

VAT deduction beyond prescription period

The Court of Justice of the European Union eases its position on the formal conditions for VAT deduction. In two recent judgments the Court ruled that VAT deduction or VAT refund cannot easily be refused outside the standard periods.

Deduction and refund

The VAT which is paid by a VAT payer within the scope of its economic activity, can be recuperated. The VAT cannot be a cost for businesses. It is only the final consumer which bears the cost of the tax.

A VAT payer can recuperate the VAT which he has paid:

- Through deduction of VAT in the member state where the VAT was paid and where the VAT payer is established.
- Through applying for refund in the member state where the VAT payer is active, but where it is not established not registered for VAT purposes with the local VAT authorities.

Material and formal conditions

Both the deduction and refund of VAT are subject to material and formal conditions.

The material condition: the goods/services are being used to perform taxable transactions. E.g. an electrician purchase equipment. The VAT on this purchase is deductible, since it is used for his taxable activity.

The formal condition: the VAT payer holds complete and conform invoice and exercises its right to deduct within the prescribed terms. The Court previously ruled that a VAT payer meeting all material conditions, but holding a non-conform invoice, still has right to deduct the VAT. **A small formal shortcoming doesn't matter.** This is also called substance over form.

Timely deduction of VAT

The law foresees specific prescription periods.

For the refund of VAT the VAT payer has the time until 30 September of the year following the year in which the VAT became due. Deduction of VAT can be done until the end of the third year following the year in which the VAT became due.

Until now it was the rule that a VAT payer who did not act within these periods, lost his right to deduction/refund.

Problem through the combination of material and formal conditions

Because the VAT payer must comply with both the material and the formal conditions, it occurs that the right to deduct VAT has materially originated (at the time the VAT became due), but he cannot exercise its deduction right since he has not received an invoice. The prescription period starts to run, but the VAT payer cannot deduct the VAT.

The Court refines

In two recent judgments the Court nuances this strict rule. In both cases VAT payers were too late to deduct/apply for refund of VAT. It was however not their fault. Their suppliers did not charge (sufficient) VAT. Only after a number of years (after the supplies) they corrected this by claiming supplementary VAT and sending a corrected invoice. The concerned VAT payers could in other words not deduct/apply for refund earlier.

The Court states in first instance that it has no problem with the prescription periods as such. But also the legal certainty principle and the effectiveness principle are important. This means that the prescription periods cannot make it too difficult or impossible for the VAT payer in order to deduct VAT/apply for refund.

In the cases which were presented to the Court, the VAT payers did not have the possibility to exercise their right to deduct VAT. The prescription period was already gone at the moment they obtained the fully compliant invoice. Therefore the VAT payer still should have the possibility to recuperate the VAT. However there can be no abuse by the VAT payer. And, another important addition, the VAT payer must have been in the objective impossibility to exercise its right earlier.

What does this mean in practice?

VAT payers obtaining the invoice too late, can still deduct the VAT. And for suppliers it will be easier to still charge the forgotten VAT, which is claimed by the VAT authorities, to their clients (which can still be deducted).

And the legislator?

It would be a good idea for the legislator to think about a change in the legislation, in order to further align the applicable provisions with the point of view of the Court.