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By PwC Deutschland | 09. September 2024

ECJ: No direct claim for refund of VAT in case of incorrect invoice

The Supreme Tax Court had asked the European Court of Justice for a preliminary ruling on the question of a direct refund claim in the case of incorrectly invoiced and paid German VAT in the event of the supplier's insolvency. In its judgment, the ECJ is of the opinion that the recipient of the service cannot claim a refund of the VAT paid to the supplier directly from the tax authorities of his Member State.

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Background

The business purpose of the applicant (KG) was the hiring of movable property to other undertakings via sale and leaseback transactions. The dispute concerns six sale-and-leaseback transactions carried out by KG for the benefit of E-GmbH, another German company. E-GmbH purchased a new motorboat from E-sr, a company established in Italy. The corresponding invoices bore the reference ‘intra-Community supply’ and did not contain any VAT. The purchase price of each boat was paid in full by E-GmbH. In the following sale and lease back E-GmbH sent KG a sales invoice for the boat on which German VAT was expressly mentioned, included that VAT in its tax returns and paid it to the competent local tax office of the applicant. That invoice gave no indication of where the boat was located at the time of sale. In its VAT returns, KG deducted, in respect of the input VAT paid, the VAT entered on that invoice. Lastly, E-GmbH and KG entered into a leasing agreement concerning the boat for a period of 36 months.

The tax office concluded that the supplies of boats had to be classified as supplies without transport which were not taxable not in Germany but in Italy where those boats were located at the time of their sale. It stated that the VAT invoiced by E-GmbH to KG could not be deducted by KG as input VAT.

Later, E-GmbH underwent insolvency proceedings. The liquidator of E-GmbH revoked the VAT statement in the amount of the invoices for the delivery of the boats. In this respect, it was doubtful whether the plaintiff could derive a claim for reimbursement against the tax authorities, as claims for reimbursement under civil law were no longer enforceable due to the insolvency of E-GmbH and the plaintiff was therefore wrongly charged VAT.

Decision

The ECJ concluded that *“under the VAT Directive the recipient of a service may not request directly from the tax authority of the Member State in whose territory it is established the refund of the VAT which it paid to the supplier of that service who erroneously has invoiced the German VAT instead of the VAT legally due in another Member State (Italy) and paid it to the German tax authorities, especially where the latter have already refunded the VAT to the supplier, which in the meantime has gone into liquidation.”*

As to the **comparability of the present case with the *Reemtsma***

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judgment (as asked by the Supreme Tax Court) the ECJ notes that the present dispute concerns claims for a refund of VAT which has been unduly invoiced and paid, and that the German tax office had already repaid the VAT unduly paid by the recipient of the services to the insolvency estate of the supplier of the services. In those circumstances, the case-law arising from the judgment *Reemtsma Cigarettenfabriken* cannot be applied to the issue at hand for the following reason:

If, in the event of VAT unduly invoiced and paid, a tax authority, at the request of the supplier of services, had already refunded the VAT and had to refund that VAT to the recipient of the services, the tax authority would be in the siuation to refund that VAT twice.

In such circumstances, it is indeed true that it could not be ruled out from the outset that the purchaser would find itself in a situation where it is impossible or excessively difficult to bring a civil action against the court-appointed insolvency administrator with a view to having an invoice including Italian VAT drawn up and that that purchaser would subsequently be prompted to make a reimbursement request directly to the tax authority.

It should be recalled, however, that the possibility for the purchaser or recipient to make its request for the refund of VAT which has been unduly invoiced and paid ‘directly’ to the tax authority constitutes an exception and is only available if the recovery of that VAT from the supplier is impossible or excessively difficult.

To require the German tax authority to determine whether the fact that the court-appointed insolvency administrator responsible for the liquidation of the service provider will not declare in Italy the Italian VAT might constitute a VAT fraud in that Member State goes beyond what may reasonably be imposed on a national tax authority in accordance with the objective of preventing potential fraud, tax evasion, and abuse.

After all, the applicant, in order not to have to bear the cost of the VAT concerned, could have brought a civil action against the insolvency administrator responsible for the liquidation of the supplier of the services in order to have an invoice including Italian VAT drawn up, an action which it did not pursue.

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ECJ judgment of 5 September 2024 **C?83/23** *H GmbH*.

Schlagwörter

incomplete invoice, insolvency, refund claim