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ECJ: VAT liability of employee issuing fake invoices in the name of employer

Following a polish request for a preliminary ruling the European Court of Justice held that an employee using employer's details to issue fake invoices is liable for VAT incurred thereon. Such is the case if the employer, who is a taxable person for VAT purposes, has exercised the due diligence reasonably required to monitor the conduct of its employee.

Background

In several cases the European Court of Justice (ECJ) had to deal with the topic of combating VAT fraud and the extent of the 'liability for VAT. It is sufficient for such liability that the undertaking ought to have known that by its purchase it was taking part in a transaction connected with VAT fraud. The **request for a preliminary ruling from Poland** concerned the question to what extent the taxable person (the employer) is liable for its employees who, without the employer's knowledge, have intentionally assisted other taxable persons, in an organized and criminal manner, in committing VAT fraud (probably together with income tax fraud).

In the case at hand, staff at a petrol station collected discarded payment receipts and then, using a second 'entry system', created new invoices for the amounts of fuel indicated on those receipts, which they sold to interested persons. Those persons used the amounts for fuel supplies (which never actually took place) for deduction of input tax in their VAT return and probably also for deduction of operating expenses in their income tax return. The fake invoices were not recorded in that company's tax returns. They were used by those who received them to obtain an undue refund of VAT, without the corresponding tax having been paid into the State budget.

Decision

The ECJ held that VAT cannot be payable by the apparent issuer of a fake invoice where it is acting in good faith and the tax authority is aware of the identity of the person who issued the invoice. In such a situation, it is that latter person who is liable for payment of the VAT. A different interpretation would be contrary to the objective of the VAT Directive, which is to prevent fraud and to stop individuals from fraudulently relying on the rules of EU law.

In order to be regarded as having acted in good faith, the taxpayer (employer) is required to prove that it has exercised the due diligence reasonably required to monitor the conduct of its employee and, in doing so, to prevent its details from being used to issue fake invoices. In the absence of such proof, the employer must be regarded as having the obligation to pay the VAT indicated on the fake invoices. It is for the tax authority or the national court to assess, in the light of all the relevant factors, whether the employer has exercised such due diligence.

Source:

ECJ, judgment of 30 January 2024 (**C-442/22**) *Dyrektor Izby Administracji Skarbowej w Lublinie (Fraude d'un employé)*. ECJ **press release No. 22/24** of 30 January 2024.

Keywords

VAT fraud