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**EY VAT News – week to 26 April 2021**

Topics – Timing of the right to VAT deduction – VAT deduction without valid invoice

[**C-80/20 Wilo Salmson France**](https://curia.europa.eu/juris/documents.jsf?oqp=&for=&mat=or&lgrec=en&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-80%252F20&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=2075940)

On 22 April 2021 the Court of Justice of the European Union (CJEU) delivered the opinion of Advocate General Kokott (AG) in this Romanian referral regarding the interpretation of Article 167 of the VAT Directive, read in conjunction with Article 178. Is there a distinction between the moment the right of deduction arises and the moment it is exercised with regard to the way in which the VAT system operates; whether the right to deduct VAT may be exercised where no (valid) tax invoice has been issued for the purchase of goods? Can an application for a refund be made in respect of VAT which became chargeable prior to the ‘refund period’ but which was invoiced during the refund period? What are the effects of the annulment of invoices and the issuing of new invoices? Can national legislation make the refund of VAT conditional on the chargeability of VAT in a situation where a corrected invoice is issued during the application period?

ZES Zollner Electronic SRL (ZES), a company established and registered for VAT purposes in Romania, supplied Pompas Salmson SAS (PS) with goods produced in Romania. PS is a company with a right of deduction whose economic activity is based in France. It is neither established nor registered for VAT purposes in Romania.

PS also concluded a contract with ZES for the purchase of tooling, which ZES sold to PS which PS made available to ZES for the purposes of manufacturing the goods subsequently supplied to it (tooling).

ZES issued invoices in 2012 in respect of the sale of the tooling, on which VAT was charged. PS applied for a refund of the VAT, pursuant to the Refund Directive, which was refused by the tax authority on the grounds that the invoices included with the claim failed to meet statutory requirements. According to the Romanian authorities, there was no proof of payment of the invoices submitted, which was a requirement under the law in force at the time.

ZES subsequently cancelled and issued new invoices in 2015 for the tooling. SP was taken over by Wilo Salmson France (WS) in 2014. In 2015, WS submitted an application for a refund of VAT on the basis of the new invoices issued by ZES for the period from 1 August 2015 to 31 October 2015. The tax authorities refused the application on the grounds that it was unfounded, stating that WS had not complied with domestic legislation and had already applied for a refund.

WS appealed, contending that the 2012 and 2015 claims were not the same.

Considering the request to be admissible, the AG noted that it is not the purpose of the Refund Directive to define the conditions for exercising the right to a refund, nor the extent of that right. The second subparagraph of Article 5 of the Refund Directive provides that, without prejudice to Article 6 of that Directive, entitlement to a refund of VAT which is paid as an input tax is to be determined pursuant to the VAT Directive, as applied in the Member State of refund. Thus, the VAT Directive determines the substantive claim and the Refund Directive regulates the procedure used to fulfil that substantive claim in accordance with Article 170 of the VAT Directive.

The moment when the right of deduction under Article 167 of the VAT Directive arose, and should have been exercised by WS, is a deciding factor as to whether WS exercised its right of deduction in 2015 with regard to the supply of tooling in 2012 in the correct refund period in accordance with Article 14 of the Refund Directive (and by the deadline stipulated in Article 15).

The AG considered when WS’s right of deduction arose. The origin of the right of deduction in principle is expressed in Article 167 of the VAT Directive and the origin of the right of deduction in a given amount is expressed in Article 178. The correct time for exercising the right of deduction, and the time at which any time limits start to run, depends upon when the requirements of both articles are fulfilled. That ultimately follows from Article 179 of the VAT Directive, which does not leave the exercise of the right of deduction to the discretion of the taxable person. On the contrary, the right of deduction can only be exercised in the tax period in which it arose, both in principle and in a given amount.

With regard to the required evidence for the right of deduction, and referring to C-664/16 Vadan, the AG opined that a taxable person must hold an invoice when they exercise their right of deduction. If the invoice is subsequently lost, the taxable person can of course use all possible evidence (usually a copy) to prove that at some point they held an invoice on which VAT was charged in a given amount. The time at which the invoice was held determines the correct period for exercising the right of deduction.

Considering the legal consequences of the ‘cancellation’ of an invoice in terms of the correct tax period for the deduction of input VAT, the AG noted that the origin of the right of deduction based on the rules in the VAT Directive lies in two acts. It arises in principle when the tax becomes chargeable by the supplier (Article 167), as a rule, therefore, when the goods or services are supplied, and it arises in a given amount when an invoice is held (Article 178(a)) documenting that the VAT has been charged. Only when both conditions have been fulfilled is the origin of the right of deduction completed. Those two conditions also determine the period in which the right of deduction has to be exercised and the time when any time limits start to run. An invoice within the meaning of Article 178(a) exists when it includes information on the supplier, the recipient of the supply, the goods or services supplied, the price and the VAT, which must be charged separately. The formalities specified in Article 226 do not have to be complied with fully for that purpose and may be provided at a later date.

In light of the above, the AG considered it to be for the referring Court to clarify whether the invoices issued in 2012 complied with the necessary requirements or whether they had so many shortcomings that they cannot be regarded as invoices within the meaning of Article 178(a). That will determine the correct refund period within the meaning of Article 14(1)(a) of the Refund Directive.

If WS first held ‘valid’ invoices in 2015, then it is irrelevant that the goods or services had already been supplied in 2012. However, if WS already held valid invoices in 2012, then the correct refund period was 2012, which is also when it submitted its first refund application. That application was refused pursuant to Article 23 of the Refund Directive. As WS (or its predecessor in title) failed to appeal against that refusal decision, it became enforceable. If that refusal decision conflicted with EU law, that should have been clarified in an appeal procedure.

The AG also opined that the cancellation of an invoice (whether by mutual agreement or unilaterally) has no effect on that enforceable decision or on a right of deduction that has already arisen.

Comments: We await to see whether the Court follows the AG’s opinion, in the meantime any businesses challenged in similar circumstances, where they can show that early invoices were invalid, should consider whether this Opinion provides an opportunity to revisit the decision.