

H&amp;I 2024/262

## H GmbH. No refund of VAT wrongly charged directly to purchaser. Risk of double VAT refund. Court of Justice

CJ 05-09-2024, C-83/23 (Uitspraak), m.nt. Marie Lamensch (H GmbH)

|                |                                                                                                                                    |
|----------------|------------------------------------------------------------------------------------------------------------------------------------|
| Instantie      | Court of Justice of the European Union                                                                                             |
| Datum          | 5 september 2024                                                                                                                   |
| Magistraten    | F. Biltgen, N. Wahl, M.L. Arastey Sahún                                                                                            |
| Zaaknummer     | C-83/23                                                                                                                            |
| Noot           | Marie Lamensch                                                                                                                     |
| Roepnaam       | H GmbH                                                                                                                             |
| JCDI           | JCDI:ADS983367:1                                                                                                                   |
| Vakgebied(en)  | Omzetbelasting / Aftrek en teruggaaf<br>Europees belastingrecht / Belastingen EU                                                   |
| Brondocumenten | Uitspraak, Court of Justice of the European Union, 05-09-2024<br>Beroepschrift, Court of Justice of the European Union, 15-02-2023 |
| Wetingang      | Council Directive 2006/112/EC                                                                                                      |

### Essentie

Judgment of the Court of Justice in the case H GmbH. Council Directive 2006/112/EC must be interpreted as meaning that the recipient of a service may not request directly from the tax authority of the Member State in whose territory it is established, the refund of the VAT which it paid to the supplier of that service - which invoiced in error the national VAT of that Member State instead of the VAT legally due in another Member State and paid it to the tax authorities of the first Member State - where those tax authorities have already refunded the VAT to the supplier, which has gone into liquidation, of the service.

### Samenvatting

#### *Facts of the case*

KG, a German company, purchased motorboats from E-GmbH, also established in Germany. At the time of the sale, the boats were located in Italy. Accordingly, Italian VAT should have been charged by E-GmbH on the supply. However, E-GmbH mistakenly invoiced German VAT, which KG then deducted in its German VAT return. Following a tax audit, E-GmbH was required to correct the invoices and KG received a VAT adjustment notice concerning the 'wrongly deducted' German VAT.

Thereafter, E-GmbH was declared bankrupt. The liquidator deleted the entry regarding the application of German VAT on the invoices and requested a refund thereof from the tax authorities. The German tax authorities reimbursed the VAT to the bankruptcy estate of E-GmbH. E-GmbH, however, did not pay this VAT back to KG. KG then sought a direct refund of German VAT from the German tax authorities. This request was rejected and, after a series of appeals, the case was brought before the Court of Justice of the European Union

(hereinafter: 'CJ').

### Questions referred

The referring court asked, in essence, whether the VAT Directive, read in the light of the principles of effectiveness and VAT neutrality, must be interpreted as meaning that a customer may request a direct refund of wrongly invoiced VAT where those tax authorities have already refunded the wrongly invoiced VAT to the supplier, which has gone into liquidation.

### Findings of the Court

Incorrectly invoiced VAT must, in principle, be corrected by the supplier. In practice, the supplier should ask for a refund and then reimburse the customer. As decided in the *Reemtsma* case (CJ 15 March 2007, C-35/05 *Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze*, ECLI:EU:C:2007:167) a customer should nevertheless be able to request a refund directly from the tax authorities if reimbursement from the supplier is 'impossible or extremely difficult', in particular in the event of the supplier's insolvency. The CJ, however, pointed out that the situation in this case is more complex than that in *Reemtsma* (C-35/07), as the tax authorities had already reimbursed the unduly paid VAT to the bankruptcy estate of E-GmbH. Therefore, the CJ concluded that the findings of the *Reemtsma* judgment cannot be applied by analogy, as this would lead to double payment. The CJ added that the case law arising from the *Reemtsma* judgment is not intended to call into question the order of priority of creditors in the context of liquidation proceedings.

The CJ further added that when granting a refund, the tax authorities cannot be required to take account of the fact that the usual refund chain has been seriously disrupted, or even interrupted, by reason of the fact that the supplier was in liquidation, with the result that the refunded VAT would become part of the insolvency estate and would risk not being refunded to the purchaser. This, according to the CJ, would be an 'unreasonable burden'.

Finally, the CJ pointed out that the finding that a reimbursement from the supplier is 'impossible or excessively difficult' presupposes that the customer has not ignored any possibility of asserting its rights, and noted that H-GmbH could have brought a civil action against the liquidator to obtain a correct VAT invoice (including Italian VAT), but did not do so.

Based on the above, the CJ decided that a customer may not request the refund of wrongly invoiced VAT which it paid to its supplier directly from the tax authorities, where those tax authorities have already refunded the VAT to the supplier, even if the latter has gone into liquidation

### Uitspraak

### JUDGMENT OF THE COURT (Seventh Chamber)

5 September 2024<sup>[1]</sup>

(Reference for a preliminary ruling - Harmonisation of fiscal legislation - Common system of value added tax (VAT) - Directive 2006/112/EC - VAT unduly invoiced and paid - Correction of the invoice - Liquidation of the supplier - Refund to the supplier of the VAT - Refusal of the tax authority to refund the VAT directly to the purchaser - Priority for the right to a VAT refund - Risk of a double refund of the VAT - Risk of loss of tax revenue)

In Case C-83/23, ECLI:EU:C:2024:699,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Fiscal Court, Germany), made by decision of 3 November 2022, received at the Court on 15 February 2023, in the proceedings

H GmbH

Finanzamt M,

THE COURT (Seventh Chamber),

composed of F. Biltgen (Rapporteur), President of the Chamber, N. Wahl and M.L. Arastey Sahún, Judges,

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure and further to the hearing on 11 January 2024,

after considering the observations submitted on behalf of:

- H GmbH, by M. Boche, M. von Einem and A. Graf, Rechtsanwälte, D. Hoffmanns and J. Scholz, Steuerberater,
- the German Government, by J. Möller and N. Scheffel, acting as Agents,
- the European Commission, by B. Eggers and J. Jokubauskaitė, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## Judgment

### 1

This request for a preliminary ruling concerns the interpretation of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive 2010/45/EU of 13 July 2010 (OJ 2010 L 189, p. 1) ('the VAT Directive'), and of Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State (OJ 2008 L 44, p. 23).

### 2

The request has been made in proceedings between H GmbH, a company established in Germany, and the Finanzamt M (Tax Office M, Germany) concerning the right to deduct input value added tax (VAT) and the equitable refund of that tax.

## Legal context

### European Union law

#### 3

Article 167 of the VAT Directive provides:

'A right of deduction shall arise at the time the deductible tax becomes chargeable.'

#### 4

Article 168(a) of that directive provides:

'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person,

the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

- (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person.'

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Article 178(a) of that directive states:

'In order to exercise the right of deduction, a taxable person must meet the following conditions:

- (a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Sections 3 to 6 of Chapter 3 of Title XI.'

6

Article 203 of that directive provides:

'VAT shall be payable by any person who enters the VAT on an invoice.'

## German law

The UStG

7

Paragraph 14(4) of the Umsatzsteuergesetz (Law on turnover tax), in the version applicable to the dispute in the main proceedings (BGBl. 2013 I, p. 1809) ('the UStG'), provides:

'An invoice shall contain the following details:

...

- (8) the applicable rate of tax and the amount of tax due on the consideration or, in the case of an exemption, an entry to the effect that the supply of goods or services is exempt.'

8

Paragraph 14c(1) of the UstG provides:

'If in an invoice in respect of a supply or 'other service' a trader mentions separately a higher amount of tax than that trader owes under this Law in respect of the transaction, then that trader shall also be liable for the higher amount. If that trader adjusts the amount of tax vis-à-vis the recipient of the service, Paragraph 17(1) shall apply by analogy. ...'

9

Paragraph 15(1) of the UstG states:

'The trader may deduct the following input tax:

- (1) the tax lawfully due on supplies of goods and services which have been effected by another trader for the purposes of his or her business. The exercise of the right of deduction presupposes that the trader holds an invoice issued in accordance with Paragraphs 14 and 14a ...'.

The AO

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The Abgabenordnung (the Fiscal Code), in the version applicable to the dispute in the main proceedings (BGBl. 2002 I, p. 3866) ('the AO'), contains Paragraph 163, entitled 'Divergent assessment of taxes on equitable grounds', the first sentence of subparagraph 1 of which provides:

'Taxes may be set at a lower amount and individual bases of taxation which increase the tax may be ignored in assessing the tax where the levy of the tax would be inequitable in the circumstances of the individual case.'

11

Paragraph 227 of the AO states:

'The tax authorities may remit, in whole or in part, amounts arising from the tax debtor-creditor relationship where their collection would be unreasonable in the circumstances of the individual case; under the same conditions, amounts already paid may be refunded or credited.'

12

H, the applicant in the main proceedings, became the successor in title of a limited partnership established in Germany ('KG'), the purpose of which was the hiring out of movable property to other undertakings, inter alia in the form of sale and leasebacks. The dispute in the main proceedings concerns six sale-and-leaseback transactions carried out by KG for the benefit of E-GmbH, another company established in Germany, in 2007, 2008, 2010 and 2012.

13

In each of those transactions, E-GmbH purchased a new motor boat from E-sr, a company established in Italy. The corresponding invoices bore the reference 'intra-Community supply' and did not contain any VAT. The purchase price of each boat was paid in full by E-GmbH.

14

Following each of those purchases, E-GmbH and KG entered into, first of all, a sale-and-leaseback agreement providing for (i) the sale of the boat to KG at the net purchase price plus German VAT, and (ii) an agreement relating to a leasing contract transferring to E-GmbH the right to use that boat. E-GmbH then sent KG a sales invoice for the boat on which German VAT was expressly mentioned, entered that VAT in its tax returns and paid it to Finanzamt X (Tax Office X, Germany) to which the applicant belonged. That invoice gave no indication of where the boat was located at the time of sale. In its VAT returns, KG deducted, in respect of the input VAT paid, the VAT entered on that invoice. Lastly, E-GmbH and KG entered into a leasing agreement concerning the boat for a period of 36 months.

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During an inspection of E-GmbH concerning 2008, the tax authority found that, at the time when E-GmbH had sold the boats to KG, those boats were not in Germany but in Italy. In October 2012, E-GmbH informed KG that it had erroneously entered German VAT on two invoices issued in April and October 2008 respectively, and informed KG that those invoices would be corrected.

16

Following a VAT inspection carried out at KG's premises, the inspector concluded that the supplies of boats had to be classified as supplies without transport which, under Article 31 of the VAT Directive read in conjunction with Paragraph 3(7) of the UStG, were taxable not in Germany, but in Italy, where those boats were located at the time of their sale. The inspector stated that the VAT invoiced by E-GmbH to KG was due under Article 203 of the VAT Directive and Paragraph 14c of the UStG, but that it could not be deducted by KG as input VAT.

17

The Tax Office M concurred with that assessment and, in accordance with Paragraph 173(1)(1) of the AO, issued KG with a VAT adjustment notice reducing the amount of VAT deducted by that company for 2008, during the course of which two invoices for the sale of boats had been drawn up. The Tax Office M subsequently rejected as unfounded the complaint lodged against that notice of adjustment.

18

Four other invoices for the sale of boats had been drawn up in 2006, 2010 and 2012. The Tax Office M also

issued amended VAT assessment notices for the years 2007 and 2010, relating to the deduction of input VAT paid in respect of the invoices drawn up for 2006 and 2010. As the objection lodged against those tax adjustment notices was rejected as unfounded by the Tax Office M, KG paid that VAT to the Tax Office M. Finally, KG did not deduct VAT in respect of the sales of boats referred to in the annual VAT return for 2012.

## 19

In 2014, E-GmbH became subject to insolvency proceedings. The court-appointed insolvency administrator responsible for the liquidation of that company corrected the six invoices relating to the supply of the boats, deleting the entry regarding VAT which the invoices erroneously included. The Tax Office X stated that the court-appointed insolvency administrator had submitted the adjusted invoices on 10 December 2014 and that the insolvency administrator had submitted a request for correction on 8 January 2015. The Tax Office X granted that request and refunded the corresponding VAT, which was repaid to the insolvency estate, while informing the tax representative of the court-appointed insolvency administrator that it was required to subject the transactions to VAT in Italy. According to the applicant in the main proceedings, the insolvency administrator refused, however, to issue the invoices containing Italian VAT. The applicant in the main proceedings did not bring proceedings against E-GmbH with a view to obtaining such invoices.

## 20

KG, on the basis of Paragraph 163 of the AO, requested the Tax Office M, on equitable grounds, to recalculate the VAT for the years 2007, 2008, 2010 and 2012. The tax authority rejected that request and subsequently also dismissed KG's complaint against that decision as being unfounded.

## 21

The action brought by the applicant in the main proceedings before the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany) was dismissed on the ground that the Tax Office M was not required to refund to it the VAT which had been unduly invoiced, since that VAT had been repaid to the insolvency estate of E-GmbH. In addition, according to that court, the applicant in the main proceedings has no civil right to a refund of that VAT from E-GmbH, but merely has a right to be issued with an invoice containing Italian VAT.

## 22

The applicant in the main proceedings brought an appeal on a point of law before the Bundesfinanzhof (Federal Finance Court, Germany).

## 23

In the first place, the referring court states that it follows from the case-law of the Court of Justice, in particular from the judgment of 15 March 2007, *Reemtsma Cigarettenfabriken* (C-35/05, EU:C:2007:167), that, in certain circumstances, the recipient of an invoice containing undue VAT has a 'direct right' to obtain the refund of that VAT from the tax authority. Recently, in the judgment of 13 October 2022, *HUMDA* (C-397/21, EU:C:2022:790), the Court, in accordance with that case-law, held that national legislation under which, first, a supplier who has paid VAT to the tax authorities in error may seek to be refunded and, second, the recipient of the services may bring a civil law action against that supplier for recovery of the sums paid but not due, observes the principles of VAT neutrality and effectiveness, since it allows the recipient, who has borne the VAT invoiced in error, to obtain a refund of the sums unduly paid. In that judgment, the Court also stated that, if the refund of the VAT becomes impossible or excessively difficult, in particular where the supplier becomes insolvent, the recipient of the services may, on the basis of the principles of VAT neutrality and effectiveness, obtain the refund directly from the tax authority. According to the referring court, the Court held in that judgment that that latter possibility also applies where, on account of an error as to the exact place of supply, the tax has been paid in the wrong Member State if, in the absence of abuse or fraud, since both the supplier and the recipient of the services acted in good faith, there is no risk of loss of tax revenue.



The referring court considers that the case at issue in the main proceedings is comparable to, in some respects, that which gave rise to the judgment of 13 October 2022, *HUMDA* (C-397/21, EU:C:2022:790). The referring court doubts, however, that the solution adopted in that judgment can be transposed to the case at issue in the main proceedings. More specifically, that judgment does not answer the question whether there is a 'direct right' to a refund where, as in the present case, it is necessary to replace the national VAT on the initial invoice with the higher rate of VAT from another Member State. The referring court asks whether, in terms of the European Union as a whole and including the Member State in which the service was actually provided, there is not rather a right to have an invoice referring to the Italian tax issued. In that context, that judgment also does not resolve the question whether the 'direct right' to a refund could, in a situation such as that at issue in the main proceedings, be subject to the condition that the purchaser has brought a civil action seeking to have the insolvent supplier issue an invoice referring to the VAT of that other Member State. The question also arises as to whether considerations relating to the prevention of fraud could, in such a situation, affect the right of the purchaser to claim directly from the tax authority a refund of the VAT unduly invoiced and paid. In that regard, the referring court states that the fact that the court-appointed insolvency administrator of E-GmbH will not declare in Italy the Italian VAT legally due could, under Italian law, result in VAT fraud in Italy.

In the second place, the referring court asks whether, in a situation such as that at issue in the main proceedings, the tax authority must prioritise the right to a refund by the issuer of the invoice on account of the adjustment of the invoice or the 'direct right' of the recipient of the invoice. It asks, in that regard, whether it is necessary to take account of the fact that the usual refund chain cannot be followed on account of the insolvency of the issuer of the invoice and/or the matters of timing such as, for example, the fact that, when the tax authorities refunded that VAT to the issuer of the invoice, they were aware that the issuer of the invoice was insolvent and could therefore discern the possibility that the recipient of the invoice had a 'direct right' to a refund.

In those circumstances the Bundesfinanzgericht (Federal Fiscal Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- (  
1) Does the recipient of a service, who is domiciled in the national territory, have a so-called direct claim against the national tax administration by virtue of the judgment of the Court of 15 March 2007, *Reemtsma Cigarettenfabriken*- C-35/05 (EU:C:2007:167) if:
- (a) the service provider, who is also domiciled within the national territory, issues the service recipient with an invoice that shows the tax incurred at a national level and the service recipient pays the invoice, with the provider then duly paying the tax shown in the invoice,
  - (b) the invoiced service is provided in another Member State,
  - (c) the service recipient is therefore denied an input VAT deduction in its country of domicile because no tax is owed under the laws of that country,
  - (d) the provider then corrects the invoice by removing any reference to the tax incurred at a national level, thereby reducing the invoice amount by the amount of the tax,
  - (e) the service recipient proves unable to assert any payment claims against the provider because insolvency proceedings were opened in respect of the provider's assets, and

- (f) the provider, who is not yet registered in the other Member State, has the option to register for VAT purposes in that Member State in order to be able to issue the service recipient with an invoice bearing the relevant tax number in that Member State and showing the tax payable in said Member State, which would entitle the service recipient to an input VAT deduction in said Member State under the special procedure set out in Directive 2008/9/EC of 12 February 2008?
- (2) Does the answer to that question depend on whether the national tax administration has refunded the tax paid to the provider merely by virtue of the corrected invoice, even though the provider did not repay anything to the service recipient following the opening of insolvency proceedings?’

## Consideration of the questions referred

### 27

By its two questions, which it is appropriate to examine together, the referring court is asking, in essence, whether the VAT Directive, read in the light of the principles of effectiveness and VAT neutrality, must be interpreted as meaning that the recipient of a service may request directly from the tax authority of the Member State in whose territory it is established the refund of the VAT which it paid to the supplier of that service - which invoiced in error the national VAT of that Member State instead of the VAT legally due in another Member State and paid it to the tax authorities of the first Member State - where those tax authorities have already refunded the VAT to the supplier, which has gone into liquidation, of the service.

### 28

As a preliminary point, it must be recalled that the principle of VAT neutrality, which lies at the heart of the common system of VAT established by EU legislation, is ensured by the right of deduction which is intended to relieve the operator entirely of the burden of the VAT due or paid in respect of all its economic activities and therefore ensuring neutrality of taxation of all economic activities, whatever their purpose or results of those activities, provided that they are themselves, in principle, subject to VAT (see, to that effect, judgment of 13 October 2022, *HUMDA*, C-397/21, EU:C:2022:790, paragraph 18 and the case-law cited).

### 29

Having set out that premiss, it should be noted that, according to settled case-law, in the absence of any provision in the VAT Directive on the adjustment by the issuer of the invoice of VAT improperly charged, it is, in principle, for the Member States to lay down the conditions in which that VAT may be adjusted (judgment of 13 October 2022, *HUMDA*, C-397/21, EU:C:2022:790, paragraph 19 and the case-law cited).

### 30

In order to ensure neutrality of VAT, it is for the Member States to provide, in their domestic legal systems, for the possibility of adjusting any tax improperly invoiced where the person who issued the invoice shows that he or she acted in good faith (judgment of 13 October 2022, *HUMDA*, C-397/21, EU:C:2022:790, paragraph 20 and the case-law cited).

### 31

In the present case, the referring court questions the transposability to the present case of the case-law arising from the judgment of 15 March 2007, *Reemtsma Cigarettenfabriken* (C-35/05, EU:C:2007:167), which concerned the principles of neutrality, effectiveness and non-discrimination.



In that judgment, as regards the question whether a recipient of services is entitled to request a refund of VAT from the supplier who has invoiced that VAT in error, and who could in turn seek a refund from the tax authority, or whether such a recipient must be able to address its request directly to that authority, the Court held that, in principle, a system in which, first, the supplier who has paid the VAT to the tax authorities in error may seek to be reimbursed and, second, the recipient of the services may bring a civil law action against that supplier for recovery of the sums paid but not due observes the principles of neutrality and effectiveness. Such a system enables the recipient who bore the tax invoiced in error to obtain a reimbursement of the sums unduly paid (judgment of 15 March 2007, *Reemtsma Cigarettenfabriken*, C-35/05, EU:C:2007:167, paragraph 39).

The Court added that, if reimbursement of the VAT becomes impossible or excessively difficult, in particular in the case of the insolvency of the supplier, those principles may require that the recipient of the services be able to address its application for reimbursement to the tax authorities directly. Thus, the Member States must provide for the instruments and the detailed procedural rules necessary to enable the recipient of the services to recover the unduly invoiced tax in order to respect the principle of effectiveness (judgment of 15 March 2007, *Reemtsma Cigarettenfabriken*, C-35/05, EU:C:2007:167, paragraph 41).

In that regard, it should be noted that, as the referring court itself pointed out in its request for a preliminary ruling, the right to a direct refund of VAT which has been unduly invoiced, as follows from the case-law of the Court, concerns national VAT not due in the Member State in which it was invoiced and in the budget of which it was paid (see, to that effect, judgment of 13 October 2022, *HUMDA*, C-397/21, EU:C:2022:790, paragraph 25). The right to a direct refund of unduly invoiced VAT which, in certain circumstances, the recipient of an invoice enjoys accordingly relates to the VAT which the Member State concerned has received from the issuer of the invoice.

While it is true that the dispute in the main proceedings concerns claims for a refund of VAT which has been unduly invoiced and paid, it is however clear that, in the present case, the Tax Office X has already repaid the VAT unduly paid by the recipient of the services to the insolvency estate of the supplier of the services.

In those circumstances, the case-law arising from the judgment of 15 March 2007, *Reemtsma Cigarettenfabriken* (C-35/05, EU:C:2007:167) cannot be transposed to a situation such as that at issue in the main proceedings.

If, in the event of VAT unduly invoiced and paid, a tax authority, at the request of the supplier of services, had already refunded the VAT, in accordance with the case-law resulting from the judgment of 15 March 2007, *Reemtsma Cigarettenfabriken* (C-35/05, EU:C:2007:167), and also had to refund that VAT to the recipient of the services, the tax authority would be required to refund that VAT twice.

In that regard, it should be recalled that the Court has held repeatedly that where a supplier has incorrectly

invoiced and paid VAT, that VAT must, in principle, be refunded to that supplier. The right to a refund of charges levied in a Member State in breach of rules of EU law is the consequence and complement of the rights conferred on individuals by provisions of EU law as interpreted by the Court. The Member State concerned is therefore in principle required to refund charges levied in breach of EU law. The request for a refund of unduly paid VAT concerns the right to recovery of sums paid but not due which, according to settled case-law, helps to offset the consequences of the tax's incompatibility with EU law by neutralising the economic burden which that tax has unduly imposed on the trader who has, in fact, ultimately borne it. The principle of VAT neutrality, which is a fundamental principle of the common system for VAT, is meant to relieve the taxable person entirely of the burden of the VAT in the course of its economic activities (see, to that effect, judgment of 2 July 2020, *Terracult*, C-835/18, EU:C:2020:520, paragraphs 23 to 25).

39

The fact that, as in the case which gave rise to the judgment of 15 March 2007, *Reemtsma Cigarettenfabriken* (C-35/05, EU:C:2007:167), the service provider in the present case is in liquidation is not relevant in the present case.

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The case-law arising from that judgment is not intended to call into question the order of priority of creditors in the context of liquidation proceedings.

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In such circumstances, it is indeed true that it could not be ruled out from the outset that the purchaser would find itself in a situation where it is impossible or excessively difficult to bring a civil action against the court-appointed insolvency administrator responsible for the liquidation of the supplier of services with a view to having an invoice including Italian VAT drawn up and that that purchaser would subsequently be prompted to make a reimbursement request directly to the tax authority. However, if an unreasonable burden is not to be imposed on the tax authority, the tax authority cannot be required to take account of the fact that, in a situation such as that at issue in the main proceedings, the usual refund chain has been seriously disrupted, or even interrupted, by reason of the fact that the supplier was in liquidation, with the result that the VAT which was to be refunded to that supplier by the tax authority would become part of the insolvency estate and would risk not being refunded to the purchaser.

42

It is also true that preventing potential fraud, tax evasion, and abuse is an objective recognised and encouraged by the VAT Directive, so that the tax authorities must not only carry out the necessary inspections of taxable persons in order to detect VAT irregularities and fraud, but also check taxable persons' returns, accounts and other relevant documents (see, to that effect, judgment of 21 June 2012, *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373, paragraphs 62 and 63 and the case-law cited).

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However, to require, in the present case, the German tax authority to determine whether the fact that the court-appointed insolvency administrator responsible for the liquidation of the service provider will not declare in Italy the Italian VAT legally due constitutes, under Italian law, VAT fraud in that Member State goes beyond what may reasonably be imposed on a national tax authority in accordance with the objective referred to in the preceding paragraph.

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It should also be recalled that the possibility for the purchaser or recipient to make its request for the refund of

VAT which has been unduly invoiced and paid 'directly' to the tax authority constitutes an exception and is, as is apparent from the case-law cited in paragraph 33 of the present judgment, available only if the recovery of that VAT from the supplier is impossible or excessively difficult, which presupposes that the purchaser or recipient has not ignored any possibility of asserting its rights outside that situation.

45

As is apparent from the order for reference and, in particular, from the circumstances set out by the referring court in its wording of the first question, in the present case, the supplier, who is not yet registered in the Member State in which the VAT is legally due, is able to register for VAT purposes in that Member State, so that the supplier could then, by indicating a tax identification number of that Member State, send the recipient of the service an invoice which refers to the tax of that Member State, which would enable the recipient of the service to deduct the input VAT paid in that Member State.

46

Therefore, as the referring court noted, in the present case, the applicant in the main proceedings could, in order not to have to bear the cost of the VAT concerned, have brought a civil action against the insolvency administrator responsible for the liquidation of the supplier of the services with a view to having an invoice including Italian VAT drawn up, an action which it has not brought.

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Having regard to the foregoing, it is appropriate to provide a composite response to the questions referred for a preliminary ruling, read in the light of the principles of effectiveness and of VAT neutrality, that the VAT directive must be interpreted as meaning that the recipient of a service may not request directly from the tax authority of the Member State in whose territory it is established, the refund of the VAT which it paid to the supplier of that service - which invoiced in error the national VAT of that Member State instead of the VAT legally due in another Member State and paid it to the tax authorities of the first Member State - where those tax authorities have already refunded the VAT to the supplier, which has gone into liquidation, of the service.

## Costs

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Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

*Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/45/EU of 13 July 2010, read in the light of the principles of effectiveness and neutrality of value added tax (VAT),*

*must be interpreted as meaning that the recipient of a service may not request directly from the tax authority of the Member State in whose territory it is established, the refund of the VAT which it paid to the supplier of that service - which invoiced in error the national VAT of that Member State instead of the VAT legally due in another Member State and paid it to the tax authorities of the first Member State - where those tax authorities have already refunded the VAT to the supplier, which has gone into liquidation, of the service.*

[Signatures]

## Noot

## A different fact pattern as compared to previous cases

Since the 2007 judgment by the Court of Justice of the European Union (hereinafter: 'CJ') in *Reemtsma* (CJ 15 March 2007, C-35/05 *Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze*, ECLI:EU:C:2007:167), we know that tax authorities must accept direct requests for refunds of wrongly paid VAT made by customers in situations where obtaining reimbursement from the supplier would be impossible or excessively difficult. This was confirmed in 2019 in *PORR Építési Kft* (CJ 19 April 2019, C-691/17 *PORR Építési Kft. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ECLI:EU:C:2019:327), in 2022 in *Humda* (CJ 13 October 2022, C-397/21 *HUMDA*, ECLI:EU:C:2022:790) and, more recently, in 2023 in *Schütte* (CJ 7 September 2023, C-453/22, *Schütte*, ECLI:EU:C:2023:639).

From this body of case law, we also know that this right of a direct refund can only be granted if the risk of loss of tax revenue has been waived, which excludes situations where the supplier, in fact, has not paid the VAT to the Treasury. In this case, the VAT had initially been paid, albeit it had already been refunded to the supplier. Granting a direct right to a refund to the customer in this situation would, therefore, have resulted in a loss for the Treasury, and thus, logically, it was refused.

In my opinion, this decision should not, however, be considered as a mere repetition of previous case law applied to similar facts.

In previous judgments, indeed, the 'impossibility' of obtaining reimbursement was due to the fact that the supplier had been liquidated and, therefore, no longer requested reimbursement (except in *Schütte* (C-453/22), where, rather, the supplier refused to reimburse the customer and invoked a limitation period). In all those cases, the supplier was not going (to be able) to ask for the refund himself. In contrast, in this case, the supplier was declared insolvent but still decided to request a refund of the wrongly collected VAT. This, even though he knew that he would most likely not be able to reimburse the customer because of the application of the insolvency rules governing the order of priority of creditors. This different fact pattern is very important because, after this judgment, it seems that in situations where the insolvent supplier is first to introduce a request for a refund, the wrongly collected VAT will automatically be included in its insolvency estate, with little chance for the customer to be reimbursed. In contrast, in situations where the customer is the first to introduce the request for a direct refund (on the grounds that it would otherwise be impossible or extremely difficult to obtain reimbursement from the supplier due to its insolvency), the tax administration might be required to grant it.

In my opinion, the question arises whether, based on the neutrality principle, the right to a VAT refund should not always be preserved for the customer who wrongly paid it in the case the supplier has been declared insolvent (whether the procedure is still ongoing or not). One way to do that would be to provide VAT legislation that the reimbursement of wrongly invoiced VAT to a supplier should be refused when this supplier has been declared insolvent in order to allow for direct reimbursement to the customer.

The other means would be to provide in the insolvency legislation that when wrongly collected VAT is being reimbursed to an insolvent supplier, this should not become a part of the insolvency estate but a debt thereof, which should directly be reimbursed to the customer. Since VAT is merely 'collected' by the supplier with a view to pass it on to the State, and is usually to be reported separately in the accounts as 'collected VAT' (which corresponds to a debt towards the State), there are in my view strong arguments to support that it should never be an amount that is available to its creditors once it has been declared insolvent, whether before payment to the State (where it is considered as a debt towards the State) or after reimbursement by the State (where it should be considered as a debt of the insolvency estate towards the customer).

In the absence of such provisions in the VAT or insolvency legislations, the result is not, in my opinion, satisfactory, because it enables suppliers who wrongly charged VAT to request for it to be reimbursed with the intention to use it for the settlement of their own debts and not for the purpose of reimbursing the customers to whom they have wrongly charged it.

### **‘Impossible or excessively difficult’?**

In *Schütte* (C-453/22), the CJ confirmed the existence of a right to a direct refund in circumstances in which it may be ‘impossible or excessively difficult’ to obtain reimbursement and clarified that it is also the case when the impossibility to obtain reimbursement from the supplier is due to the expiry of a limitation period.

In this case, it is, in my view, unclear whether the CJ considered that KG would have been entitled to a refund at all, even if the refund had not yet been made to the supplier. As a matter of fact, the CJ states that ‘impossible or excessively difficult’ presupposes that ‘the purchaser or recipient has not ignored any possibility of asserting its rights outside that situation’. The CJ then pointed out that KG should have made its best effort to obtain a corrected invoice (with Italian VAT) and, to that end, could have brought a civil action against the insolvency administrator responsible for the liquidation of E-GmbH with a view to having an invoice which included Italian VAT. It is unclear to me whether the CJ draws from those findings the conclusion that KG should not have been granted a direct refund (the operative part of the decision does not include a decision on this point). But if that is the case, I find it disputable, as I fail to see why this request for a correction should be a decisive criterion for granting the refund of German VAT. Moreover, this is probably not a factor that the tax authorities would have been able to take into account before granting the refund to E-GmbH.

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### **Footnotes**

[1] Language of the case: German.