VAT EUROPEAN CASE·LAW

Deduction denial? No problem, we can rectify. It is not that easy (case C-80/20)

Francisco Javier Sánchez Gallardo

FACTS (I)

In its judgment of 21-10-2021, Wilo Salmson, C-80/20, the ECJ refers to the possibility of deducting a VAT whose **refund** had been denied, the denial **being final or firm**, by issuing a **rectified invoice** and sending it to the customer.

The French-based entity Pompes Salmson acquired production equipment in 2012 from Zollner, an entity established and identified for VAT purposes in Romania. Such equipment did not leave Romanian territory, as Pompes Salmson made it available to Zollner for its use in the manufacture of goods that were later to be delivered to him.

During that same year, Zollner issued the corresponding invoices, including VAT, requesting Pompes Salmson his VAT refund in accordance with Dir 2008/9, and its Romanian transposition regulations, by reference to fiscal year 2012.

That request was denied by means of resolution of January 14, 2014. Zollner then proceeded to rectify the initial invoices, issuing in 2015 new invoices for those same acquisitions. In 2014, Pompes Salmson merged with Wilo France. The new entity resulting from said merger, Wilo Salmson France, submitted a new refund request referring to 2015. This request was denied, which generated the dispute.

REASONING (I)

Focusing on the elements analysed by the ECJ, the first question has been whether, in accordance with articles 167 to 171 and 178 of the VAT Directive and Directive 2008/9, the right to a refund of VAT that has been levied on a delivery of goods can be exercised by a non-established taxable person if said taxable person does not have an **invoice**, within the meaning of the VAT Directive, relating to the acquisition of the goods concerned.

Based on the usual references to the duality between formal and material requirements in the right to deduction, as well as the inadmissibility of denying the deduction of VAT when the material requirements are met due to a mere formal breach, unless this prevents verification of those, it has been resolved, as expected, that the right to a VAT refund cannot be exercised by a non-established taxable person if he does not have an invoice, within the meaning of the VAT Directive, relating to the acquisition of the goods concerned. Only if a document suffers from defects such as to deprive the national tax administration of the data necessary to substantiate a claim for a refund, is it possible to consider that such a document does not constitute an 'invoice' within the meaning of the VAT Directive.

REASONING (II)

The next analysed question was to determine whether a request for a VAT refund corresponding to a refund period can be denied due to the fact that said **VAT** was due during a previous refund period, while it was not **invoiced** until that **specified period**.

It must be borne in mind, however, that the refund of VAT to those not established is conditional on possession of the invoice corresponding to the acquisition of the goods or services in question.

On the other hand, Dir 2008/9 article 14 (1) (a) establishes that the refund request must refer to the acquisitions whose invoicing was made within the return period, provided that the tax is payable before or at the time of invoicing, or for which the tax has accrued within the return period, provided that the acquisitions have been invoiced before the tax is due. Therefore, what determines which acquisitions a refund request may refer to is the date on which the taxable person came into possession of an invoice, relating to the acquisition of the goods or services in question.

It has been concluded by stating that a request for a VAT refund corresponding to a certain settlement period cannot be denied simply because said VAT had become payable during a previous refund period, while it was not invoiced until that specified period.

REASONING (III)

Regarding the third question, the ECJ has assumed that the operations carried out in 2012 had not been cancelled nor the invoices issued at the time rectified in a consensual manner or their amount refunded.

Similarly, it was found that the claimant had not contested the initial denial of the requested refund. Therefore, it has been started from the premise that, at the time of rectification and issuance of new invoices, said refusal was already firm.

Thus, it has been understood that the question was aimed at determining whether unilateral cancellation of an invoice by a supplier, after the adoption by the Member State of return of a decision rejecting the request for return based on that invoice, and when that the decision had already become final or firm, followed by the issuance, by that supplier, of a new invoice corresponding to the same deliveries, without the latter being called into question, it has an impact on the existence of the right to refund VAT that has already been exercised and in the period in relation to which this right must be exercised.

REASONING (IV)

The ECJ has recalled that the period established for the request of the VAT refund by non-established taxpayers is an expiration period, whose non-observance implies the extinction of the right to VAT refund (judgments of 21-6-2012, Elsacom, C-294/11, and of 2-5-2019, Sea Chefs Cruise Services, C-133/18). Applicants have the same remedies against refusal decisions as against any other acts of the tax administrations, including, in particular, both the terms of appeal and the dismissal of extemporaneous actions.

Admit that, in circumstances such as those described, the unilateral cancellation of an invoice by a supplier, after the decision to reject a first return request based on that invoice has become final, followed by its replacement by the issuance of a new invoice relating to the same acquisitions, allows the taxpayer, on the basis of the latter, to reapply for the refund of VAT corresponding to the same acquisitions in relation to a subsequent repayment period, would have the effect of allowing to circumvent both the deadline expiration date established in Dir 2008/9 art.15(1)(a) to submit a refund request as the deadline to appeal such a refusal decision, established by the Member State in question by virtue of art.23 (2) of said Directive, which would deprive these provisions of any useful effect and undermine legal certainty.

REASONING (V)

Additionally, the ECJ has ruled out that its jurisprudence on the regularization of deductions or the possible retroactive effect of rectifying invoices could be applicable, since it was neither a case of rectification of deductions nor the refund was impossible on the basis of the initial invoices.

RELATED TOPICS

The judgment we are commenting on illustrates very well the **dilemma** between the **EU law general principles** and **some particularities of VAT**. Faced with the denial of a deduction, it is not strange to hear the argument of "no problem, a corrective invoice can be issued and deducted later, it is not necessary to appeal." It is not that easy.

As the ECJ points out:

a) The right to deduct VAT expires, it can be extinguished by inaction. No other is the conclusion to which the principle of **legal certainty** leads, as the ECJ itself points out.

b) Against administrative acts, in the event of a dispute, the **remedies established in national provisions** must be followed, assuming, as must be assumed until the contrary is proven, that they respect the general principles of both general and EU law.

c) The issuance, without further ado, of **rectifying invoices** with which to replace the previous ones, without further ado, in order to "circumvent" the initial denial of the deduction and the lack of reaction in the corresponding means of appeal, is not in accordance with the law.

d) **Shortcuts**, such as the one intended by the claimant, do not always lead anywhere.