

NNDKP CELF obtains a new court decision recognizing the right to deduct VAT on investment expenses in case of project abandonment



The NNDKP Center of Excellence in Fiscal Disputes (NNDKP CELF) has successfully represented a client in maintaining the recognition, through a final court decision, of the right to deduct VAT on expenses incurred for investments necessary to start or continue certain real estate projects that were ultimately not completed.

In this case, the taxpayer, a real estate developer, intended to start two real estate projects on the land they owned. The first project was not completed due to a legal dispute that prevented the start of construction. After the legal matter was resolved, the developer initiated the second project, which was not completed due to the municipality's refusal to issue a permit within the developer's desired technical parameters. Subsequently, the developer formally decided to abandon the project and to register the investment as a cost, as well as to sell the land. The entire process lasted around 13 years.

The National Agency of Fiscal Administration (ANAF) adjusted the VAT initially deducted by the company in relation to the real estate projects, arguing that *the company did not provide objective evidence to demonstrate that the abandonment of the investment was due to external factors beyond its control.*

Furthermore, ANAF calculated the 5-year limitation period imposed by the Fiscal Procedure Code by referring to the date of the formal decision to abandon the investment, rather than the date on which the VAT became due. Moreover, ANAF considered that no adjustment period applies to the VAT related to services acquired for the development of the real estate projects (the 5/20-year period for capital goods does not apply because, on the one hand, the capital good was not completed, and, on the other hand, there is no adjustment period for goods/services that are not capital goods). Therefore, ANAF adjusted the entire VAT deducted in relation to both projects, even in the instance when the due date occurred after the 5-year limitation period.

The fiscal law issue was resolved through the arguments presented by the **NNDKP CELF** specialists regarding the application and interpretation of the CJEU case law, the provisions of the Fiscal Code, and the Methodological Norms for the application of the Fiscal Code, arguments confirmed by the courts. The courts agreed that the abandonment of the investment was due to objective reasons beyond the taxpayer's control and, therefore, no VAT adjustment was required.

We frequently encounter in practice situations where a taxable person decides not to finalize an investment project for various reasons. While in the past the case law almost exclusively originated from the real estate sector, currently, such cases are also found in the manufacturing or retail sectors.

Following older CJEU case law, the Methodological Norms stipulate that the right to deduct VAT on incurred expenses is preserved, even if the project was subsequently abandoned for objective reasons that could not have been foreseen or controlled and that were beyond their control.

In practice, ANAF often applies this concept in a restrictive manner, going so far as to challenge certain business decisions, which exceeds their powers. In other cases, ANAF imposes adjustments not necessarily based on the reason for the abandonment, but on what happens subsequently (if the company carries out other economic activities or not). The difficulty here arises from the fact that certain goods or services are specific to a particular project and might be difficult to repurpose.

Both recent CJEU and national case law in this respect are extensive but inconsistent. They rely heavily on specific circumstances rather than on principles, and often hinge on the proof of motives and future intentions of companies.

The courts have accepted the conclusions presented by **NNDKP CELF** according to which, based on the legislative and case law analysis undertaken, a taxable person retains the VAT deduction (does not have to adjust the VAT) when they abandon a project for objective reasons beyond their control and sell the salvageable assets subject to tax.

The question of the adjustment period for the deduction of VAT on ongoing investments that have not been completed and turned into capital goods remains open.

The NNDKP team that provided assistance and representation in this case included **Alexandru Aparaschivei**, Partner, NNDKP Tax Advisory Services, **Marius Ezer**, Partner, Dispute Resolution practice and **Florentin Nanu**, Senior Associate, Dispute Resolution practice.

NNDKP CELF provides integrated legal and tax services from the initial stage of a fiscal dispute until and during the litigation stage before the Romanian courts, offering a seamless approach throughout the fiscal dispute.

About NNDKP

Nestor Nestor Diculescu Kingston Petersen is a promoter of business law in Romania with more than 30 years of experience, independently acknowledged as a pioneer of the Romanian legal market. NNDKP offers full-service and integrated legal and tax advice to companies from diverse industry sectors.

NNDKP represents Romania in some of the most prestigious international professional alliances - Lex Mundi, World Services Group, International Attorneys Club - and is a founding member of SEE Legal and Three Seas Legal Alliance. The firm is constantly top ranked in all practice areas by the renowned international guides Chambers & Partners, Legal 500 and IFLR 1000.

NNDKP is a 6-time winner of the “Romania Law Firm of the Year” award at the Chambers Europe Awards gala, in 2022, 2021, 2017, 2013, 2012 and 2009.