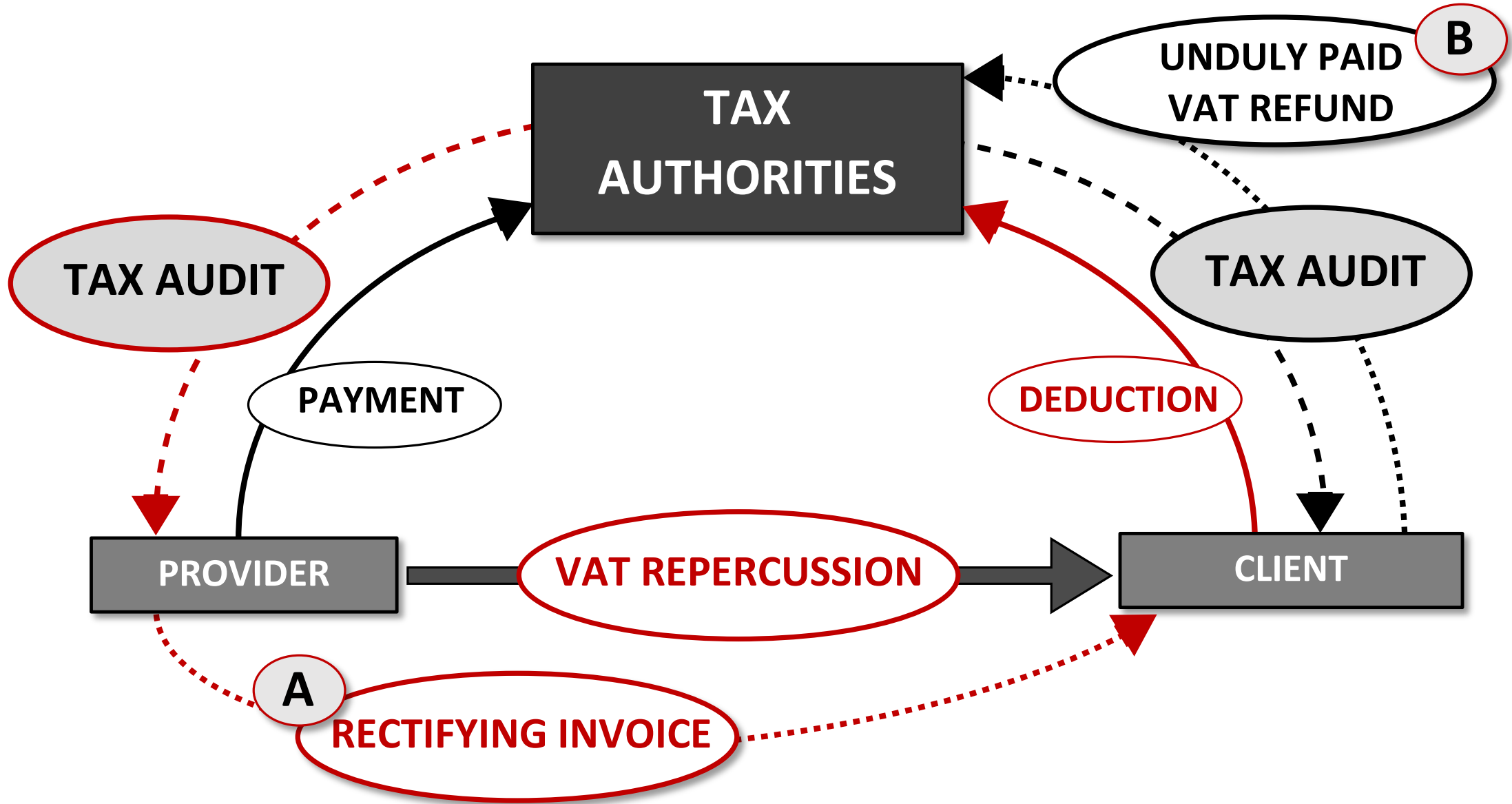


ON THE VAT FULL REGULARIZATION



SOME GENERAL COMMENTS

- As is known, VAT is a tax paid by taxpayers to the tax authorities, but is **actually borne by the recipients** of the goods and services subject to the tax. This transfer of VAT to customers is carried out through the **repercussion** of the tax.
- The principle of full regularization can be defined as the restoration of the taxpayer's situation to that which should have occurred if the VAT had been applied correctly. This principle raises problems in **VAT tax audits**, carried out on taxpayers who have to pay VAT (situation A) or who want to deduct it when it has been improperly borne (situation B), precisely because of the repercussion mechanism.
- In the following slides we summarize some of the **ECJ's conclusions** on this topic and complete them with some additional comments.

A. ASSESSMENTS ON UNPAID VAT (PROVIDERS, I)

- When the action of the tax authorities focuses on unpaid VAT, its **full regularization** is achieved by **rectifying its repercussion** to the clients.
- Note that if, apart from the control procedures, the impact of VAT **prevents** it from **becoming a cost** for taxable persons, it makes sense that, in the event of a settlement issued by the tax authorities, the taxpayer can rectify its impact and charge the customer the VAT that he did not charge at the time.
- Likewise, in the event that the existence of VAT charged to customers in excess is detected, its **refund** should be made to the latter, not to the taxpayers who entered it, since they are not the ones who have directly borne its cost.

A. ASSESSMENTS ON UNPAID VAT (PROVIDERS, II)

- As regards the rectification of the charge of unpaid VAT, the **ECJ case-law** can be summarized as follows:
 - As a general principle, **VAT charged** to the recipients of the taxable transactions must be **equal** to the **VAT entered** into the Public Treasure (judgment of 25-5-1993, Bally Chaussures, C-18/92).
 - The **penalties' system** corresponds to the Member States (judgment of 20-6-2013, Rodopi-M 91, C-259/12). This scope for subsidiarity is obviously subject to the general principles of the EU law, as proportionality, neutrality and legal certainty.
 - **Mistakes** incurred by the taxable persons do not relieve them from the adequate fulfilment of their obligation to pay the tax, no matter if the reverse charge mechanism has been applied and VAT entered improperly by the recipient (judgment of 23-4-2015, GST - Sarviz Germania, C-111/14).
- Art.203 of Dir 2006/112, and the principles of VAT **proportionality** and **neutrality**, are opposed to a national regulation that does not allow a taxpayer in good faith to regularize invoices in which VAT had been unduly charged, after the initiation of a tax inspection procedure, despite the fact that the recipient of such invoices would have been entitled to a refund of that tax if the operations that are the subject of said invoices had been declared correctly (judgment of 18-3-2021, UAB «P.», C 48/20).

A. ASSESSMENTS ON UNPAID VAT (PROVIDERS, III)

Some **additional topics** that should be taken into account are the following:

- If, in general, VAT should not constitute a cost for VAT taxpayers, when it is settled by the tax authorities, the **principle of effectiveness** should guarantee that taxpayers are allowed to charge it to their customers.
- In particular, the **length of the tax audit procedures** should not prevent the taxpayer from retaining the possibility of issuing rectifying invoices and charging VAT on their clients, once completed.
- When the rectifying invoices are delivered to the **recipients**, the same principle of effectiveness should guarantee the latter their **right to the deduction**, regardless of the time elapsed since the accrual of VAT and the consequent birth of this right (judgments of 21-3-2018, Volkswagen, C-533/16, and of 12-4-2018, Biosafe - Indústria de Reciclagens, C-8/17).

B. ASSESSMENTS ON RECIPIENTS (UMPROPERLY PAID VAT, I)

- **VAT improperly borne** must be **excluded from deduction**. This exclusion can be applied:
 - To situations in which the **VAT** was **passed on** the recipient **by mistake** (judgments of 13-12-1989, Genius Holding, C-342/87, or of 26-4-2017, Farkas, C-564/15)
 - In cases of **fictitious transactions** (judgments of 31-1-2013, Stroy trans, C-642/11, and LVK, C-643/11). In particular, said exclusion applies in situations of improperly misuse of the reverse charge mechanism.
 - When the deduction was correct but becomes inappropriate because a **transaction** for which there were some advance payments is **not finally carried out**, the tax authorities can equally claim for the adjustment in the referred deduction even if the initial supplier remains liable for the tax (judgment of 13-3-2014, FIRIN, C-107/13).

B. ASSESSMENTS ON RECIPIENTS (UMPROPERLY PAID VAT, II)

- Neither the VAT Directive nor the principles of fiscal neutrality and effectiveness preclude a practice whereby, without suspicion of fraud, the **right to deduct VAT is denied** to a company, as recipient of services, has mistakenly paid the provider of said services, when the **reverse charge should have been applied**, without **the tax authority**:
 - before refusing the right to deduct, examine whether **the issuer of the invoice could return** the amount of VAT to the recipient of the invoice unduly paid and could rectify said invoice and regularize it, in accordance with the applicable national regulations, to recover the tax paid in error,
 - **or decides to return** to the recipient of said invoice the tax that it has paid by mistake to the issuer and entered improperly.
- However, these principles require, in the event that it proves impossible or excessively difficult for the provider to reimburse the service recipient for the VAT invoiced in error, in particular, in the event of the provider's insolvency, that the service **recipient** have the **possibility to request the refund directly** to the tax authority (judgment of 11-4-2019, PORR Építési Kft., C-691/17).

B. ASSESSMENTS ON RECIPIENTS (UMPROPERLY PAID VAT, III)

As regards **the refund of VAT unduly paid**, the ECJ case-law can be characterized as follows:

- 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).
- 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).
- 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, Stedeco, C-566/07).
- 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 and sales (judgment of 10-4-2008, Marks & Spencer, C-309/06).

B. ASSESSMENTS ON RECIPIENTS (UMPROPERLY PAID VAT, IV)

- 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, or 18-4-2013, Irimie, C-565/11). In doing so, the Member States must respect the **general principles of the EU law**, in particular, those of neutrality and effectiveness.
- The principle of **tax neutrality** precludes to discriminate between creditors and debtors in this regard (judgment of 10-4-2008, Marks & Spencer, C-309/06); as well as a national rule that makes this refund conditional on the correction of the incorrect invoice, where the right to deduct has definitively been refused and such refusal results in the system for correction provided for no longer being applicable (judgment of 11-4-2013, Rusedespred, C-138/12), or where the correction of unduly issued invoices is the proper way to solve situations of unduly charged VAT (judgment of 13-3-2014, FIRIN, C-107/13). On the contrary, that principle does not preclude different limitations periods for asking the refund and for the civil actions related to the VAT charging (judgment of 15-12-2011, Banca Antoniana Popolare Veneta, C-427/10).

B. ASSESSMENTS ON RECIPIENTS (UMPROPERLY PAID VAT, V)

- The power to act against the tax administration can be reserved to the taxpayer who entered the tax. Nevertheless, if the recovery is not feasible, the **principle of effectiveness** requires that those who bore improperly the tax can recover it (judgments of 3-3-2007, Reemtsma Cigarettenfabriken, C-35/05, 26-4-2017, Farkas, C-564/15, and 11-4-2019, PORR Építési Kft., C-691/17). That power to act is equally recognized 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).
- This principle of **effectiveness** does not preclude national rules governing the recovery of VAT improperly paid, under which the time-limits for a civil law action for recovery of said VAT are bigger than the ones for a fiscal law action for a tax refund brought against the tax authority (judgment of 15-12-2011, Banca Antoniana Popolare Veneta, C-427/10).
- **Delay interest** systems must be designed in order to guarantee an adequate indemnity of the taxpayers, respecting the principle of equivalence (judgments of 19-7-2012, Littlewoods Retail and Others, C-591/10, and 18-4-2013, Irimie, C-565/11).

B. ASSESSMENTS ON RECIPIENTS (UMPROPERLY PAID VAT, VI)

- It is possible to ask for the refund can be subject to a **limitation period** (judgment of 21-1-2010, Alstom Power Hydro, C-472/08).
- In cases of regularization, the internal procedures of the Member States must consider all the circumstances of the case, making **feasible** the reimbursement of improperly paid VAT quotas (judgments of 6-2-2014, Fatorie, C-424/12, or of 23-4-2015, GST - Sarviz AG Germania, C-111/14). This principle, however, does not preclude the regularization of improperly borne quotas (judgment of 26-4-2017, Farkas, C-564/15).

B. ASSESSMENTS ON RECIPIENTS (UMPROPERLY PAID VAT, VII)

- Some **additional comments** (or doubts) are the following:
 - Can a VAT that has been charged to customers be refunded when the **identity** of those **customers** is **unknown**, for example, because they are not taxable and no complete invoice was issued, knowing that said VAT will never be received by those who bore its cost (the aforementioned customers)?
 - It seems logical that the adequacy of the refund of VAT unduly paid is checked by the tax authorities. If a **VAT** quota has been **improperly borne** and its deduction is denied, what happens if the person who charged said VAT has not actually paid it to the Public Treasury? Could it be relevant, for these purposes, that the recipient who borne and deducted it **knew or could have known** that it was participating in a **tax fraud** committed by a third party?