VAT

EUROPEAN CASE·LAW

Why are invoices so important in VAT? (on the Ferimet decision, C-281/20)

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FACTS (I)

In its judgment of 11-11-2021, Ferimet, C-281/20, the ECJ once again insisted on the **importance of invoices** in levying VAT.

Ferimet had **acquired scrap metal** from the company Reciclatges de Terra Alta. **Reverse charge** was applied. Ferimet issued the corresponding self-invoice (mandatory at the time according to the Spanish VAT regulations).

The Spanish tax authorities verified that the company identified in the invoice as the supplier did not have the material and personal means necessary for its delivery and concluded that the **invoices** so issued were **false**. In their view, although the delivery of the materials could not be refused, the operation constituted a simulation, since its **true supplier** had been **deliberately hidden**. It was decided that the VAT deduction did was not acceptable.

Ferimet argued the reality of the scrap purchase and that the consignment of a fictitious supplier in the invoice was a mere **formal requirement**, given that, materially, the acquisition took place. The deduction of VAT cannot be denied when the reality of the operation is established and when the reverse charge guaranteed not only the collection of VAT and its control, but also the absence of any tax advantage for the taxpayer.

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REASONING (I)

The ECJ has analysed whether, in accordance with Directive 2006/112, in relation to the principle of tax neutrality, a taxable person should be denied the right to deduct VAT corresponding **a real acquisition of goods** when said taxable person has **deliberately indicated a fictitious supplier** in the invoice he has issued for this operation, carried out under the reserve charge mechanism.

The first question faced has been whether the indication of the supplier on the invoice constitutes a purely formal requirement, as well as the consequences, for the purposes of the VAT deduction, of its concealment in a case in which the reality of the delivery of said goods and their subsequent use by said taxable person for the needs of its own taxed operations is not disputed.

Based on the traditional distinction between material and formal requirements, the ECJ has declared that **the identification of the supplier on the invoice constitutes a formal requirement** of the right to deduct. The condition of taxable person of the supplier of the goods or services belongs to the material requirements of said right.

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REASONING (II)

Regarding the consequences derived from concealing the identity of the true supplier in the supporting documents for the right to deduct, the ECJ has recalled that the **non-compliance** with the formal requirements is relevant when said non-compliance has the **effect** of **preventing the provision of true proof that the material requirements are met** (judgment of 19-10-2017, Paper Consult, C-101/16, among others).

This can happen when the **identity of the true supplier** is not mentioned in the invoice corresponding to the goods or services for which the right to deduction is exercised, if this prevents identifying that supplier and, therefore, proving that he had the status of VAT taxable person, since this condition constitutes one of the material requirements of the right to deduct.

To the above has been **added**:

a) That the Tax Administration cannot limit itself to examining the invoice itself, but also the **supplementary information** provided by the taxpayer (judgment of 15-9-2016, Barlis 06 - Investimentos Imobiliários e Turísticos , C-516/14).

b) That it is **incumbent on the taxpayer** to prove that he meets the requirements to be entitled to deduct. These tests may include, in particular, the documents that are in the possession of the providers from whom the taxpayer has purchased goods or services and for which he has born VAT (judgment of 21-11-2018, Vădan, C-664/16).

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REASONING (III)

The taxable person who wishes to exercise his right to deduct VAT cannot be generally **required to check** that the supplier has the status of taxable person. It is not that way when the determination of that condition is necessary to verify that this material requirement of the right to deduction is fulfilled.

It follows that when the identity of the true supplier is not mentioned in the invoice corresponding to the goods or services for which the right to deduct is exercised, this right should be denied if the data necessary to verify that the supplier had the status of taxable person is missing.

According to settled case law, **the taxable person** can only be denied the right to deduce if, after having made a global assessment of all the elements and factual circumstances of the case, based on objective elements, and not on mere assumptions, and in accordance with the rules on proof of national law, it is shown that he has **committed VAT fraud** or **knew or should have known** that the transaction invoked to substantiate the right to deduction **was part of such fraud**.

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REASONING (IV)

The fact that **the taxpayer deliberately mentioned a fictitious supplier on the invoice**, issued by himself, is an element that may indicate that the taxpayer was aware that he was participating in a delivery of goods that was part of VAT fraud (obviously, without prejudice to the judgment of the court).

As regards the relevance of the **bad faith** of the taxable person and the rax loss risk, always in the context of operations to which the reverse charge is applied, where no payment is owed to the Public Treasury if the right to deduct is complete, the ECJ has admitted that the right to deduction can be denied:

a) when the missing data is necessary to verify that the **supplier** of the goods or services in question had the **status of taxable person** or,

b) when it has been sufficiently proven that said taxable person **committed VAT fraud** or **knew or should have known** that the operation invoked as the basis of that right **was part of such fraud**.

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REASONING (V)

It is not necessary to prove that there is a **risk of loss of tax revenue** to justify such a denial.

Likewise, it is irrelevant whether or not the operation in question has reported a **tax advantage** to the taxpayer or to other participants in the supply chain:

a) On one hand, the existence of such an advantage is unrelated to the question of whether the **material requirements** to which the right to deduction is subordinated are met, such as the status of taxable person of the supplier of the goods or services.

b) On the other hand, unlike what has been declared in the area of **abusive practices**, the verification of the participation of the taxpayer in a VAT fraud is not subordinated to the requirement that this operation has resulted in a tax advantage whose concession is contrary to the objectives pursued by the VAT Directive (order of 14-4-2021, Finanzamt Wilmersdorf, C-108/20).

Since the referring court has mentioned the possible bad faith of the taxable person who concealed the identity of the true supplier, it has been added that, while it is not contrary to EU law to require an operator to act in good faith, **it is not necessary for the bad faith of the taxpayer to be credited** in order for the right to deduct to be denied.

Finally, the possibility of denying the right to deduction in the face of verification difficulties in **direct taxation** has been ruled out as contrary to the fundamental principle that this right constitutes and, consequently, to the principle of fiscal neutrality.

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CONCLUSION

According to VAT Directive, in conjunction with the principle of fiscal neutrality, a taxable person must be refused the right to deduct VAT relating to the acquisition of goods actually supplied where he has knowingly mentioned a fictitious supplier on the invoice which that taxable person has issued in respect of that transaction, carried out under the reverse charge procedure, if, taking into account the factual circumstances and the evidence provided by that taxable person, the information necessary to verify that the true supplier had the status of taxable person is lacking, or if it is established to the requisite legal standard that the taxable person has committed VAT fraud or knew or ought to have known that the transaction relied on as a basis for the right of deduction was connected with such a fraud.

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RELATED TOPICS (I)

A. The first related question is the consequence of the **concealment** of the identity of the **real supplier** of the acquired goods.

The Spanish tax authorities “punished” it with the denial of the right to deduction and the ECJ, despite the relevance of this right, considers this denial appropriate.

The above reinforce the importance of the invoice in the levy of VAT, as we said at the beginning, as well as the need for the information contained in it to be adequate.

The conclusion reached is in line with that indicated in the case C-285/09, regarding the denial of the exemption in intra-EU deliveries when the identity of the purchaser of the goods is intentionally hidden (something surpassed since 2020 with the adoption of quick fixes).

It cannot be hidden that the case C-521/19, relating precisely to hidden sales, has deviated somewhat from these criteria, by admitting (not unconditionally, it is important to say so), that when the tax authorities discover hidden sales, VAT should be considered included in the amounts received, with the consequent "abatement" effect.

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RELATED TOPICS (II)

B. The previous conclusions may seem consistent in the assumptions in which **the provider of goods and services receives VAT from its client**, as we illustrated in the graphic at the beginning.

The deduction of input VAT is the consequence of its payment to the supplier, who is supposed to pay it to the tax authorities.

The later, in their control activities, must verify (1), if the deduction is correct or not and (2), in case the entry is wrong, the conditions and applicable general principles for its return.

The ECJ has faced these returns in a number of cases.

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RELATED TOPICS (III)

C. In the ECJ case-law, the **scope for the refund** of VAT unduly paid can be characterised as follows:

1st. The power to act against the tax administration can be reserved to the taxpayer who entered the tax. Nevertheless, in the event that the recovery of the tax paid by the customer is not feasible or too difficult, the **principle of effectiveness** requires to establish some possibility such that the person who bore the tax improperly can recover it (judgments of 3-3-2007, Reemtsma Cigarettenfabriken, C-35/05, and 22-4-2019, PORR Építési, C-691/17).

That power to act is equally recognised to persons paying by mistake what is not VAT properly charged because of the absence of taxable transactions (judgment of 6-11-2003, Karageorgou and others, C-78/02 to C-80/02).

2nd. The terms and conditions of the refund should not take the tax authorities to an **unjust enrichment** (judgments of 10-4-2008, Marks & Spencer, C-309/06, or 18-6-2009, Stadeco, C-566/07). This prohibition of unjust enrichment should apply, it goes without saying, to taxpayers.

The repair obligation can be extended to the **selling losses** due to the illegal levy of the tax and its effect on the products price (judgment of 10-4-2008, Marks & Spencer, C-309/06).

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RELATED TOPICS (IV)

D. As regards the **procedures for the refund of VAT** unduly paid:

1st. It is **up to the Member States** to settle the specific procedures and their features (judgments of 24-3-1988, Commission v Italy, C-104/86, 6-7-1995, BP Soupergaz, C-62/93, 18-4-2013, Irimie, C-565/11, or 22-4-2019, PORR Építési, C-691/17). This is a general principle in the ECJ jurisprudence.

2nd. In doing so, the Member States must respect the **general principles of the EU law**, in particular:

a) **Neutrality**, which precludes to discriminate between creditors and debtors as regard the taxable persons entitled for the refund (judgment of 10-4-2008, Marks & Spencer, C-309/06); as well as a national rule that makes the refund of VAT invoiced in error conditional on the correction of the incorrect invoice, in circumstances where the right to deduct that VAT has definitively been refused and such definitive refusal results in the system for correction provided for under national law no longer being applicable ((judgment of 11-4-2013, Rusedespred, C-138/12), being that the correction of unduly issued invoices is the proper way to solve situations of unduly charged and paid VAT (judgment of 13-3-2014, FIRIN, C-107/13).

On the contrary, that principle does not preclude the establishment of different limitations periods for asking the refund and for the civil actions as regards to the charging of the tax (judgment of 15-12-2011, Banca Antoniana Popolare Veneta, C-427/10).

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RELATED TOPICS (V)

D. b) **Effectiveness**, according to which to the extent that reimbursement of the unduly invoiced VAT by the seller to the purchaser becomes impossible or excessively difficult, said purchaser must be able to address his application for reimbursement to the tax authority directly (judgments of 26-4-2017, Farkas, C-564/15, and 22-4-2019, PORR Építési, C-691/17).

Presumably, the same principle of effectiveness must guarantee that the tax authorities have all the information necessary to verify the adequacy of the return and that the applicable control procedures allow the development of said verification (precisely due to the lack of complete information , the Ferimet case has admitted the denial of the right to deduction).

c) **Equivalence**, as usual in the tax control procedures (judgment of 22-4-2019, PORR Építési, C-691/17).

3rd. **Delay interests** systems must be designed and applied in order to guarantee an adequate indemnity of the taxpayers and respect the principle of equivalence (judgments of 19-7-2012, Littlewoods Retail and Others, C-591/10, and 18-4-2013, Irimie, C-565/11).

4th. It is possible for the refund can be subject to a **limitation period**, after which the applications should be rejected (judgment of 21-1-2010, Alstom Power Hydro, C-472/08).

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RELATED TOPICS (VI)

E. The Ferimet case did not refer to an **undue repercussion of VAT**, since the reverse charge had been applied. However, some of its considerations underlie the jurisprudence regarding the rectification of VAT repercussion, regarding which it is possible to say:

1st. **Member States have to admit the adjustment** of any VAT improperly charged, being such adjustment mandatorily admitted if the taxable person justifies having acted in good faith (judgments of 19-9-2000, Schmeink & Cofreth and Strobel, C-454/98, and 12-13-1989, Genius Holding, C-342/87) or eliminates any risk of financial losses for the tax authorities (judgment of 19-9-2000, Schmeink & Cofreth and Strobel, C-454/98).

2nd. The adjustment of VAT improperly charged because of the **absence of taxable transactions** must be equally authorized (judgment of 6-11-2003, Karageorgou and others, C-78/02 to C-80/02).

3rd. The **principle of effectiveness** does not preclude national rules on the refund of VAT paid but not due, under which the time-limits for a civil law action for the refund of said sums are bigger than the corresponding for a fiscal law action for a tax refund, brought by the supplier against the tax authority (judgment of 15-12-2011, Banca Antoniana Popolare Veneta, C-427/10).

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RELATED TOPICS (VII)

F. The Ferimet case referred to a situation in which the **reverse charge** had been applied, so, as such, there was no VAT debt to be paid to the tax authorities (which makes the judgment more forceful, if possible).

This mechanism tends to provoke more discussions when what happens is the opposite, despite the existence of a rule that establishes the application of this mechanism, the seller charges VAT improperly to his client, who bores it and claims its deduction. When this happens, what arises is the **principle of full regularization**, that the ECJ has also faced.

This principle being understood as obliging the tax administrations to cover all the aspects of the transactions under revision in any control procedure, it can be especially relevant in the assessment of VAT given the operation of the tax.

In the case Equoland, of 17-7-2014, C-272/13, the ECJ is clear: if the VAT corresponding to a certain transaction, in this case, an import, has been assessed and paid, a practice consisting in its new requirement without authorising its deduction is contrary to the principle of neutrality.

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RELATED TOPICS (VIII)

F. In Stroy trans (31-3-2013, C-642/11), the ECJ concluded that as long as the rectification of the invoice does not occur, the tax authorities are not obliged, when carrying out the tax audit of the issuer, to check whether the VAT invoiced and declared corresponds to **operations actually carried** out by said issuer. Consequently, it cannot be inferred from the mere fact that the tax authorities have not corrected the VAT declared by the invoice issuer that said authorities have recognized that the invoices issued by the latter correspond to real operations subject to VAT.

The principles of fiscal neutrality, proportionality and legitimate expectations do not preclude the recipient of an invoice from being denied the right to deduct input VAT due to the absence of a real transaction subject VAT, even though, in the corrected assessment issued to the issuer of that invoice, the VAT declared by the latter has not been rectified.

In the case Rusedespred (11-4-2013, C-138/12), it was declared that the principle of **neutrality**, in relation to Dir 2006/112 art.203, precludes the refusal to refund the VAT invoiced by mistake by the provider of an exempt service, being the refusal based on the lack of rectification of the erroneous invoice, where the tax authorities have refused, through a firm resolution, the right to deduct VAT to the recipient and, as a result, the rectification regime established by national law no longer applies.

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RELATED TOPICS (IX)

F. The decision of 23-4-2015, GST - Sarviz AG Germania, C-111/14, analyses more specifically the application of the **reverse charge** and its regularization when VAT has been charged incorrectly, in particular, whether the principle of neutrality precludes a national provision that allows the tax administration to deny a provider the refund of the entered VAT, when its recipient has been denied the right to deduct it for not having the corresponding tax document, since the national law does not allow the regularisation of tax documents when there is a final assessment.

Based on the need for the measures to be adopted to ensure the correct assessment and payment of the tax do not go beyond what is necessary, it was decided that: «the inability to adjust the tax documents in the circumstances of the case in the main proceedings, in which the risk of any loss of tax revenue has been definitively eliminated, is not necessary in order to ensure the collection of VAT and for the prevention of fraud».

In a case of improper application of the reverse charge, Dir 2006/112 opposes the requirement of VAT to the provider when the recipient, who has also paid the tax, has been denied the right to deduct for not having the corresponding tax document, since the national law does not allow the regularisation of tax documents when there is a final complementary assessment.

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RELATED TOPICS (X)

F. Finally, the judgment of 22-4-2019, PORR Építési, C-691/17, again on a case of improper reverse charge, declares that if the possibility of the recipient to exercise a private law action against said provider is not feasible or excessively difficult, in particular, in the event of the insolvency of the service provider, the principle of effectiveness may require that **the recipient** of services **can claim the refund directly** from the tax authorities.

In this case, the regulation of the procedures must provide the instruments and the procedural rules necessary to allow the recipient of services to recover the unduly billed tax in order to respect the principle of effectiveness.

In addition, and regarding the possible existence of an **obligation for the tax authority to verify** that the rectification of **the corresponding invoices and the recovery** by the issuers of said invoices of the tax erroneously paid to the Public Treasury are legally possible, the ECJ declared that, to the extent that the Hungarian System allows PORR to recover the VAT that it has paid by mistake to its suppliers, and in what specifically refers to the denial of the right to deduct the VAT unduly borne in this way, the tax authorities were not obliged to verify whether said issuers can rectify those invoices in accordance with national regulations or to order such rectification.

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RELATED TOPICS (IX)

F. The ECJ jurisprudence on the matter is varied, as are national laws, specially in tax control procedures.

In any case, it is possible to point out a principle as fundamental for these purposes, which is that of **effectiveness**, in such a way that the circumstances of the case do not prevent the **full regularization** of the taxpayer's tax situation.

This principle, affirmed in various ways, should not, however, lose perspective on other, equally relevant issues, such as the reference of effectiveness to the tax authorities (in the form of the fight against fraud based on information truthful and complete) and even, ultimately, the principle of neutrality and the inappropriate equalization between those who fulfil their tax obligations and those who, as is the case with Ferimet, withhold information from said tax authorities.

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