area (HFD 2016 ref. 51). 18. The question at issue here is whether voluntary tax liability can be refused solely on the ground that several tenants occupy the same premises, even though all the tenants are either engaged in taxable activities or are public operators.

The case referenced as HFD 2023 ref. 45 serves as an example of a change in judicial precedent. The case concerned the allocation of the right to deduct input VAT in so-called mixed activities. Swedish legislation prescribes a reasonable basis as the allocation key. However, the Sixth VAT Directive stipulates a specific allocation key according to Article 173 – 175. In previous jurisprudence, the Supreme Administrative Court held that the Swedish rule was compatible with EU law (see HFD 2014 ref. 18). It should be noted, however, that although the Supreme Administrative Court refers to the Directive and CJEU judgments, it does not expressly state that there has been a change in precedent. Furthermore, it should be observed that the Supreme Administrative Court did not convene in plenum in the case HFD 2023 ref. 45.

8.4.2. Citations of previous European and national decisions

It is common for the Swedish Administrative Supreme Court to refer both European and national judgement.

The technique employed by the Supreme Administrative Court when referencing the CJEU and national decisions does not typically involve verbatim citations of the judgements/decisions; rather, references are generally made to a judgment as such. The Supreme Administrative Court also elucidates, albeit not in extensive detail, its interpretation of the law in force. In the following, an example illustrates on how the court cites both CJEU and national decisions.

HFD 2021 ref 18

10. However, it is settled case-law of the Court of Justice of the European Union that individuals may not rely on EU law in a way that constitutes tax evasion or other abuse (see, for example, Schoenimport "Italmoda" Mariano Previti and Others, C-131/13, C-163/13 and C-164/13, paragraph 43 and the case-law cited), According to the CJEU, national authorities and courts must therefore refuse to grant an exemption to a seller where it is established, having regard to objective



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factors, that the seller knew or ought to have known that, by making the sale, it would be involved in tax evasion in the context of the supply chain. This applies even if the evasion took place in another Member State and did not involve any gain for the seller himself. The tax administration bears the burden of proving that there has been tax evasion and that the seller knew or ought to have known about it (see, for example, Maks Pen, C-18/13, EU:C:2014:69, paragraphs 27-29; Schoenimport "Italmoda" Mariano Previti and Others, paragraphs 44, 45, 50, 62 and 69; Bakati Plus, C-656/19, EU:C:2020:1045, paragraph 80).

11. The CJEU has further clarified that the principle of abuse is a general principle of EU law, which means that the obligation for national authorities and courts to deny individual rights, such as the right to tax exemption, in cases of tax avoidance and other abuses, applies even if there are no provisions in national law which provide for this and which can be interpreted in an EU compliant manner (see Schoenimport "Italmoda" Mariano Previti and Others, paragraphs 51-59 and 62 and N Luxembourg 1 a n d others, C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraphs 117-119; cf. also HFD 2013 ref. 12 where the Supreme Administrative Court drew essentially the same conclusion, but then - with reference to previous case law from the CJEU - based on a reasoning on the possibility of interpreting the VAT Act in accordance with EU law)

8.4.3. Non-self-standing JPOL (subject = pronoun or other)

In general, the Supreme Administrative Courts seems to quote the interpretation of a rule or a previous decision in the same way as Italian courts. An example illustrating how the court quotes previously mentioned principle:

HFD 2023 ref 48

16. A fundamental principle of the VAT system is that the tax should be borne solely by the final consumer. It follows from the case-law of the Court of Justice of the European Union that the taxable amount of the VAT to be collected by the tax authorities may not therefore be higher than the consideration actually paid by the final consumer and on which the VAT ultimately charged to that consumer has been calculated (Elida Gibbs, C-317/94, EU:C:1996:400, paragraphs 19 and 28, and Boehringer Ingelheim Pharma, C-462/16, EU:C:2017:1006, paragraph 35).

17. In the case of a multi-stage sale of goods, the principle is maintained by allowing each buyer to deduct the VAT that the seller has added to the price and



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paid to the State. The VAT will thus be borne only by the buyer who has no right of deduction, which is normally a final consumer at the last stage

An example illustrating how the court quotes previously mentioned cases:

HFD 2023 ref 48

18. If a seller gives a discount and reduces the price after a sale, the VAT Act allows the seller, under certain conditions, to reduce the taxable amount and reduce his output tax. The European Court of Justice has ruled that price reductions made by the first supplier in a chain of transactions "skipping" some steps and giving the discount to someone further down the chain, do not have to be done by adjusting the taxable amount at each step. The deduction system ensures that the taxable amount at intermediate stages is not affected by the reduction. This is also the case where the reduction is passed on to someone who reimburses the consumer for the cost of the goods (Elida Gibbs, paragraphs 32-34 and Boehringer Ingelheim, C-717/19, EU:C:2021:818, paragraphs 40-45).

19. These cases concerned transactions which were taxed equally at all stages and where VAT had been charged on the sale to the final consumer. The reason why a vendor is entitled to reduce his taxable amount because of a price reduction in such transactions is that the price paid by the final consumer includes VAT and so does the amount by which that price is reduced (Commission v Germany, C427/98, EU:C:2002:581, paragraph 64).

Although the Supreme Administrative Court references principles, this is not always done explicitly. At times, it may be indirectly inferred that the court bases its judgment on a principle. The challenge lies in identifying this type of articulation.

8.4.5. Non-VAT JPOL

The Swedish Administrative Supreme Court sometimes refers to non-VAT JPOL, such as the principle of proportionality mentioned in the following judgement:

HFD 2021 ref 18

14. In the view of the Supreme Administrative Court, the Court of Appeal's approach is not supported by the case-law of the Court of Justice of the European Union. On the contrary, it is clear from the Court's case-law that combating tax evasion and abuse is an objective recognised and promoted in the VAT Directive and that the principle of the neutrality of VAT does not preclude the denial of a right to a person who has been involved in tax evasion (see, for example, Schoenimport "Italmoda" Mariano Previti and Others, paragraphs 42 and 48, and



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Bakati Plus, paragraph 80), Denying rights to an individual only where it can be ensured that this does not lead to double taxation would also make it considerably more difficult to combat unfair practices. Indeed, this would in many cases lead to a situation where tax could not be levied in any country despite the fact that it is clear that fraudulent acts have taken place in the supply chain and that the individual knew or should have known this. Therefore, the principle of proportionality cannot be considered to entail that the principle of abuse should be given such a limited scope of application as the Administrative Court of Appeal has considered.

8.4.6. One JPOL composed by statements to be found in different paragraphs

In more recent judgements from the Swedish Administrative Supreme Court, numbered paragraphs are used. Older judgements, on the other hand, is presented in a less structured form, without the use of paragraphs. An example illustrating this less structured form is HFD 2012 ref 18, relevant parts from the judgement can be read in the following. In the initial part of the judgement, the judgement made by the BAR is presented, along with the question whether the principle of predominance or the principle of allocation should be applied according to the facts given. However, The Swedish Administrative Supreme Court, does not explicitly mention the principles when giving their judgement under *Reasons for the judgement Questions*.

HFD 2012 ref 18:

In an application to the Tax Tribunal for an advance ruling, X AB (the Company), which was the group principal in X AB Mervärdeskattegrupp, stated, inter alia, the following. The Company intends to acquire from Y AB direct transport of customer correspondence and related goods and services. The goods and services in question are as follows:

- production packaging, including paper, envelopes, pallets and protective transport packaging, - production services, including printing, enveloping, sorting, bundling and packing on carriers, and

- distribution services, including the transport of individual postal items posted in Åland to the Company's customers in Sweden - the Company has not been able to deduce from the legal text, preparatory work or practice how taxation should take place in the present case. From the beginning of the year, the Swedish Tax Agency can impose value added tax on a transport service under Chapter 5 5 of the Value Added Tax Act (1994:200), ML, and Swedish Customs can impose value added tax on a transport service under Chapter 7. 8 ML and the Customs Code. Two authorities may thus tax the same transaction. It is also important that the



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relevant issues are clarified to avoid the risk of double taxation. The company would like a decision from the Tax Tribunal on the following issues.

- 1. Should the acquisition by the Company of the transport of customer correspondence, including the described goods and services in their entirety, be regarded as a single supply under the principle of predominance, or should the principle of splitting be applied to the supply?*
- 2. Should the supply by Y AB be considered a supply of goods or services?*
- 3. If the principle of predominance is to be applied and the supply constitutes a supply of services, is the transport service then the main service? If so, should the Company account for VAT on its acquisition in accordance with the new main rule for taxation of services provided to taxable persons, or should VAT be accounted for in accordance with the exemption in Chapter 3, Section 32 of the VAT Code?*
- 4. If the splitting principle is to be applied, and the supply constitutes a supply of services, should the splitting then take place by the Company accounting for VAT on its acquisition in accordance with the new main rule for taxation of services supplied to taxable persons, or should VAT be accounted for in accordance with the exemption in Chapter 3, Section 32 ML?*

X AB Mervärdeskattegrupp appealed the preliminary ruling and requested that the Supreme Administrative Court declare that the transactions in question in the case would constitute, firstly, a supply of goods and, secondly, two separate supplies in the form of goods and services respectively, and that the service would be exempt from taxation. Furthermore, compensation was claimed for costs in the Supreme Administrative Court. In that connection, the following was stated, inter alia. Y AB produced the mail items entirely in accordance with the model sent by X AB (the group principal). Without the provision of the mail item, i.e. the goods, the additional service, in the form of enveloping, addressing and transport, etc. was completely uninteresting to the group principal. The additional service was therefore to be considered subordinate to the supply of the goods. Since it was a question of import of goods, taxation would be handled by the Swedish Customs according to the applicable provisions. In the case of two separate supplies, the service, which essentially concerned transport, was considered exempt from taxation under Chapter 3, Section 32 of the General Tax Code because it was included as a secondary cost in the taxable amount for the import.

The Swedish Tax Agency also appealed the preliminary ruling and requested that the Supreme Administrative Court declare that the transactions at issue in the case constituted a single indivisible supply of goods. The Swedish Tax Agency thus granted the respondent's first request. In the event that there was a specific supply



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in the form of a goods transport service, the Swedish Tax Agency considered that such a service was traded in Sweden pursuant to Chapter 5, Section 5 of the Swedish VAT Act. 5 ML and that the exemption in Chapter 3, Section 32 ML was applicable only if the goods were taxed upon import. Furthermore, the Swedish Tax Agency contested the claim for compensation for costs in the case.

The Supreme Administrative Court (2012-06-19, Billum, Knutsson, Jermsten, Stenman, Saldén Enérus) gave its opinion:

Reasons for the judgement Questions

1-4 The agreement between the group principal and Y AB means that the latter company undertakes to handle the group principal's customer correspondence. As the Tax Tribunal notes, the assignment involves a number of different steps such as printing and enveloping of the correspondence and sorting and distribution of to the group principal's customers. To fulfil its mission, Y AB uses goods in the form of paper and envelopes.

In the opinion of the Supreme Administrative Court, the different parts of the assignment are so closely linked to each other that they may be regarded as constituting a single supply. What is mainly requested by the group principal is the actual distribution of the correspondence. The other elements may be considered subordinate to this part of the supply. The supply thus constitutes a transport service. In view of this and since the Supreme Administrative Court otherwise makes the same assessment as the Tax Tribunal, the advance ruling shall be confirmed.

8.4.7. Explicit qualification as JPOL or similar terms

As mentioned above regarding the precedential value of the Swedish Supreme Administrative Court, the judgement is applicable both at the case at hand and cases in general. However, a judgment from the Supreme Administrative Courts is only binding for the case as such. Lower courts, as the Administrative County Court, and/or the Tax Authority can choose to deviate from the “case law” established by the Supreme Administrative Court. In practice it is absolutely most common that precedents are followed.

HFD 2023 ref 24:

Decision of the Supreme Administrative Court

The Supreme Administrative Court declares that the question referred to it must be answered as follows. The requirement of permanent use in Chapter 3, Section 3, second paragraph, of the Value Added Tax Act does not mean that voluntary



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tax liability for the letting of premises cannot be granted solely because the premises are occupied by several tenants without any of them having exclusive rights to a specific area.

The Supreme Administrative Court grants leave to appeal in the part of the case that has been declared dormant and refers the case back to the Administrative Court of Appeal in Jönköping for further consideration in accordance with what is stated in the grounds of the judgement.

HFD 2012 ref 43:

Reasons for the judgement

Questions 1-4

The agreement between the group principal and Y AB means that the latter company undertakes to handle the group principal's customer correspondence. As the Tax Tribunal notes, the assignment involves a number of different steps such as printing and enveloping of the correspondence and sorting and distribution of to the group principal's customers. To fulfil its mission, Y AB uses goods in the form of paper and envelopes. In the opinion of the Supreme Administrative Court, the different parts of the assignment are so closely linked to each other that they may be regarded as constituting a single supply. What is mainly requested by the group principal is the actual distribution of the correspondence. The other elements may be considered subordinate to this part of the supply. The supply thus constitutes a transport service. In view of this and since the Supreme Administrative Court otherwise makes the same assessment as the Tax Tribunal, the advance ruling shall be confirmed.

[...]

Decision of the Supreme Administrative Court

The Supreme Administrative Court upholds the preliminary ruling of the Tax Tribunal. The Supreme Administrative Court rejects the claim for compensation for costs in the case.