Just a Formality!: Substance over Form in EU VAT and the Right to Deduct Input VAT

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When it comes to the right to deduct input tax, substance in principle takes precedence over form. The CJEU has already ruled several times that the fundamental principle of the neutrality of VAT requires that if the substantive conditions for the right of deduction are met, this right can be exercised even when certain formal conditions are not met. In this article the author addresses recent case law of the CJEU on the distinction between formal and substantive conditions for the exercise of the right of deduction and the right to refund. The following topics are addressed: (1) Incorrect or incomplete invoices, (2) mistakes and refunds under Directive 2008/9/EC, (3) including an asset in the business assets and (4) VAT deduction in the event of late filing of intra-Community acquisitions. The recent CJEU cases will be analysed in the light of previous and pending case law providing the reader with an overview of the current situation.

Keywords: formality, substantive condition, deduction, refund, invoice, VAT fraud, business assets, intracommunity acquisition, neutrality principle, principle of proportionality

1 Introduction

When it comes to the right to deduct input tax, substance in principle takes precedence over form. The CJEU has already ruled several times that the fundamental principle of the neutrality of VAT requires that if the substantive conditions for the right of deduction are met, this right can be exercised even when certain formal conditions are not met.[1] The taxpayer, however, will be required to demonstrate that those substantive conditions have actually been satisfied. Failure to meet formal requirements may make the provision of this evidence difficult or even impossible. Over a period of one year, the CJEU ruled several times on the distinction between formal and substantive conditions for the exercise of the right of deduction and the right to refund. The objective of this article is to review those decisions in light of previous case law and pending cases in respect to four issues that were addressed in recent CJEU case law and address both conditions from the VAT Directive as well as conditions placed on taxable person by Member States' national VAT legislation: (1) Incorrect or incomplete invoices (section 2), (2) mistakes and refunds under Directive 2008/9/EC (section 3), (3) including an asset in the business assets (section 4), and (4) VAT deduction in the event of late filing of intra-Community acquisitions (section 5). The objective of the article is to provide an overview of the current situation of the formal and substantive conditions for the right to deduct input VAT and VAT refunds.

2 Incorrect or incomplete invoices

To be able to deduct input tax, Article 178(1)(a) of the VAT Directive stipulates that the customer must hold an invoice drawn up in accordance with Title XI, Chapter 3 sections 3 to 6. Invoice requirements are listed in Article 226 VAT Directive. Cases such as Senatex[2] and Barlis 06[3] have already shown that an invoice that does not meet all of the invoicing requirements mentioned in Article 226 VAT Directive, such as the VAT identification number of the supplier or the sufficiently detailed description of the goods or services that are supplied, does not prevent exercising the right to deduct input tax. In the recent cases that are discussed below, the court of justice was asked how to deal with the right of deduction when information that is more essential, such as the name of the supplier or the VAT amount, is missing from the

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1 *See* e.g., CJEU 15 Sep. 2016, C-518/14, ECLI:EU:C:2016:691 (*Senatex*), CJEU 15 Sep. 2016, C-516/14, ECLI:EU:C:2016:690 *(Barlis 06)* and CJEU 15 Nov. 2017, Joined Cases C-374/16 and C-375/16, ECLI:EU:C:2017:867 (*Geissel and Butin*).

2 CJEU 15 Sep. 2016, C-518/14, ECLI:EU:C:2016:691, *supra* n. 1.

3 CJEU 15 Sep. 2016, C-516/14, ECLI:EU:C:2016:690, *supra* n. 1.

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invoice or is incorrect. Are such invoice requirements also to be considered as formal conditions, or are they substantive conditions?

2.1 *Incorrect Supplier Mentioned on the Invoice*

In both the Ferimet[4] and the Kemwater ProChemie cases,[5] the CJEU ruled in situations in which the incorrect supplier was mentioned on the invoice. In the former, this was done for reasons of concealing the identity of the actual supplier. It was undisputed that the goods had actually been supplied to Ferimet. It should be noted that the VAT on the supply was reverse charged. Even though there was no loss of tax revenue, the Spanish High Court of Catalonia stated that substantive conditions should be met for claiming a right to deduct the VAT. Ferimet appealed this decision before the supreme court which referred questions to the CJEU.

According to the CJEU, the three questions that were submitted equate to answering the question of whether the right to deduct input tax can be refused to a taxable person who deliberately stated a fictitious supplier on the invoice in a situation where the reverse charge mechanism applies.[6] The CJEU again states that the right to deduct VAT is subject to compliance with substantive and formal conditions. Substantive requirements under Article 168(a) are: (1) the person in question must be a taxable person, (2) the goods or services relied on as the basis for claiming the right of deduction must be supplied by another taxable person as inputs, and (3) the goods or services must be used by the taxable person for the purposes of his own taxed output transactions. Regarding the detailed rules governing the exercise of the right to deduct VAT, which may be considered formal conditions, Article 178(a) VAT Directive provides that the taxable person must hold an invoice drawn up in accordance with Articles 220–236 and 238–240 VAT Directive.[7] According to the CJEU, naming the supplier on the invoice is a formal condition.[8] The status of the supplier as a taxable person is among the substantive conditions.[9] Deduction of input VAT should be allowed if the substantive conditions are satisfied even if the taxable person has failed to comply with some of the formal conditions.[10] This is different if noncompliance with formal requirements effectively prevents the production of conclusive evidence that the substantive requirements have been satisfied.[11] That may be the case when the identity of the true supplier is not mentioned on the invoice if that prevents the supplier from being identified and, therefore, the supplier's status as a taxable person from being established.[12] With regard to this, the CJEU notes that the tax authorities cannot restrict themselves to examining the invoice itself. They must also take account of the additional information provided by the taxable person. This information must be provided by the taxable person from whom they may require to produce the evidence that the tax authorities consider necessary for determining whether or not the requested deduction should be granted.[13] In the case of fraud, however, a taxable person is to be refused the right of deduction not only when fraud is committed by the taxable person himself. This right can also be refused when it is established that that taxable person – to whom the supply of goods or services, on the basis of which the right of deduction is claimed, was made – knew or ought to have known that, through

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4 CJEU 11 Nov. 2021, C-281/20, ECLI:EU:C:2021:910.

5 CJEU 9 Dec. 2021, C-154/20, ECLI:EU:C:2021:989.

6 CJEU Ferimet, *supra* 4, para. 23.

7 *Ibid.*, para. 26.

8 Similarly, the CJEU ruled earlier in the Maks Pen case (CJEU 13 Feb. 2014, C-18/13, ECLI:EU:C:2014:69) that the mere fact that a supply made to Maks Pen was not actually made by the supplier mentioned on the invoices or by its subcontractor does not prevent Maks Pen from exercising its right to deduct VAT. According to the tax authorities the supply was not actually made by the supplier mentioned on the invoices, inter alia, because they did not have the personnel, equipment, or assets required, there was no record of the costs of making the supply in their accounts and the identification of persons signing certain documents as suppliers was shown to be inaccurate. This is different in case of VAT fraud and if Maks Pen knew or should have known that the transactions were connected to that fraud. In Vikingo (CJEU 3 Sep. 2020, C-610/19, ECLI:EU:C:2020:673), the CJEU held that the fact that the goods concerned were neither manufactured nor supplied by the issuer of the invoices or its subcontractor, inter alia, because they did not have the human and material resources necessary, is not sufficient for concluding that the supplies of the goods at issue did not exist and to exclude the right to deduct relied on by Vikingo. That fact may be the result both of a fraudulent pretense by the suppliers and simply a recourse to subcontractors. In PPUH Stehcemp (CJEU 22 Oct. 2015, C-277/14, ECLI:EU:C:2015:719), the CJEU ruled that the fact that the dilapidated state of the building in which the supplier's corporate seat is located did not allow any economic activity to take place does not result in a loss of VAT deduction. This is because such a finding does not mean that that activity could not be conducted in places other than the seat. In particular, when the economic activity in question involves supplies of goods made in the context of several successive sales, the first purchaser and reseller of those goods can simply order the first seller to transport the goods at issue directly to the second purchaser.

9 CJEU Ferimet, *supra* n. 4, para. 27.

10 *Ibid.*, para. 33.

11 *Ibid.*, para. 36.

12 *Ibid.*, para. 37.

13 *Ibid.*, para. 38.

the acquisition of those goods or services, he was participating in a transaction connected with the evasion of VAT.[14] In the present case, in the context of that overall assessment, the fact that the taxable person who claims to be entitled to the right of deduction and who issued the invoice knowingly mentioned a fictitious supplier on that invoice is relevant information that may indicate that the taxable person was aware that it was participating in a supply of goods connected with VAT fraud. It is, however, for the referring court to assess taking into account all of the evidence and factual circumstances of the case, whether that is indeed so in the context of the case in the main proceedings.[15] According to the CJEU, a risk of loss of tax revenue is not necessary in order to justify the refusal of the right to deduct VAT. Thus, even if there is no loss in tax revenue because of the application of the reverse charge rule, the right to deduct VAT can still be denied if the taxable person in question knew or should have known that the transaction was connected to VAT fraud.[16] A finding that the taxable person participated in VAT fraud is also not subject to the condition that that transaction has conferred a tax advantage on that person.[17] The right to deduct VAT cannot be denied based on the fact that concealing the supplier's identity may jeopardize direct taxation.[18]

In Kemwater ProChemie, the CJEU builds on the judgment of the Ferimet case. This case once again concerns a situation in which the supplier that is stated on the invoice is not the actual supplier or at least does not appear to be. This case concerns advertising services provided during a golf tournament for which Kemwater ProChemie received invoices with the indicated name of Viasat Service s.r.o.. However, the director of this supplier declared to the Czech tax authorities that he was not aware that the services had been provided by his company. Kemwater ProChemie was unable to prove that Viasat Service s.r.o. was the actual supplier of the services. The Czech tax authorities therefore refused the deduction of input tax without calling into question that the services had actually been supplied. Referring to its previous judgment in the Ferimet case, the CJEU again ruled that the naming of the supplier on the invoice relating to the goods or services on the basis of which the right to deduct VAT is exercised is a formal condition. By contrast, the status of the supplier of the goods or services as a taxable person is among the substantive conditions for the exercise of that right.[19] It is for the taxable person to establish on the basis of objective evidence that the supplier has the status of a taxable person unless the tax authorities have the information necessary to check that the substantive condition governing the right to deduct VAT is satisfied.[20] In this respect, the CJEU adds to the Ferimet case and states that the supplier's status as a taxable person may be apparent from the circumstances of the case. According to the CJEU when it clearly follows from the factual circumstances that that supplier necessarily had the status of taxable person it would be contrary to the principle of fiscal neutrality to deny the recipient of that supply the right to deduct VAT. In that situation that right cannot be denied on the grounds that the true supplier of the goods or services concerned has not been identified and that the taxable person has not proved that the supplier was a taxable person .[21] In order to be able to exercise that right, the taxable person cannot be required in every case to prove that the supplier has the status of taxable person when the true supplier of the goods or services concerned has not been identified. The right to deduct VAT must, however, be denied if, taking into account the factual circumstances and notwithstanding the evidence provided by that taxable person, the information needed to verify that the supplier had the status of taxable person is lacking. The tax authorities are not required to prove that the taxable person committed VAT fraud or that he knew or should have known that the transaction relied on to establish the right of deduction was connected with such fraud to deny the right to deduct in that latter situation.[22] The CJEU also mentions the exemption for small businesses under Article 287 VAT Directive that do not exceed a yearly turnover threshold. When it can be inferred with certainty from the factual circumstances, such as the volume and price of the goods or services purchased, that the supplier's annual turnover exceeds that amount and the supplier cannot benefit from the exemption provided for in that article, it is clear that that supplier necessarily has the status of taxable person according to the CJEU.[23]

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[14] *Ibid.*, para. 46.

[15] *Ibid.*, para. 53.

[16] *Ibid.*, para. 56.

[17] *Ibid.*, para. 57.

[18] *Ibid.*, para. 59.

[19] CJEU Kemwater ProChemie, *supra* n. 6, para. 25.

[20] *Ibid.*, para. 38.

[21] *Ibid.*, para. 40.

[22] *Ibid.*, para. 41.

[23] *Ibid.*, para. 39.

2.2 *No VAT on the Invoice*

The most recent case that deals, inter alia, with non-compliance with invoice requirements is the Zipvit case.[24] Zipvit purchased postal services from Royal Mail. On the basis of UK VAT legislation and the policy of the tax authorities, Royal Mail has assumed that these services are exempt from the VAT. It therefore issued an invoice to Zipvit on which it did not charge it. However, the TNT Post UK judgment[25] showed that the exemption had been wrongly applied. Royal Mail did not charge the VAT to its customers because this involved administrative burdens and costs. Moreover, no additional assessment was imposed because Royal Mail could rely on the principle of the protection of legitimate expectations or because of the statute of limitation. Zipvit took the position that Royal Mail's invoice amount included a VAT amount, and it wished to deduct it. Two issues were raised by the referring judge. First of all whether the amount invoiced by Royal Mail to Zipvit should be regarded as an amount including or excluding the VAT and, secondly, whether it can be deducted based on an invoice that does not mention the VAT amount and applicable VAT rate.

The CJEU considered that, if the parties have fixed the price of goods without mentioning the VAT and the supplier of those goods is the person liable for payment of it, it must be deemed to be already included in the agreed price if the supplier cannot recover the VAT claimed by the tax authorities from the purchaser.[26] However, according to the CJEU, Royal Mail was legally entitled to pass the VAT amount on to Zipvit. According to the CJEU, since Royal Mail failed to do so and the tax authorities themselves have refrained from collecting the VAT, it must be concluded that the price charged to Zipvit for providing the postal services excludes it.[27] Therefore, the amount charged on the invoice cannot be deemed to include the VAT. According to the CJEU, it is also not due within the meaning of Articles 167 and 168 of the VAT Directive in this situation. Liability presupposes an enforceable tax obligation that the taxable person is obligated to pay the amount of the VAT that he wishes to deduct as input tax.[28] The CJEU does not answer the third question which is whether the VAT can be deducted on the basis of an invoice that does not state the amount of it and the applicable VAT rate. However, Advocate General Kokott provides interesting observations on that point that will be discussed below.

2.3 *Lessons Learned*

In the author's view, the recent cases confirm that all requirements mentioned in Article 178 VAT Directive are formal requirements according to the CJEU. This is particularly demonstrated by paragraph 26 of the Ferimet case in which the CJEU states that the right to deduct VAT is subject to substantive and formal conditions with the latter included in Article 178 (a) VAT Directive. This could, in the author's view, already be derived from the Senatex case where the CJEU in paragraph 38 ruled that possessing an invoice showing the details mentioned in Article 226 of the VAT Directive is a formal condition and not a substantive condition of the right to deduct the VAT. However, it was yet unclear whether the CJEU's ruling would be the same if essential elements, such as the supplier's or customer's name or the VAT amount, was missing instead of less essential elements such as a VAT identification number. The recent cases, in the author's view, confirm that it does not matter which information is stated incorrectly on the invoice or what is missing as long as the document issued can be regarded as an invoice (see below).

The situation in which an invoice does not mention all of the required information (or mentions this information but it is incorrect) should be distinguished from the situation when there is no invoice at all. In that situation, the taxable person cannot exercise its right to deduct the VAT because it can only be exercised when the goods have been supplied or the services performed *and* the taxable person is in possession of the invoice or the document that, under the criteria determined by the Member State in question, may be considered to serve as an invoice.[29] Similarly, in the recent judgment in the Wilo Salmson case, the CJEU ruled that a request for refund cannot be denied simply because the tax was due in a previous tax period when the invoice was issued in the tax period of refund.[30] The reason why a taxpayer must be in the possession of an invoice to exercise its right to deduction is, according to the CJEU, that the exercise of the right to deduct VAT assumes that, in principle, taxable persons do not make payments and therefore do not pay input VAT

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[24] CJEU 13 Jan. 2022, C-156/20, ECLI:EU:C:2022:2.

[25] CJEU 23 Apr. 2009, C-357/07, ECLI:EU:C:2009:248.

[26] CJEU, *supra* 24, para. 23.

[27] *Ibid.*, paras 28–31.

[28] *Ibid.*, paras 35–40.

[29] CJEU 29 Apr. 2004, C-152/02, ECLI:EU:C:2004:268 (Terra Baubedarf), para. 34.

[30] CJEU 21 Oct. 2021, C-80/20, ECLI:EU:C:2021:870, para. 87.

until they have received an invoice or another document that may be considered to serve as an invoice. The VAT can therefore not be regarded as being chargeable on a specific transaction before it has been paid.[31] In Zipvit, the CJEU uses a similar reasoning to deny Zipvit the right to deduct the VAT based on an invoice that does not include a VAT amount. The judgment of the CJEU in the Zipvit case is also relevant for situations in which transfer pricing adjustments have VAT implications.[32] In case of an upward year end adjustment that can be regarded as a price increase for VAT, the customer may deduct an additional amount of VAT. Even in the event that the parties have agreed on prices including the VAT, it is likely they did not take account of the later price increase beforehand. This therefore makes it unlikely to presume that the original invoice included the additional VAT amount and that it has actually been paid. Instead, the additional VAT can, in the author's view, only be deducted in the tax period in which a new invoice (including the additional VAT amount), document, or message amending the original invoice is issued.[33]

In another recent judgment, the Wilo Salmson case, the CJEU ruled that, when a document is so deficient that it does not provide the national tax authorities with the information needed to support a claim for a refund, then it can be considered that such a document is not an 'invoice'.[34] This means that de facto the conditions that have been qualified by the CJEU as formal conditions for exercising the right to deduct VAT can turn into substantive conditions if certain essential information is lacking on the invoice. The author agrees with Advocate-General Kokott that certain information is more essential than other information.[35] Unlike the advocate general,[36] the CJEU gives no indication as to when a document is so deficient that it can no longer be regarded as an invoice. The VAT Directive does not help in this aspect either. Although Articles 218 and 219 of the VAT Directive define the concept of an invoice, Article 218 states that the invoice is a document or message that fulfils the conditions set out in the VAT Directive thereafter. At the same time, it is known from the CJEU case law that the VAT can still be deducted if the invoice does not meet all of the requirements.

In the Netherlands, the supreme court has ruled that any document in which a payment is claimed can be regarded as an invoice.[37] Even though this case deals with Article 37 of the Dutch VAT Act (the equivalent of this provision can be found in Article 203 VAT Directive), in the author's view, it is also relevant in the case that the VAT is rightfully charged. Under the VAT Directive (and, consequently, under national law that is an implementation of that directive), there can only be one definition of an invoice. Only if it is an invoice on the basis of which the right of deduction can be exercised is it necessary to ensure via Article 203 of the VAT Directive that the VAT is paid by the supplier in order to avoid a VAT loss for the treasury because the recipient might deduct the VAT mentioned on the invoice. In the author's opinion, a document in which a payment in claimed is a minimum requirement. In addition, there will have to be a person claiming the payment and a person from whom the payment is claimed. This does not necessarily have to be the supplier and the customer provided that it can be proven on the basis of objective evidence that the supplier is a taxable person and that the customer is also a taxable person who has acquired the goods or services and will use them as inputs for his taxable transactions. It is only the actual recipient of a supply[38] who can deduct the VAT on the basis of an invoice.[39] However, according to the author, it follows from the case law discussed above that not mentioning this person on the invoice does not prevent the exercise of the right of deduction provided that the substantive conditions for the right of deduction are met, and this can be demonstrated. The amount claimed must also be indicated on the invoice in the author's opinion. However, in the author's view, the VAT amount

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[31] *Ibid.*, para. 35.

[32] For an extensive review of the VAT implications of transfer pricing adjustments, the author refers to Ronald van den Brekel, Ad van Doesum & Herman van Kesteren, *VAT Effects of Year-End Transfer Pricing Adjustments*, 4 EC Tax Rev. 182–192 (2017).

[33] The author therefore does not agree with the general observation from van den Brekel, van Doesum and van Kesteren (*ibid.*, at 189) that the additional VAT should be deducted retroactively in each of the tax periods in which the supplies took place. Although this adjustment is covered by Arts 184 et seq. of the VAT Directive, which does not prescribe when the adjustment is to be made in this situation, in the opinion of the author, it would be logical to make the adjustment during the tax period in which the change occurs instead of retrospectively. Furthermore, the situation in which an invoice has not yet been received, and thus there is no obligation to pay, is treated in the same way as the situation in which there is already an invoice but an additional (VAT) amount is still due. For that additional (VAT) amount an invoice or additional document has to be issued in order to create an obligation to pay that additional amount. In both situations, the (additional) VAT amount is not yet due by the recipient of the invoice until the (new) invoice or additional document has been provided if following the reasoning of the CJEU discussed previously.

[34] CJEU Wilo Salmson France, para. 81.

[35] Opinion of Advocate-General Kokott of 8 Jul. 2021, C-156/20, ECLI:EU:C:2018:888 (Zipvit), paras 79–81.

[36] According to the advocate general, there are five essential items that she derives from case law of the German Bundesfinanzhof: supplier, recipient, description of goods or services, price, and VAT amount. Opinion of Advocate General Kokott 22 Apr. 2021, C-80/20, ECLI:EU:C:2021:326, paras 93–94, repeated in her Opinion in the Zipvit case of 8 Jul. 2021 C-156/20, ECLI:EU:C:2021:558, para. 81.

[37] Dutch Supreme Court 4 Mar. 2016, 14/03556, ECLI:NL:HR:2016:356.

[38] For services this is the person with whom the supplier has a legal relationship, CJEU 3 May 2012, C-520/10, ECLI:EU:C:2012:264 (Lebara). For supplies of goods it is the person that has obtained the right to dispose of the goods as owner, CJEU 6 Feb. 2003, C-185/01, ECLI:EU:C:2003:73 (Auto Lease Holland).

[39] CJEU 8 Nov. 2018, C-502/17, ECLI:EU:C:2018:888 (C&D Foods), para. 23.

does not have to be mentioned separately when it is clear from objective evidence that the amount invoiced includes a VAT amount. For example, if an invoice is issued mentioning an amount of EUR 1,200 and the contract mentions a consideration of EUR 1,000 and EUR 200 in VAT or a remuneration of EUR 1,000 excluding VAT and the VAT rate on the product or service concerned is 20%, it can be assumed that a VAT amount of EUR 200 has been charged. Unlike the advocate general,[40] the author opines that the goods or services for which payment is claimed do not have to be mentioned on the invoice for an invoice to be regarded as such for VAT purposes. This applies as long as the person claiming the VAT deduction can provide objective evidence that the payment is requested for a certain supply of goods or services. The CJEU will have to rule in the Raiffeisen Leasing case[41] whether a contract also constitutes an invoice. However, In the author's opinion, a contract should not be regarded as such. In commercial transactions, a contract has a different meaning than an invoice and following the Terra Baubedarf ruling discussed above, there is not yet a situation in which the customer has been charged the VAT assuming the contract is concluded before the supply is made and the payment occurs. It should be noted that not only the original invoices can be considered invoices by Member States but also any other documents such as duplicate invoices. Member States may require the taxable person to produce other evidence that the transaction in respect of which the deduction is claimed actually took place.[42]

The Barlis 06 case makes clear that the tax authorities cannot restrict themselves to examining the invoice itself. They must also take into account the additional information provided by the taxable person. The CJEU confirms that this also applies to VAT refunds under Directive 2008/9/EC in the Wilo Salmson case. In Geissel and Butin, the CJEU made clear that the purpose of the name, address, and VAT number of the issuer on the invoice is to make it possible to establish a link between a distinct economic transaction and a specific economic operator, i.e., the issuer of the invoice. The identification of the latter allows the tax authorities to check whether the amount of VAT giving rise to the deduction has been declared and paid. Such identification allows the taxable person to determine whether the issuer of the invoice is a taxable person for the purposes of the VAT rules. In the author's view, the information required by the tax authorities should allow them to identify the supplier and allow them to check whether the supplier has declared and paid the VAT. Other information cannot be required, in the author's view, and the VAT deduction should be allowed. This is demonstrated in the CJEU case Polski Trawertyn[43] where the VAT deduction was claimed by a partnership on an investment made by the partners prior to the establishment and registration of the partnership. Even though the invoice was drawn up in the name of the partners instead of the partnership, the VAT could be deducted.[44] In paragraph 48, the CJEU states that there are circumstances in which the data may be legitimately established by means other than by an invoice. In paragraph 49, it indicates that, in a situation such as that at issue in the main proceedings, the data necessary to ensure a reliable and efficient collection of the VAT is established. In this respect, the author also endorses the judgment of the CJEU in the Kemwater ProChemie case that, if the facts demonstrate that the supplier is a taxable person, the deduction may not be refused by the tax authorities except in the case of knowledge of fraud by the customer.

A situation in which the taxpayer could not claim its right to deduction because it could not produce sufficient evidence is the Vădan case.[45] Mr Vădan engaged in real estate transactions for which he erroneously did not register for the VAT. He appealed the VAT assessment that was issued by the Romanian tax authorities claiming, among others, a right to deduct the VAT. He claimed the VAT based on expert reports because he could not produce the original invoices. In those expert reports, the deductible VAT was assessed on the basis of the amount of work performed or the necessary labour used by Mr Vădan for the construction of the buildings that he sold. The CJEU ruled that strict application of the substantive requirement to produce invoices would conflict with the principles of neutrality and proportionality inasmuch as it would disproportionately prevent the taxable person from benefiting from fiscal neutrality relating to his

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[40] Opinion of Advocate General Kokott of 21 Oct. 2021, C-80/20, ECLI:EU:C:2021:326.

[41] Pending case C-235/21.

[42] CJEU 5 Dec. 1996, C-85/95, ECLI:EU:C:1996:466 (Reisdorf).

[43] CJEU 1 Mar. 2012, C-280/10, ECLI:EU:C:2012:107.

[44] It should be noted that this case seems to be a special case. The partners had no option other than to purchase the quarry themselves because the partnership did not exist at the moment that it was purchased. In this situation, neither the partners (because they were not the ones using the quarry for taxable supplies) nor the partnership (because it did not acquire the quarry) could deduct the VAT according to the Polish tax authorities. The CJEU ruled that the Polish legislation denying both the partnership and its partners the right to deduct for investments made before the partnership was incorporated and registered is not permitted. According to the CJEU, the partnership may deduct the VAT even if the invoices are not in the partnership's name. Later, in the Malburg case (CJEU 13 Mar. 2014, C-204/13, ECLI:EU:C:2014:147), the CJEU ruled in a situation in which the partnership did exist, and the partner decided to provide clientele for free to the partnership that a right to deduct VAT could not be obtained. The CJEU points out that, unlike in the Polski Trawertyn case, the national legislation does not, in principle, preclude the application of the principle of neutrality since Malburg had other options at its disposal of which it did not avail itself.

[45] CJEU 21 Nov. 2018, C-664/16, ECLI:EU:C:2018:933.

transactions.[46] Nevertheless, it is for the taxable person seeking deduction of the VAT to establish that he satisfies the conditions for eligibility as mentioned above. That evidence may include, according to the CJEU, documents held by the suppliers or service providers from whom the taxable person has acquired the goods or services for which he has paid the VAT. An assessment based on an expert report commissioned by a national court may, if necessary, supplement that evidence or reinforce its credibility but may not replace it.[47] The expert reports in which the deductible VAT was assessed do not, according to the CJEU, establish that Mr Văđan actually paid that tax for the input transactions carried out for the purposes of constructing the buildings.[48] Advocate General Kokott explains that the Văđan case only deals with the evidence to be produced to demonstrate that the substantive conditions for a deduction of the VAT have been met.[49] There must be consensus with that view considering the Terra Baubedarf judgment where the CJEU held that VAT can be exercised in the tax period in which the taxpayer is in the possession of an invoice is not overruled by the Văđan case. In the author's opinion, if the CJEU had actually wanted to go back on its judgment in the Terra Baubedarf case, this should have followed much more explicitly from the judgment in the Văđan case.

Finally, it remains important for the supplier to issue correct invoices. Although an invoice containing incorrect information does not necessarily impede the customer's right of deduction, Member States may penalize the supplier by imposing fines if he does not fulfil his invoicing obligations.[50] The customer must also remain cautious and vigilant. If he receives an incorrect invoice, he may have to deduct the VAT already because the substantive conditions for the right of deduction are fulfilled at that moment. A VAT deduction should be claimed in the correct tax period as the Wilo Salmson case discussed above demonstrates.

3 Refund requests under Directive 2008/9/EC

VAT refund requests under Directive 2008/9/EC VAT should also be complied with when all of the substantive conditions have been met. The cases discussed below do not concern incorrect invoices but other mistakes made by the taxpayer. These cases demonstrate that the Member State of refund may not simply refuse a refund request if certain information is missing or incorrect. It can be obligated to request certain information from the taxpayer or to afford him the opportunity to correct the application.

3.1 *The recent CJEU case law dealing with refund requests under Directive 2008/9/EC*

In the Y-Gmbh case,[51] an Austrian business applied for a refund of German VAT. In its refund requests, invoice numbers were mentioned differently from the sequential invoice numbers that were indicated on the invoices. On three occasions and prior to expiry of the deadline for filling a refund request, the German tax office informed Y-GmbH of this noncompliance with the legal requirements. According to the CJEU, the invoice number referred to in Directive 2008/9/EC refers to the sequential number because of the correlation between the VAT Directive and Directive 2008/9/EC.[52] The absence of the sequential number in the application, however, cannot lead to a denial of the refund. This would infringe the neutrality and proportionality principle.[53] The CJEU regards the sequential number as a formal condition.[54] The CJEU also refers to Article 20 of Directive 2008/9/EC that allows Member States of refund to request additional information. This provision would be deprived of its effectiveness if the Member State could immediately refuse the refund application disregarding that a number that allows the invoice to be identified is mentioned in the application.[55] Particularly in the case of Y-GmbH. This is because Germany has used the option provided in Article 10 of Directive 2008/9/EC based on which the applicant was required to submit a copy of the invoices with its application.[56]

Similarly, the CJEU ruled in the CHEP equipment pooling case in which the Hungarian tax authorities requested information under Directive 2008/9/EC but restricted the refund to the VAT amount mentioned in the application for it. It was obvious from the invoices provided by the taxpayer that a refund should be granted for a larger amount. If the tax

Notes

[46] *Ibid.*, para. 42.

[47] *Ibid.*, paras 44 and 45.

[48] *Ibid.*, para. 47.

[49] Opinion of Advocate General Kokott of 21 Oct. 2021, C-80/20, ECLI:EU:C:2021:326, para. 75.

[50] CJEU Senatex, *supra* n. 1.

[51] CJEU 17 Dec. 2020, C-346/19, ECLI:EU:C:2020:1050.

[52] *Ibid.*, paras 40–42.

[53] *Ibid.*, para. 43.

[54] *Ibid.*, para. 44.

[55] *Ibid.*, paras 49 and 50.

[56] *Ibid.*, para. 52.

authorities can determine with certainty the amount of VAT to be refunded to the taxpayer, the principle of sound administration requires it to notify the taxable person thereof as soon as possible by the means that it considers the most appropriate. It must also request that individual to correct his refund application in order to ensure a favourable ruling.[57] The CJEU further ruled that a corrective application is deemed to have been made on the date of the initial application since it is based on the latter and is therefore filed on time.[58]

Last but not least, in an infringement procedure against Germany,[59] the European Commission filed a complaint stating that Germany should request additional information pursuant to Article 20 of Directive 2008/9/EC in the case of an incomplete or insufficient refund application in the view of the German tax authorities. After several exchanges of letters between the European Commission and Germany, one point of dispute remained. Germany stated that, in view of the fact that the time limit provided in Article 15 (1) of Directive 2008/9/EC is a preclusive time limit, any supporting documents that are missing after the expiry of that time limit pursuant to Article 10 of the directive are not to be requested. An exception to that practice could be made only if the rejection of the refund application was contrary to the principle of proportionality, in particular in certain cases where the supporting documents had been misplaced. Regarding that latter position, the commission brought an action against Germany before the CJEU stating that Germany failed to comply with Articles 170 and 171 of the VAT Directive and Article 5 of Directive 2008/9/EC.

According to the CJEU, the infringement procedure does not concern an encroachment of formal requirements preventing substantiation that the substantive requirements of the right to a refund of the VAT were fulfilled. It concerns – subject to the submission of the refund application within the time limit established in Article 15(1) of the directive – the time at which that proof can be provided.[60] The German administrative practices according to the CJEU exceed what is necessary to achieve the objectives of combating tax evasion, avoidance, and possible abuse in the field of value added tax.[61] When a taxpayer has not added an invoice to its refund application, it should be allowed pursuant to Article 20 Directive 2008/9/EC to supplement its application by submitting the copy of the invoice, if necessary, after the expiry of the period laid down in Article 15(1) of the directive or by submitting relevant information enabling the application to be processed.[62]

3.2 *Lessons Learned*

The cases discussed demonstrate that the principles applicable under the VAT Directive also apply to refund requests under Directive 2008/9/EC. Refunds must be allowed if all substantive conditions have been met, and it is possible for taxpayers to provide additional information after the refund request has been filed. Tax authorities are even required to ask for that information in the event of an incomplete or insufficient application including situations after the expiry of the deadline of filing the application. The same – although not explicitly stated in the case law until now – should apply for a deduction of the VAT under the VAT Directive considering both the neutrality principle and the link between the VAT Directive and Directive 2008/9/EC that is demonstrated by Articles 170 and 171 of the VAT Directive and Directive 2008/9/EC. The tax authorities cannot deny a deduction without providing the opportunity for the taxpayer to substantiate its claim. If, however, the taxpayer had ample opportunity to provide additional information but failed to do so without decent justification and in spite of several requests for it, the information can still be accepted in court proceedings. However, it can also be refused as the CJEU ruling in the GE Auto Service Leasing case demonstrates.[63] Last but not least, the author considers it correct that tax authorities should not be able to disregard obvious errors made by the taxable person when they are evident from the documentation that is provided. Additionally, they should be required to refund the VAT to which the taxable person is entitled because the right of deduction (and refund) is such a fundamental right in the EU VAT system.

4 Making the choice to include an asset in the business assets

4.1 *CJEU case law about including an asset in the business assets*

The issue of substantive and formal conditions was raised in two cases concerning the inclusion of assets in the business assets. The joined cases E and Z[64] deal with the

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[57] CJEU CHEP equipment, *supra* n. 56, para. 54.

[58] *Ibid.*, para. 53.

[59] CJEU 18 Nov. 2020, C-371/19, ECLI:EU:C:2020:936.

[60] *Ibid.*, para. 85.

[61] *Ibid.*, para. 86.

[62] *Ibid.*, para. 88.

[63] CJEU 18 Nov. 2020, C-371/19, ECLI:EU:C:2020:936.

[64] CJEU 14 Oct. 2021, C-45/20 and C-46/20, ECLI:EU:C:2021:852.

moment that the choice to include an asset in the business assets must be made and when it must be disclosed to the tax authorities. E has a scaffolding business and builds a family home. The home includes an office that is being used for the scaffolding business. Invoices for the building of the house were raised in October 2014-November 2015. E exercised its right to deduct the VAT in a VAT return for the year 2015. This VAT return was received on 28 September 2016 by the German tax authorities. The right to deduct the VAT was refused because E included the asset in its business assets after 31 May 2016. Z purchased a photovoltaic system in 2014, and the electricity generated by it was partially used for his own consumption and in part resold to an energy supplier. The contract for the supply of electricity to the energy supplier was also concluded in 2014. Z filed a VAT return for the year 2014 on 29 February 2016 in which it claimed a VAT deduction for an invoice dated 11 September 2014 regarding the supply of the photovoltaic system. Z's right to deduct the VAT was also denied because Z failed to include the photovoltaic system in its business assets before 31 May 2015.

The CJEU initiated its judgment by stating that the right to deduct VAT is subject to compliance with the substantive and formal conditions established by the VAT Directive.[65] It is the taxable person's choice to act as such.[66] Therefore, it is a substantive condition governing the right to deduct. Whether a taxable person has acted in that capacity should be determined based on the facts of the case.[67] In order to ascertain whether a taxable person acted in that capacity when acquiring goods, a clear and express declaration of the intention to use the goods for economic purposes at the time of their acquisition may suffice. The absence of such a declaration does not exclude the possibility that such an intention may be implicitly conveyed.[68] The factors that may do so include, in particular, the nature of the goods concerned, the capacity in which the person acted, and amount of time that elapsed between the acquisition of the goods and their use for the purposes of the taxable person's economic activity.[69] The immediate use for taxable transactions is not required because the use to which goods are put merely determines the extent of the initial deduction or any subsequent possible adjustments but does not affect the issue of whether a right of deduction arises.[70] It is at the referring judge's discretion to determine, taking into account all circumstances, whether E and Z acted as a taxable person when acquiring the goods in question.[71] VAT deductions made by taxable persons in their tax returns are capable of establishing an allocation decision.[72] However, the absence of deductions in the provisional VAT return for the period in which the goods were acquired does not inherently support the conclusion that the taxable person chose not to allocate the goods concerned to his business.[73] Even though the allocation decision itself is a substantive condition, the communication of that decision to the tax authorities is a formal condition.[74]

The case may be different if noncompliance with such formal requirements effectively prevents producing conclusive evidence that the substantive requirements have been satisfied.[75] The failure by E and Z to comply with the deadline by which they were they were supposed to communicate their allocation decision is not enough to prevent them from producing conclusive evidence that they had taken such a decision at the time of acquiring the capital goods at issue in the main proceedings.[76] This should be verified by the referring judge.

A temporal limit is allowed when it is in accordance with the principles of equivalence and effectiveness which, according to the CJEU, seems to be valid in this case.[77] Still, the CJEU appears to be reluctant to accept the loss of the right to deduct the VAT because, in paragraph 63, it states that the referring judge should establish whether the time limitation is proportionate to the objective of ensuring compliance with the principle of legal certainty. In that respect, account should be taken of the possibility for the national authorities of imposing penalties on a negligent taxable person that is less detrimental to the principle of neutrality than the rejection of the right of

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[65] *Ibid.*, para. 33.

[66] *Ibid.*, para. 41.

[67] *Ibid.*, para. 42.

[68] *Ibid.*, para. 43.

[69] *Ibid.*, para. 45.

[70] *Ibid.*, para. 46.

[71] *Ibid.*, para. 47.

[72] What the CJEU means to say here is that the VAT can only be deducted if a good is included in the business assets. Therefore if the VAT is deducted this demonstrates that the decision to allocate goods to the business assets has been made.

[73] CJEU joined cases E and Z, *supra* 64, para. 49.

[74] *Ibid.*, para. 55.

[75] *Ibid.*, para. 56.

[76] *Ibid.*, para. 58.

[77] *Ibid.*, para. 59.

deduction. Consideration should also be taken of the pre-eminent place of the right of deduction in the common VAT system.[78]

4.2 *Lessons Learned*

Once again, the CJEU ruled that the existence and extent of the right to deduct are substantive conditions. Since the right to deduct only exists when an asset is acquired in the capacity of taxpayer, it makes sense that the allocation decision is a substantive condition for the right to deduct to exist. On the other hand, the author also agrees with the CJEU that the deduction of the VAT in the VAT return is a formal condition. After all, it is not a condition that follows from Article 168 of the VAT Directive that the CJEU refers to as substantive conditions nor, for that matter, from Article 178 of the VAT Directive concerning the conditions that the CJEU refers to as formal conditions.

In the E and Z case, the CJEU is more lenient than in its previous judgment in the Nestrade case.[79] In that latter case it ruled that a limitation period for which the expiry has the effect of penalizing a taxable person who has not been sufficiently diligent and has failed to rectify incorrect or incomplete invoices for the purposes of exercising the right to a refund of VAT governed by national law with the loss of the right to deduct VAT is allowed. However, this is only allowed provided that that procedure applies in the same way to analogous rights in tax matters founded on domestic law and EU law (principle of equivalence) and that it does not, in practice, render impossible or excessively difficult the exercise of that right (principle of effectiveness).[80] The proportionality principle is not mentioned in that case, however, it seems that the right could not be granted since the tax authorities in that case did not have all of the necessary information to determine the right to the refund. In Zabrus Siret,[81] the CJEU held that, in view of the predominant position that the right of deduction has in the common system of value added tax, a penalty consisting of an absolute refusal of the right of deduction appears disproportionate when no evasion or detriment to the budget of the state is ascertained. This appears to be the same in the E and Z case. The advocate general at least seems of the opinion that the denial of the right to deduct VAT would be in breach of the proportionality principle. It states that, in a situation when the communication of the allocation decision was received by the tax authorities on 28 September 2016 in E's case and on 29 February 2016 in Z's case, the substantive requirements for a deduction of the VAT might well be met. Further, the period of delay of both E and Z could not be described as administratively unmanageable. E's request for a deduction of input tax was received by the tax office on 28 September 2016, that is, sixteen months after the deadline of 31 May 2015, and Z filed a turnover tax declaration on 29 February 2016, nine months after the expiry of the 31 May 2015 deadline.[82]

5 VAT DEDUCTION IN THE CASE OF LATE FILING OF INTRA-COMMUNITY ACQUISITIONS

5.1 *CJEU case law about deduction of VAT on intra-Community acquistions*

Last but not least, the A case[83] deals with a VAT deduction in the event of the late filing of intra-Community acquisitions. The VAT on these is deductible pursuant to Article 168 (c) VAT Directive. Article 178 (c) VAT Directive makes the right to deduct VAT dependent on the possession of an invoice. EU Member States may waive this requirement pursuant to Article 181 VAT Directive.

A has made intra-Community acquisitions that he should have reported, according to Polish law, within three months after the month in which they were made. However, due to several reasons such as invoices issued late, wrong classifications, or mistakes of employees, A cannot report all intra-Community acquisitions on time. According to Polish law, these will have to be reported with retrospective force. A claims that it can also deduct the VAT due on those intra-Community supplies with retrospective force therefore resulting in no VAT due on the balance. According to the Polish tax authorities, A cannot deduct the VAT with retrospective force. A VAT deduction can only be claimed in the tax period in which the intra-Community acquisition is actually being reported. According to Polish legislation, reporting the intra-Community acquisition within a three month period will facilitate an audit of the intra-Community trade and the VAT reverse charge rule.

According to the CJEU, this interpretation of the EU VAT Directive is erroneous. The substantive conditions for deducting the VAT on intra-Community

Notes

[78] *Ibid.*, para. 64.

[79] CJEU 14 Feb. 2019, C-562/17, ECLI:EU:C:2019:115.

[80] *Ibid.*, para. 35.

[81] CJEU 26 Apr. 2018, C-81/17, ECLI:EU:C:2018:283.

[82] Opinion of Advocate General Tanchev of 20 May 2020, C-45/20 and C-46/20, ECLI:EU:C:2021:417, para. 59.

[83] CJEU 18 Mar. 2021, C-895/19, ECLI:EU:C:2021:216.

acquisitions can be found in Article 168 (c) VAT Directive. Pursuant to this provision, the following conditions must be satisfied: (1) the acquisitions are effected by a taxable person, (2) this taxable person is liable for the payment of VAT on those acquisitions, and (3) the goods must be used for the purposes of that person's taxable transactions.[84] Formal requirements governing the right to deduct, by contrast, regulate the rules governing its exercise and monitoring thereof and the smooth functioning of the common system of VAT.[85] With regard to VAT that is due on intra-Community acquisitions, it is apparent from Article 178 (c) VAT Directive that the exercise of the right of deduction is subject to the condition that the taxable person has set out in the VAT return provided for in Article 250 of that directive all the information needed to calculate the amount of VAT due on the intra-Community acquisition. Additionally, he must possess also an invoice drawn up in accordance with Sections 3 to 5 of Chapter 3 of Title XI of the VAT Directive.[86] The right to deduct VAT, in principle, must be exercised in respect of the period during which, first, the right has arisen and, second, the taxable person has an invoice.[87] The origin of the right to deduct VAT is not necessarily dependent on obtaining an invoice, submitting a tax declaration, and calculating the VAT due on such an acquisition within a specific period.[88] Moreover, the Polish legislation results in A temporarily bearing a VAT burden regardless of the circumstances of the case, A's good faith, and the reasons for the late declaration; it is only because a formal condition has not been fulfilled.[89] If the substantive conditions were met, A should be allowed to deduct the VAT during the same period as that during which the same amount of the VAT was calculated. Poland, however, can impose sanctions because of the late filing of the intra-Community acquisitions.[90]

5.2 *Lessons Learned*

Like the cases discussed in the previous sections, this CJEU judgment demonstrates that a distinction must be made between formal and substantive requirements. The reporting of the intra-Community acquisition is a formal requirement and does not prevent the taxable person from exercising his right to deduct the VAT in the tax period in which it met all of the substantive conditions. As in the cases discussed in section 2, the A case demonstrates that the requirements mentioned in Article 178 VAT Directive are formal requirements. In this case, they include the provision of information in the VAT return needed for calculating the amount of VAT due on the intra-Community acquisition and the possessing an invoice drawn up in accordance with sections 3 to 5 of Chapter 3 of Title XI. Thus, if a taxable person has an invoice and has acquired goods that resulted in an intra-Community acquisition, the VAT can be deducted even when the latter is reported late.

6 Conclusion

In this article, the author addressed recent case law of the CJEU regarding formal and substantive requirements for the deduction and refund of the VAT. Four different topics were discussed:

6.1 *Incorrect or Incomplete Invoices*

Recent judgments demonstrate that all invoicing requirements are formal conditions even when information that is more essential is missing from the invoice or is incorrect. To be able to exercise its right to deduct input tax, the taxable person should be in the possession of an invoice. A document not meeting the invoice requirements can be so deficient that it cannot be regarded as such. In the authors view, a minimum requirement should be a person claiming a payment from another person. They do not necessarily have to be the actual supplier and customer if it can be demonstrated with objective evidence that the supplier is a taxable person and the customer is a taxable person who has acquired the goods or services and will use them as inputs for his taxable transactions. Only the real recipient of the supply can deduct the VAT. The VAT amount does not have to be mentioned separately when it is clear from objective evidence that the VAT amount has been charged to the customer.

Notes

[84] *Ibid.*, para. 36.

[85] *Ibid.*, para. 37.

[86] *Ibid.*, para. 38.

[87] *Ibid.*, para. 40.

[88] *Ibid.*, para. 45.

[89] *Ibid.*, para. 46.

[90] *Ibid.*, para. 53.

6.2 *Mistakes and Refunds Under Directive 2008/9/EC*

Recent case law regarding mistakes made by taxpayers when applying for a refund under Directive 2008/9/EC demonstrates that tax authorities are required to request information in the case of incomplete or insufficient applications. They cannot simply deny the refund request because the request is incomplete or insufficient. In the author's view, the same applies for a deduction of the VAT under the VAT Directive. The tax authorities should ask the taxable person for information to substantiate its claim before denying the right to deduction.

6.3 *Including an Asset in the Business Assets*

The decision to allocate assets in the business assets is a substantive requirement but communicating this decision and the actual deduction of the VAT in a VAT return is not. The joined E and Z cases demonstrate that the proportionality principle should also be taken into account. The refusal of the right to deduct the VAT appears to be disproportionate in these cases.

6.4 *VAT Deduction in Case of Late Filing of Intra-Community Acquisitions*

The VAT on intra-Community acquisitions can be deducted also when those are reported late. The case law on formal and substantive conditions also applies here.

6.5 *Final Observations*

The message of the CJEU is consistent and clear. The right of deduction under the VAT Directive or a refund under Directive 2008/9/EC can be exercised when all substantive conditions are met, even if not all formal conditions are fulfilled. There are only two exceptions to this rule: (1) the non-fulfilment of the formal conditions prevents the production of conclusive evidence that the substantive conditions are fulfilled (additional documentation provided by the taxable person and undisputed facts of the case must also be taken into account) and (2) there is VAT fraud, and the taxable person in question knew or should have known about it. The recent judgments of the CJEU enrich the existing case law on this matter but will certainly not be the last cases. Tax authorities seem to continue stating: Just a formality!