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Highlights & Insights on European Taxation

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FREE ARTICLE

– ***H GmbH* (C-83/23)**. No refund of VAT wrongly charged directly to purchaser. Risk of double VAT refund. Court of Justice

(comments by **Marie Lamensch**) (*H&I* 2024/262)

A different fact pattern as compared to previous cases

Since the 2007 judgment by the Court of Justice of the European Union (hereinafter: 'CJ') in *Reemtsma* (CJ 15 March 2007, C-35/05 *Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze*, ECLI:EU:C:2007:167), we know that tax authorities must accept direct requests for refunds of wrongly paid VAT made by customers in situations where obtaining reimbursement from the supplier would be impossible or excessively difficult. This was confirmed in 2019 in *PORR Építési Kft* (CJ 19 April 2019, C-691/17 *PORR Építési Kft. v Nemzeti Adó- és Vámhivatal*

Fellebbviteli Igazgatósága, ECLI:EU:C:2019:327), in 2022 in *Humda* (CJ 13 October 2022, C-397/21 *HUMDA*, ECLI:EU:C:2022:790) and, more recently, in 2023 in *Schütte* (CJ 7 September 2023, C-453/22, *Schütte*, ECLI:EU:C:2023:639).

From this body of case law, we also know that this right of a direct refund can only be granted if the risk of loss of tax revenue has been waived, which excludes situations where the supplier, in fact, has not paid the VAT to the Treasury. In this case, the VAT had initially been paid, albeit it had already been refunded to the supplier. Granting a direct right to a refund to the customer in this situation would, therefore, have resulted in a loss for the Treasury, and thus, logically, it was refused.

In my opinion, this decision should not, however, be considered as a mere repetition of previous case law applied to similar facts.

In previous judgments, indeed, the 'impossibility' of obtaining reimbursement was due to the fact that the supplier had been liquidated and, therefore, no longer requested reimbursement (except in *Schütte* (C-453/22), where, rather, the supplier refused to reimburse the customer and invoked a limitation period). In all those cases, the supplier was not going (to be able) to ask for the refund himself. In contrast, in this case, the supplier was declared insolvent but still decided to request a refund of the wrongly collected VAT. This, even though he knew that he would most likely not be able to reimburse the customer because of the application of the insolvency rules governing the order of priority of creditors. This different fact pattern is very important because, after this judgment, it seems that in situations where the insolvent supplier is first to introduce a request for a refund, the wrongly collected VAT will automatically be included in its insolvency estate, with little chance for the customer to be reimbursed. In contrast, in situations where the customer is the first to introduce the request for a direct refund (on the grounds that it would otherwise be impossible or extremely difficult to obtain reimbursement from the supplier due to its insolvency), the tax administration might be required to grant it.

In my opinion, the question arises whether, based on the neutrality principle, the right to a VAT refund should not always be preserved for the customer who wrongly paid it in the case the supplier has been declared insolvent (whether the procedure is still ongoing or not). One way to do that would be to provide VAT legislation that the reimbursement of wrongly invoiced VAT to a supplier should be refused when this supplier has been declared insolvent in order to allow for direct reimbursement to the customer.

The other means would be to provide in the insolvency legislation that when wrongly collected VAT is being reimbursed to an insolvent supplier, this should not become a part of the insolvency estate but a debt thereof, which should directly be reimbursed to the customer. Since VAT is merely 'collected' by the supplier with a view to pass it on to the State, and is usually to be reported separately in the accounts as 'collected VAT' (which corresponds to a debt towards the State), there are in my view strong arguments to support that it should never be an amount that is available to its creditors once it has been declared insolvent, whether before payment to the State (where it is considered as a debt towards the State) of after reimbursement by the State (where it should be considered as a debt of the insolvency estate towards the customer).

In the absence of such provisions in the VAT or insolvency legislations, the result is not, in my opinion, satisfactory, because it enables suppliers who wrongly charged VAT to request for it to be reimbursed with the intention to use it for the settlement of their own debts and not for the purpose

of reimbursing the customers to whom they have wrongly charged it.

‘*Impossible or excessively difficult’?*

In *Schütte* (C-453/22), the CJ confirmed the existence of a right to a direct refund in circumstances in which it may be ‘impossible or excessively difficult’ to obtain reimbursement and clarified that it is also the case when the impossibility to obtain reimbursement from the supplier is due to the expiry of a limitation period.

In this case, it is, in my view, unclear whether the CJ considered that KG would have been entitled to a refund at all, even if the refund had not yet been made to the supplier. As a matter of fact, the CJ states that ‘impossible or excessively difficult’ presupposes that ‘the purchaser or recipient has not ignored any possibility of asserting its rights outside that situation’. The CJ then pointed out that KG should have made its best effort to obtain a corrected invoice (with Italian VAT) and, to that end, could have brought a civil action against the insolvency administrator responsible for the liquidation of E-GmbH with a view to having an invoice which included Italian VAT. It is unclear to me whether the CJ draws from those findings the conclusion that KG should not have been granted a direct refund (the operative part of the decision does not include a decision on this point). But if that is the case, I find it disputable, as I fail to see why this request for a correction should be a decisive criterion for granting the refund of German VAT. Moreover, this is probably not a factor that the tax authorities would have been able to take into account before granting the refund to E-GmbH.

Prof. Marie Lamensch

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