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The Contents of Highlights & Insights on European Taxation, Issue 6, 2023

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Highlights & Insights on European Taxation

Please find below a selection of articles published last month, June 2023 in [Highlights & Insights on European Taxation](#), plus one freely accessible article.

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– *Aquila Part Prod Com (C-512/21)*. No VAT deduction in case of carousel fraud. Objective evidence. Court of Justice

(comments by **Marie Lamensch**) (H&I 2023/143)

‘Should have’ or ‘could have’?

The judgment released by the Court of Justice of the European Union (hereinafter: ‘CJ’) in this case once again highlights the difficulties of applying in practice the so-called ‘Kittel’ doctrine (CJ 6 July 2006, C-439/04 *Axel Kittel v Belgian State* and C-440/04 *Belgian State v Recolta Recycling SPRL*, [ECLI:EU:C:2006:446](#)), i.e., the CJ’s case law-based third-party liability rule whereby the tax authorities may refuse a taxable person the right to deduct input VAT if that person ‘knew or should have known’ that transactions to which he has been a part are involved in a fraud (see also, inter alia, CJ 12 January 2006, C-354/03 *Optigen*, C-355/03 *Fulcrum Electronics Ltd*, and C-484/03 *Bond House Systems Ltd v Commissioners of Customs & Excise*, [ECLI:EU:C:2006:16](#), C-131/13; CJ 18 December 2014, C-131/13 *Staatssecretaris van Financiën v Schoenimport ‘Italmoda’ Mariano Previti vof and Turbu.com BV and Turbu.com Mobile Phone’s BV v Staatssecretaris van Financiën*, [ECLI:EU:C:2014:2455](#); and CJ 14 February 2019, C-531/17 *Vetsch Int. Transporte GmbH v Zollamt Feldkirch Wolfurt*, [ECLI:EU:C:2019:114](#)). There are, most probably, cases where the taxable person was perfectly aware of the fraud, and it is possible to demonstrate that he willingly turned a blind eye to it. In other situations, however, it might be delicate to determine what someone ‘should have known’ something.

In *Aquila Part Prod Com* (C-512/21), the investigations of the tax authorities lasted almost five years. At the end of such an investigation, it seems that a fraudulent pattern appeared very clearly. However, this does not necessarily mean that it was known by the taxable person. This is why, as the CJ confirmed, due diligence may be required by the taxable person, however, without this

taxable person being required to conduct an in-depth investigation. It is noteworthy, however, that in its answer to the fourth question raised by the referring court, the CJ uses the words ‘could have known’ (*‘aurait pu savoir’*, see paragraph 45 of the case at comment) and not ‘should have known’ (*‘aurait dû savoir’*), although ‘should have’ and ‘could have’ have different meanings.

Ignoring this difference broadens the scope of application of this third-party liability rule, whereby a person who did not commit the fraud himself is deprived of the right to deduct input VAT (unfortunately, the same transition from ‘should’ to ‘could’ can be found in other CJ judgments such as CJ 11 November 2021, C-281/20 *Ferimet*, [ECLI:EU:C:2021:910](#) and CJ 11 April 2021, C-108/20 *Finanzamt Wilmersdorf*, [ECLI:EU:C:2021:266](#)).

All factual elements potentially relevant

Following this judgment, it becomes clear that there do not seem to be any factual circumstances that would be considered generally irrelevant. In this case, the CJ clarified that the national court may take into consideration an alleged infringement of an obligation arising from an EU legislation other than VAT legislation (paragraph 57 of the case at comment). This is an element that may indeed seem relevant. However, if the procedure is still pending and the infringement has not yet been confirmed, the reference to an ongoing procedure is likely to cast doubts on the integrity of the taxable person, even if this is not justified, and the complaint against the taxable person is eventually dismissed. On whether this may not infringe on the right to a fair trial, the CJ replied that the right to a fair trial only requires that the taxable person be able to challenge the allegation made against him. One may wonder whether this is sufficient protection, as it is unlikely that an alleged non-tax infringement can adequately be addressed during the judicial tax procedure (and even if the factual element is eventually not considered relevant, the doubts might play in the disfavour of the taxable person).

Is third-party liability the suitable approach to address organized VAT fraud?

Now turning to the effectiveness of this third-party liability rule arising from the CJ case law to tackle VAT fraud, we should bear in mind that if this rule probably allows tax authorities to limit the damage of the fraud by denying deduction or refund requests, it does not suppress the fraud itself. The real fraudsters are still out there, and the future looks bright for them if third-party liability – a rule that does not harm them because it only impacts other taxable persons – becomes the ultimate weapon for tax authorities.

Let us also bear in mind that this third-party liability rule does not apply in carousel frauds involving services, as confirmed by the CJ in Case C-641/21 (CJ 27 October 2022, C-641/21 *Climate Corporation Emissions Trading*, [ECLI:EU:C:2022:842](#)).

If the VAT in the Digital Age proposal by the European Commission of 8 December 2022 (hereinafter: the ‘ViDA proposal’) is adopted, B2B transactions will have to be reported in almost real-time by both the supplier and the customer. This will reduce the time gap for receiving information regarding intra-community transactions. However, will it be sufficient to put an end to carousel fraud, knowing that, currently, fraudsters are able to steal billions of euros using a carousel scheme for months or years in spite of periodically reported information in the VAT Information Exchange System (VIES) (see Operation Admiral in which the European Public Prosecutor Office announced that the fraudsters were able to steal 2.2 billion EUR over several

years)? At least with real-time reporting, we will be able to say that the tax authorities ‘should’ or ‘could’ have known when a massive fraud is uncovered several years after it started.

Prof. Marie Lamensch

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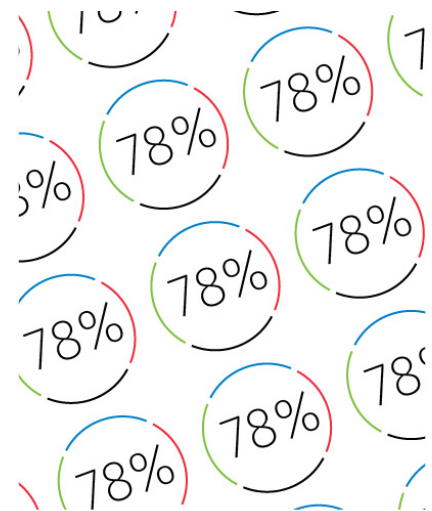
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