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By PwC Deutschland | 31 May 2023

ECJ: Input VAT deduction in case of invalidity of the transaction under civil law

The invalidity of a legal transaction under national civil law cannot as such lead to the exclusion of the deduction of input VAT. According to a decision of the ECJ, however, this only applies if the national court has examined and ensured that the transaction is not a fictitious transaction or that, if this transaction was physically carried out, it is neither in connection with VAT evasion nor considered as an abuse of rights.

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Background

In 2015, *M. sp. z o.o. S.K.A*., (a company similar to a partnership limited by shares) issued an invoice for an assignment of trademarks to *W.* including the statutory VAT, which was declared and paid by *W*. The tax authority called into question the right to deduct the VAT in respect of said invoice on the ground that the assignment of trademarks was invalid under Article 58(2) of the Polish Civil Code, namely that it was contrary to the rules of social conduct.

The referring polish court has doubts as to whether the national VAT regulation is compatible with the EU VAT Directive. Therefore, the following question was submitted to the European Court of Justice (ECJ) for a preliminary ruling:

Must the VAT Directive and the principles of neutrality and proportionality be interpreted as precluding a national provision, which deprives a taxable person of the right to deduct VAT on the acquisition of a right (asset) which deemed to have been made under false pretenses (…) and irrespective whether the result sought was a tax advantage, which would be contrary to EU law (…)?

ECJ decision

First, the ECJ points out that it had already decided that it is inherent in the VAT scheme that a fictitious acquisition or transaction cannot give rise to an entitlement to deduct VAT, since such a transaction cannot be connected in any way to actual output transactions (judgment of 8 May 2019 *EN.SA.* **C?712/17**, paragraphs 24 and 25 and the case-law cited). Hence, the Court notes that the burden of proof lies with the taxable person, who is required to provide objective evidence that goods and services were provided as inputs by another taxable person for the purposes of his or her own transactions being subject to VAT. The assessment of the evidence produced to establish whether there is a taxable transaction must be done by the national court in accordance with the rules of evidence under national law, thereby carrying out an overall assessment of all the facts and circumstances of the case.

If it is found by the referring court that the assignment of the trademarks did not actually take place, input VAT may not be deducted. If, however, it is apparent from that overall assessment that the assignment was in fact carried out and that the assigned trademarks were used by the taxable person for the purposes of his taxed output transactions, input Vat deduction cannot, in principle, be denied. However, in the latter case, the taxable person may be refused of the right to deduct input VAT if it is established, in the light of objective evidence, that that right is being relied on for fraudulent or abusive ends.

The ECJ summarizes the questions referred by the polish court as follows:

Article 167, Article 168(a), Article 178(a) and Article 273 of the VAT Directive 2006/112/EC must be interpreted as precluding national legislation under which a taxable person is deprived of the right to deduct input value added tax solely because a taxable economic transaction is regarded as fictitious and invalid under the provisions of national civil law, without it being necessary to establish that the criteria for classifying, under EU law, that transaction as fictitious are met or, where that transaction has actually been

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carried out, that it is the result of value added tax evasion or abuse of rights.

Source:

ECJ judgment of 25 May 2023 in the case **C-114/22** - *Dyrektor Izby Administracji Skarbowej w Warszawie (TVA - Acquisition fictive)*.

Keywords

abuse of rights, input VAT deduction