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European VAT Cases: Expert Insights and Business Implications

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KPMG practitioners from France, Ireland, Austria, Poland, and Italy discuss recent value added tax rulings from the Court of Justice of the European Union.

In this report, KPMG professionals from Germany, Ireland, Austria, France, Poland, and Italy discuss recent important value added tax (VAT) rulings from the Court of Justice of the European Union (CJEU). These decisions touch on topics such as VAT relief on bad debts, recovery of overcharged VAT, cross-border supply chains, the concept of fixed establishment for VAT purposes, and the VAT treatment applicable to vouchers.

VAT Relief on Bad Debts

The right for businesses to claim VAT relief on bad debts is anchored in Article 90 of the EU VAT Directive. Article 90 stipulates that in cases of cancellation, refusal, or total or partial non-payment, the amount on which VAT is chargeable should be reduced accordingly. However, the conditions for this reduction are determined by each Member State. Furthermore, in cases of total or partial non-payment, Member States can choose to deviate from this requirement to reduce the amount of VAT due.

While Member States have the right to set the conditions for businesses to claim VAT bad debt relief in their jurisdiction, the CJEU has confirmed that this is not an unfettered right. The extent of Member States' discretion has been the subject of several CJEU cases over the last decade or so, which have broadly been favorable to taxpayers. In essence, the CJEU considers the conditions set by Member States cannot be so difficult to make it virtually impossible for taxpayers to claim bad debt relief and they must respect general EU principles, such as fiscal neutrality and proportionality.

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The most recent CJEU judgment on this topic is the *Consortium Remi Group* (CRG) case (C-314/22 (Feb. 29, 2024)). In this case, CRG, a construction company located in Bulgaria, did not receive full payment from five customers for supplies it made in the years from 2006 to 2012. Between 2012 and 2020, these customers entered various forms of insolvency proceedings. In 2019, CRG itself was deregistered for VAT purposes as, according to the judgment, it had not fulfilled the administrative obligations as a VAT registered business. In 2020, CRG also went into insolvency proceedings. At that point, CRG sought to claim relief from the Bulgarian tax authorities for the VAT, plus interest, on the bad debts arising on its supplies to the five customers made in the period from 2006 to 2012. The Bulgarian tax authorities refused this claim arguing that the taxpayer CRG was out of time to make the claim and had not fulfilled certain administrative obligations under Bulgarian law, such as notifying the relevant customers that it was claiming a VAT relief on their bad debts.

The CJEU confirmed that Member States are entitled to impose time limits for businesses to claim bad debt relief, but such limits must commence from the date when the taxpayer has a reasonable degree of certainty that the debt will not be paid. The time limit set by Member States cannot be by reference to the date of the original supply. The CJEU further confirmed that Member States may require taxpayers to notify the customer of the reversal of the original supply or issue adjusting invoices but not in cases where issuing such notifications is impossible for reasons beyond the control of the taxpayer (e.g., the customer no longer exists). Finally, the CJEU held that taxpayers have a right to interest on their bad debt reclaim but only in cases where the tax authority delayed the payment, and from the date the taxpayer made the claim (rather than the date of the original supply).

KPMG Observations

Despite the positive CJEU decisions confirming taxpayers' rights to bad debt relief, claiming the relief still entails meeting various conditions which vary significantly across EU Member States. Businesses should thus consider their processes to help ensure they meet the specific conditions (e.g., timing, documentation, etc.) established by the relevant Member State in which the claim is being made. However, there is the opportunity to unlock significant cost and cashflow savings by giving attention to the business's bad and doubtful debts and making timely claims. The CRG judgment, while positive in reaffirming the right to bad debt relief, is nonetheless cautionary in ensuring that time limits and administrative obligations are met.

Recovery of Overcharged VAT

The recovery of overcharged VAT (e.g., when an incorrect rate has been applied on an invoice) has long been a contentious point as the EU VAT Directive considers that VAT incorrectly invoiced is (1) owed to the tax authorities, and (2) not deductible for the customer (i.e., the customer must seek remedy from the seller). In addition, several Member States consider that refunding sellers for overcharged VAT constitutes "unjust enrichment." In this respect, recent CJEU cases provide some clarity on the reclaim of overcharged VAT on business-to-consumer (B2C) transactions and if business customers may request a refund of overcharged VAT from the tax authorities when the seller cannot provide remedy.

In *P GmbH* (C-378/21 (Dec. 22, 2022)), an indoor playground operator charged customers the standard Austrian VAT rate of 20% instead of the reduced VAT rate of 13%, with the latter being the correct rate for supplies of this kind in Austria. The seller tried to reclaim the overcharged VAT but was denied by the Austrian tax authorities because the taxpayer did not correct the original invoices that had been issued to the private customers and because they argued that any refund to the taxpayer would result in an unjust enrichment of the taxpayer.

The CJEU noted that according to article 203 of the EU VAT Directive, VAT is payable by any person who enters the VAT on an invoice, even if there is no actual taxable transaction. However, this only applies where VAT has been invoiced incorrectly and there is a risk of loss of tax revenue because the recipient of the invoice could deduct such VAT. In the present case, since the customers were final consumers with no right to deduct VAT, there was no risk of loss of tax revenue, and thus the CJEU concluded that Article 203 of the VAT Directive was not applicable. Therefore, the taxpayer was allowed to recover overcharged VAT. The Austrian Federal Fiscal Court subsequently held that, in the case at hand, it cannot completely rule out that the services were provided exclusively to final customers, who have no right to deduct VAT. The Austrian tax authorities therefore challenged the VAT recovery of the provider and the CJEU will now have to clarify how the VAT recovery of overcharged VAT should be handled when there are both business-to-business (B2B) and B2C transactions (pending case C-794/23).

The CJEU further addressed whether a buyer is allowed to recover incorrectly charged VAT from the tax authorities where local law does not require the seller to refund this overcharged VAT to customers. In *Schütte* (C-453/22 (Dec. 7, 2023), a farmer and forester purchased timber from various sellers between 2011 and 2013 and resold it as firewood. VAT was charged on the sellers' invoices at the 19% rate, but the farmer charged his customers a reduced rate of 7%. Following an audit, the tax office concluded that the farmer's purchases should have been subject to the reduced 7% VAT rate, rather than the standard 19% rate. The farmer then contacted his sellers to seek corrected invoices and repay him the VAT overcharged. However, the sellers invoked the statute of limitation under German civil law, resulting in the invoices not being corrected and the farmer not receiving the VAT overcharged by the sellers. The farmer then applied to the tax office for a discharge from the additional VAT recovery sought, but the tax office rejected this application.

The CJEU ruled that the EU VAT Directive and the principles of VAT neutrality and effectiveness require that a customer has a direct right to claim from the tax authorities the reimbursement of improperly invoiced VAT paid to their sellers and paid by those sellers to the public purse in circumstances where the customer cannot claim that reimbursement from those sellers due to the limitation period provided for by national law. The CJEU also ruled that if the VAT is not reimbursed by the tax authority within a reasonable time, the loss suffered by the customer of having borne the improperly charged VAT must be compensated by the payment of default interest by the tax authority.

KPMG Observations

These recent cases clarify that sellers should be able to recover overcharged VAT on B2C transactions as there is no risk to the VAT revenue. In B2B cases, where customers should in principle be able to recover VAT, an invoice correction might be required. However, customers should be able to recover VAT overcharged from the tax authorities if the seller cannot (e.g., due to insolvency) or is not willing (e.g., statute of limitation) to correct the invoice and reimburse the overcharged VAT amount to the customer. Cases of overcharging VAT could increase in the near future as the EU VAT Directive has been amended effective 2025 to provide Member States wider rights to use reduced VAT rates, including an option to introduce a new rate below 5% on a limited range of sales. Member States can apply a new reduced rate below 5% to up to 7 of a list of 24 categories of products and services. They could then also apply reduced rates of 5% or above to the remaining 24 categories of the same list. The CJEU cases thus provide a welcome relief in case VAT rates have been applied incorrectly.

Cross-Border Supply Chains

The VAT treatment applicable to intra-EU B2B sales of goods should in principle be relatively straight forward: (1) the seller zero-rates the sale, and (2) the customer self-assesses VAT on the purchase. However, this mechanism has unfortunately been prone to fraud and tax authorities across the EU have in recent years focused on the application of the zero-rating on the seller's side, taking an increasingly strict approach.

The CJEU recently addressed the conditions for intra-EU cross-border sales of goods to be zero-rated in *B2 Energy s.r.o.* (C-676/22 (Feb. 24, 2024)). Under the applicable provisions at the time (which predate the "quick fixes" provisions introduced on January 1, 2020), cross-border sales of goods could be zero-rated if the goods were transported between two Member States and the acquirer qualified as a taxpayer for VAT purposes. In the case, a Czech taxpayer delivered rapeseed oil to Poland, but the tax documents showed different recipients than those who actually received the goods. Following a tax inspection in July 2015, the tax authority concluded that the taxpayer had not satisfied the conditions to zero-rate the cross-border sale because the taxpayer failed to detail the transfer of the right to dispose of the goods to the customers listed as recipients.

The CJEU focused on whether the recipients qualified as taxpayers for VAT purposes. It held that the zero-rating can be denied if the seller has not shown that the goods were sold to a recipient qualifying as a taxable person for VAT purposes in the Member State of arrival of the goods if the factual evidence provided by the seller does not contain the information necessary to verify that the recipient had that status. It should be highlighted that since the quick fixes came into effect on January 1, 2020, there are two additional substantive conditions for intra-EU sales of goods to be zero-rated: (1) the acquirer must be identified for VAT purposes in a Member State other than that in which the transport of the goods begins and has indicated this VAT identification number to the seller, and (2) the seller must report the transaction in its recapitulative statement (also commonly referred to as EC Sales List). Moreover, the EU Directive and Regulations now contain a list of documentary evidence allowing taxpayers to presume that the goods have been transported from one Member State to another.

However, challenges with cross-border transactions remains. For example, drop shipments often create issues from an EU VAT perspective. To alleviate the complexity of such transactions, the EU VAT Directive includes a relief, commonly referred to as triangulation simplification. The triangulation simplification applies where businesses in three different EU Member States are involved in a chain sale of goods, but the goods are shipped between two Member States. Typically, the business in the middle of the transaction ("B") would need to register for VAT in either the Member State of dispatch or the Member State of arrival of the goods. However, under triangulation simplification, this requirement is waived if certain conditions are met and the final business in the chain ("C") becomes liable for the VAT under the reverse charge system, simplifying the process for the middle party, i.e., B.

In *Luxury Trust Automobil* (C-247/21 (Dec. 8, 2022)), the CJEU addressed whether the triangulation simplification could be denied by the Member State of Party B if the invoice from Party B to Party C did not explicitly include a reference to "reverse charge." The case involved an Austrian taxpayer, Luxury Trust Automobil, which purchased goods (vehicles) from a UK vendor using its Austrian VAT identification number and sold these goods to a Czech VAT-registered customer. The goods were shipped directly from the UK to the Czech Republic. It is important to note the transaction took place before the UK exited the EU. The Austrian taxpayer believed that the conditions for applying the simplified triangulation had been met and thus issued an invoice to the Czech customer with a reference saying "VAT-exempt intra-Community triangular transaction." However, the Austrian tax authorities argued that the invoice did not include the required reference to "reverse charge." Therefore, the taxpayer should have reported an intra-EU acquisition in Austria and paid VAT using its Austrian VAT registration number.

The CJEU ruled that issuing a correct invoice is a substantive condition for applying the triangulation simplification. As for the triangulation simplification, the invoice should specifically state "reverse charge" to ensure the end customer is aware of their tax obligations. The CJEU further ruled that a retroactive inclusion of the correct reference on the invoice does not mean that the simplified triangulation applies retroactively.

KPMG Observations
While historically the CJEU focused on the substance to evidence a zero-rating or the right to recover VAT, the cases and legislative amendments demonstrate that when it comes to intra-EU sales, the EU VAT system is moving to a more formalistic system, in line with global trends on e-invoicing and digital reporting. For instance, under the latest draft of the VAT in the Digital Age (ViDA) proposal, which is not yet agreed, Member States would be allowed effective July 1, 2030, to deny the right to deduct VAT if the transaction is not supported by an e-invoice. This move requires businesses to ensure that the information included in their systems as well as supporting documents (e.g., invoices, waybills, etc.) are in line with the legal requirements to ensure the correct VAT treatment is applied and not subject to challenges by tax authorities. Moreover, ViDA would provide opportunities for businesses to review their VAT supply chains as it proposes to introduce, from July 1, 2027, a one-stop shop VAT registration mechanism for movements of own goods between Member States and a mandatory reverse charge on domestic B2B transactions when the seller is non-established in the Member State where the supply is deemed to take place. This could reduce the overall VAT compliance for businesses with complex EU-wide supply chains.

Fixed Establishment

The concept of a "fixed establishment" (FE) under EU VAT legislation refers to a business location that possesses a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to provide or receive services. While similar to the permanent establishment concept for direct taxes, the FE is a separate concept that needs to be analyzed independently. This concept is crucial in determining the place of supply of services and the accountable person for that supply for VAT purposes. For instance, if a company based outside of the EU has a fixed establishment in an EU Member State, it may be required to register for VAT and charge VAT on services supplied to customers in that Member State.

Over recent years, certain tax authorities across the EU have taken a broad view of this concept arguing that a company's subsidiary or third-party supplier could be considered an FE of that company for VAT purposes. This has resulted in a number of referrals to the CJEU, which gave rise to the following judgments: *Titanium Ltd* (C-931/19 (June 3, 2021)); *Berlin Chemie A. Menarini SRL* (C-333/20 (Apr. 7, 2022)); and *Cabot Plastics Belgium SA* (C-232/22 (June 29, 2023)). The CJEU held in these cases that while a parent company's subsidiary or a third-party supplier could constitute an FE of that parent company for VAT purposes if it indeed can be said to constitute human and technical resources of the parent company, those same human and technical resources cannot be used to both provide and receive the same services. In other words, the CJEU considers that it is not possible for the FE to provide services to itself, resulting, for instance, in a toll manufacturer not constituting an FE of its foreign principal in *Cabot Plastics Belgium SA*. Therefore, the toll manufacturer's services to a foreign recipient should be outside the scope of VAT in the country where the toll manufacturer is established, with the services instead having a place of supply where the recipient has its place of establishment.

The latest case before the CJEU on the FE concept is *SC Adient Ltd & Co*. (C- 533/22 (Feb. 1, 2024) the nonbinding opinion of its Advocate General (AG). In the case, Adient Ltd & Co. KG ("Adient DE"), a company based in Germany and part of the Adient group, entered into a contract with SC Adient Automotive România SRL ("Adient RO"), another company within the Adient group. The contract, dated June 1, 2016, included the manufacture and assembly of upholstery components, as well as ancillary and administrative services. Adient DE purchased the raw materials and sent them to Adient RO for processing. Adient DE remained the legal owner of the raw materials, semi-finished products, and finished products throughout the process. The Romanian tax authority, after an inspection, concluded that Adient RO was required to charge VAT on its services to Adient DE, as it considered that Adient DE had sufficient technical and human resources in Romania through the branches of Adient RO, thereby satisfying the conditions for an FE for VAT purposes in Romania.

In its nonbinding opinion, the AG reiterates the CJEU case law on the FE concept but went even further as it proposed to the CJEU that an FE exists only if it substitutes for a head office located within the territory of another Member State. Therefore, a contract with a services provider can only constitute a fixed establishment if it aims at providing the necessary human and/or technical resources to ensure that the recipient can sell goods or services on site (i.e., at the place of the fixed establishment) that are similar to those provided at a head office.

The broader the application of the FE concept goes beyond the supply of services in some jurisdictions. While historically the FE concept does not influence the VAT treatment of sales of goods, a recent tax authority ruling in Italy has suggested that an FE can intervene in the supply of goods, thereby making the supplier liable to charge VAT on the supply. In tax authority ruling 57/2023, a German business with an FE in Italy delivered goods from Germany directly to a customer in Italy. The contentious point was not whether the German business had an FE (as this was accepted) but rather (1) whether the existence of the FE in Italy resulted in the German business performing an intra-EU transfer of own goods from Germany to its Italian FE followed by a domestic sale of goods in Italy, or (2) whether there was one intra-EU sale of goods from Germany to the Italian customer. The Italian tax authorities followed the former approach, arguing that because the Italian FE participated in concluding the contracts and did not merely provide support administrative services, the FE is considered to be making a domestic sale in Italy the Italian customer and must charge Italian VAT accordingly. The Italian tax authority's position in this case is not in line with the non-binding guidelines from the EU VAT Committee, which has concluded that the FE should only be considered to intervene in the supply of goods if the FE takes the physical possession of the goods. However, this illustrates the potential broad application of the FE in some cases, and we might therefore require further CJEU judgments to bring further clarity to the position.

KPMG Observations

We expect that the FE concept will continue to result in case law as business structures evolve and tax authorities seek to apply a broad approach to the concept and application of the FE concept. Businesses should carefully monitor whether they have an FE in a Member State, in the same way as they monitor the existence of a permanent establishment for corporate income tax purposes. The existence of an FE could have significant implications as provisions throughout the EU VAT Directive and Member States' legislation distinguish between non-established traders that are simply VAT registered and traders that are established in the Member State in question. For instance, most EU Member States that are in the process of implementing e-invoicing requirements limit these mandates to "established" taxpayers, which should therefore include businesses with an FE in that Member State, while non-established businesses having a VAT registration only in that jurisdiction are typically excluded from such mandates. However, this should also be monitored as the prevalence and scope of e-invoicing is expected to grow in the future.

Vouchers

On April 18, 2024, the CJEU published its judgment in *M-GbR* (C-68/23), regarding the distinction between a single-purpose voucher (SPV), which is subject to VAT upon each (re)sale of the voucher, and a multi-purpose voucher (MPV), which is subject to VAT upon redemption of the voucher. The case involved a German reseller of "X-cards" issued by a UK company, which can be used to purchase digital content. The X-card is country-locked, meaning it can only be legitimately used by end users in one country (Germany in this case). The German reseller argued that the X-cards were MPVs because the X-cards were (1) sold through a chain of resellers (at least some of whom were outside Germany, and (2) it was technically feasible, albeit not permissible under the terms and conditions, for consumers outside Germany to redeem the voucher. The taxpayer therefore took the view that the VAT treatment of the sale of the vouchers was not clear at the time of their sale and did not charge VAT on the resale of the cards. The German tax authorities disagreed, arguing that the X-cards were SPVs, and that German VAT was due on the resale of the X-cards.

The CJEU held that to qualify as an SPV, two conditions must be fulfilled at the time the voucher is issued: (1) the place of taxation of the goods or services for which the voucher can be redeemed must be known; and (2) the VAT payable on those goods or services must be known. The CJEU found that the first condition was met because the X-cards could only be legitimately used by consumers in Germany and the digital services for which the X-cards could be redeemed are generally taxable at the place of destination (i.e., the customer's place of residence). The CJEU disregarded the potential illegitimate use by non-German consumers as this was contrary to the terms and conditions and also the intermediate resale of the vouchers, as it was the final sale for consumption that was decisive. The CJEU referred back to the referring court, however, to determine whether all the services for which the X-cards can be redeemed are taxable at the same VAT rate (and tax base) and thus whether the second condition for SPV treatment was met.

The CJEU also stated that even if the referring court finds that the X-cards must be treated as MPVs, the resale of the X-cards may still be subject to VAT as a distinct provision of an independent service (e.g., a distribution or marketing service) to the person who ultimately sells the goods or services in return for redemption of the MPV. This aspect may need further analysis.

KPMG Observations
Given these complexities, businesses need to be aware of the VAT consequences of their voucher structures, particularly in cross-border scenarios. The definition of SPVs versus MPVs is key, as they lead to different VAT consequences. Incorrect VAT treatment could lead to complex consequences and potential disputes with tax authorities.

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