

Newsalert

EU Direct Tax Group

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PRELIMINARY QUESTIONS IN CASE C-261/05 (LAKÉP KFT ET AL): HUNGARIAN LOCAL BUSINESS TAX BEFORE THE ECJ

In Hungary, several businesses have taken court action to establish that the Hungarian local business tax (LBT) is unlawful, arguing that it contravenes EU legislation.

As the County Court of Komárom-Esztergom was uncertain about the correct interpretation of Community law, it suspended proceedings concerning the unlawfulness of the LBT by order of 29 April 2005, and referred the following questions to the ECJ for a preliminary ruling:

1. *What, according to Sixth Council Directive 77/388/EEC of 17 May 1977, are the criteria which allow a tax to be characterised as a tax having the nature of a turnover tax?*
2. *Should a tax the taxable basis of which is the net turnover corresponding to sales made or to services provided, after deduction of the purchase price of the goods sold and the value of the services provided by third parties, and also of the material costs (or a certain proportion thereof), be regarded as having the nature of a turnover tax?*
3. *Is Article 33 of the directive to be taken to mean that in the Member States only a single tax having the nature of a turnover tax may be maintained?*
4. *In so far as two or more taxes having the nature of turnover taxes are maintained in a Member State after accession to the European Union, is the assessment, with retroactive effect, of a tax - relating to a period before accession - contrary to Article 33 of the directive?*

The consequences of the ECJ answering these questions in favour of Lakép Kft, i.e. ruling that the LBT is not compatible with the Sixth Directive, would be as follows.

Taxpayers that have lodged their claim within the statutory time limit of 5 years following the date of payment of the LBT would be able to reclaim the LBT retroactively.

However, in case C-475/03 (Banca Popolare di Cremona or IRAP-case), involving a similar issue concerning an Italian tax, the Advocate General recommended that the ECJ change the current legal practice and declare the tax concerned incompatible with EU legislation, but only with regard to the future. If the ECJ would be to follow that recommendation and would also hand down a similar decision in the case of Lakép Kft, then retrospective claims might be rejected. The final judgment in the Italian case is expected before the end of this year and may be a first indication. It should be emphasized, however, that the facts and circumstances in the case of Lakép Kft will be judged on their own merits.

If the ECJ does consider the Italian tax to be unlawful with retroactive effect, this would be an indication that the case of Lakép Kft will be decided in a similar fashion. Hungarian businesses still have time to take the legal measures necessary for maintaining their right to reclaim tax within the 5-year time limit as described above. They only need to make sure that the relevant local authority does not close – by means of a state tax audit – the tax period concerned.

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