Kluwer International Tax Blog

The Contents of Highlights & Insights on European Taxation, Issue 5, 2022

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Highlights & Insights on European Taxation

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– ***Wilo Salmson France*** **(C-80/20)**. Right to VAT deduction. No deduction without invoice. Court of Justice

(comments by **Pawel Mikula**) (H&I 2022/136)

The sole conclusion of the judgment itself with respect to the main issue (possibility of reapplying for the same refund) is not surprising: a taxable person may not reapply for a second time for a refund on the basis of Directive 2008/9/EC (Directive 2008/9/EC laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State ('the Refund Directive') OJ L 44, 20.2.2008, p. 23-28) by indicating the reissued invoice in respect of the same supply.

Such a conclusion seems to follow from a mere linguistic interpretation of the provisions of that directive. According to Article 14(1)(a) of Directive 2008/9/EC: 'the refund application shall relate to … the purchase of goods or services which was invoiced during the refund period, provided that the VAT became chargeable before or at the time of the invoicing …'. According to Article 15(1) of Directive 2008/9/EC, 'the refund application shall be submitted to the Member State of establishment at the latest on 30 September of the calendar year following the refund period'.

The adoption of a different approach (that it is possible to apply for a refund more than once – if only the purchaser again receives an invoice documenting the same sale) would render the above provisions ineffective. This conclusion is also what the Court held in the judgment under comment. However, the CJ was also obliged to consider another issue: whether it is necessary to hold an

invoice to make a VAT deduction and what it means to ‘hold’ or ‘receive’ an invoice.

This issue was crucial to the case. If it is considered that possession of an invoice is not necessary, the right to refund was undoubtedly time-barred in 2015, as it arose in 2012. If, on the other hand, possession of an invoice is necessary, then the time limit for requesting a refund passed around 2012 (if the invoice is considered to have been issued at that time) or it passed around 2015 (if one believes that the invoice was issued in 2015). This is also how this problem was outlined by Advocate General Kokott (22 April 2021(1), C-80/20 Wilo Salmson France SAS v Agen?ia Na?ional? de Administrare Fiscal? – Direc?ia General? Regional? a Finan?elor Publice Bucure?ti – Administra?ia Fiscal? pentru Contribuabili Nereziden?i, ECLI:EU:C:2021:326, paragraph 48 of the Opinion).

These problems – i.e., the issue of having an invoice as a condition for the right to deduct – has not, in the author’s opinion, been unequivocally resolved in CJ case law so far. On the one hand, the CJ has repeatedly held that the benefit of a favourable taxation standard (VAT deduction, exemption) should depend exclusively on the fulfilment of substantive conditions (being a taxable person, performance of a taxable activity, use of inputs for taxable activities), and should not depend on the fulfilment of formal conditions (registration, possession of certain documents).

The mere possession of an invoice document, according to the author, is a formal condition. This is also the view of the CJ, e.g., in para. 71 of the commented judgment. At the same time, however, although the possession of an invoice is a formal condition, the Court has ruled to date that it is a necessary condition for VAT deduction (at least for domestic acquisitions).

However, it seems that this contradiction has been clarified by the Court in recent months. Thanks to this commented judgment and the judgment in the Zipvit case (CJ 13 January 2022, C-156/20 ECLI:EU:C:2022:2) and the Opinion of Advocate General Juliane Kokott (8 July 2021 (1) C?156/20 Zipvit Ltd v The Commissioners for Her Majesty’s Revenue & Customs, ECLI:EU:C:2021:558) on these two cases, this conundrum has a chance of being solved. The judgments provide a coherent theory linking the two prima facie contradictory views.

What then is this new coherent picture? To reproduce it, in my view, is as follows. A Member State may not make the right to deduct subject to formal conditions. However, to deduct input VAT, it must be established that the amount of VAT was actually passed on by the seller to the purchaser. And the only instrument for this may ultimately be the invoice – in the case of a domestic sale at least. It does not have to be a document rigorously judged by its content – any document by which the seller effectively passes the tax on to the purchaser will suffice. This seems to follow from paras. 61-62 of the Advocate General’s Opinion to this commented case, from para. 63 of the Advocate General’s Opinion in the Zipvit case and the judgment in the latter case, as is explained in my Comment, ‘Zipvit VAT deduction’ published in H&I 2022/76).

This finally seems to correspond to the Court’s conclusion in para. 81 of the commented judgment: ‘Consequently, only if a document is affected by defects which deprive the national tax authorities of the data necessary to justify a request for reimbursement can such a document be regarded as not constituting an ‘invoice’ within the meaning of the VAT Directive, with the result that the right to reimbursement cannot be exercised where the taxable person has come into possession of such a document’.

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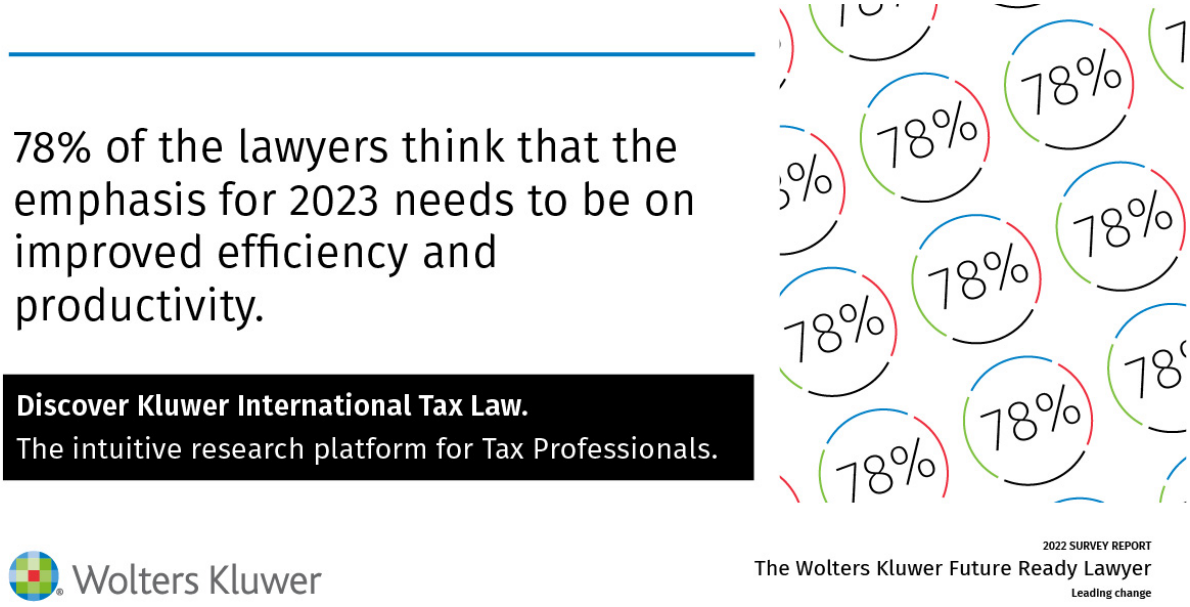

This entry was posted on Monday, May 23rd, 2022 at 10:44 am and is filed under Customs and Excise, Direct taxation, EU law, Indirect taxation
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