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By PwC Deutschland | 13 December 2021

ECJ: Deduction of input VAT only after supplier’s status as taxable person has been verified

In a Czech case the ECJ once again had the opportunity to comment on the material requirements for the deduction of input VAT. In the current case, the focus of the judicial review was on the ways to demonstrate and prove that the supplier of the service is a taxable person within the meaning of the VAT Directive.

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Background

The Czech request for a preliminary ruling deals with the right to deduct VAT in cases of suspected tax evasion or abuse. The circumstances of the case are similar to those addressed by the ECJ in its judgment of 11 November 2021 (**C?281/20,***Ferimet)* to which the ECJ – not quite surprisingly as a matter of fact - makes frequent references and citations in its current judgment in the Czech *Kemwater ProChemie* case.

***Note:** In the *Ferimet* judgment the ECJ has held: "*That a taxable person must be refused the right to deduct VAT relating to the acquisition of goods supplied to that taxable person where he or she has knowingly mentioned a fictitious supplier on the invoice which that taxable person him- or herself has issued in respect of that transaction under the reverse charge procedure, if, taking into account the factual circumstances and the evidence provided by that taxable person, the information necessary to verify that the true supplier had the status of taxable person is lacking, or if it is established to the requisite legal standard that the taxable person has committed VAT fraud or knew or ought to have known that the transaction relied on as a basis for the right of deduction was connected with such a fraud.*"

The referring Czech court wants to know if it is compatible with the VAT Directive that the right to deduct input VAT requires the taxable person to prove that the taxable service or supply received was made by another specific taxable person (entrepreneur). If this question is answered in the affirmative and the taxable person fails to fulfil that obligation, can the right to deduct input VAT be refused without it being established that that taxable person knew or could have known that, by acquiring the goods or services in question, he was participating in tax fraud?'

ECJ decision

Summary of the court: *Council Directive 2006/112/EC of 28. November 2006 must be interpreted as meaning that deduction of input VAT must be refused (without the tax administration having to prove that the taxable person committed VAT evasion or knew or ought to have known of evasion) if the taxable person fails to prove that the true provider of the services in question was a "taxable person". However, this only applies if – based on the factual circumstances and the information provided by the taxable person - the information necessary to verify whether the true supplier or provider of services was a taxable person is lacking.*

Regarding the questions submitted the Court provided the following explanations:

- The fundamental principle of VAT neutrality requires deduction of input VAT to be allowed if the material conditions are satisfied, even if the taxable person has failed to comply with some of the formal conditions (judgment of 11 November 2021, *Ferimet*, C?281/20, item 33).
- The situation may, however, be different if non-compliance with formal requirements effectively prevents the production of conclusive evidence that the substantive requirements have been satisfied (judgment of 11 November 2021, *Ferimet*, C?281/20, item 36 and the case-law cited).

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- Thus, although, in the context of fighting VAT fraud, a taxable person wishing to exercise the right to deduct VAT cannot, as a general rule, be required to check that the supplier of the goods or services concerned has ‘taxable person’ status, the position is different if establishing that status is necessary for the purpose of verifying that the material condition governing the right of deduction is satisfied (judgment of 11 November 2021, *Ferimet*, C?281/20, EU:C:2021:910, item 42).
- In the latter situation, it is for the taxable person to establish, based on objective evidence, that the supplier has the status of taxable person, unless the tax authorities have the information necessary to check that that material condition governing the right to deduct VAT is satisfied. In that regard, it follows from the wording of Article 9(1) of Directive 2006/112 that the concept of ‘taxable person’ is defined widely, based on factual circumstances, and therefore that the supplier’s status as a taxable person may be apparent from the circumstances of the case (judgment of 11 November 2021, *Ferimet*, C?281/20, item 43).

Conclusion: To deny a taxable person the right to deduct VAT on the ground that the true supplier of the goods or services concerned has not been identified and that that taxable person has not proved that that supplier was a taxable person, when it clearly follows from the factual circumstances that that supplier necessarily had that status, would be contrary to the principle of fiscal neutrality and to previous case-law. Consequently, and contrary to the referring court’s submissions, to exercise that right, the taxable person cannot in every case be required to prove, where the true supplier of the goods or services concerned has not been identified, that that supplier has the status of taxable person.

Source:

The ECJ case reference is **C?154/20** *Kemwater ProChemie* judgment of 9 December 2021.

Keywords

VAT fraud, input VAT deduction, taxable person