

Case C-80/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

12 February 2020

Referring court:

Tribunalul București (Regional Court, Bucharest, Romania)

Date of the decision to refer:

19 December 2019

Applicant:

Wilo Salmson France SAS

Defendant:

Agencia Națională de Administrare Fiscală — Direcția Generală Regională a Finanțelor Publice București

Agencia Națională de Administrare Fiscală — Direcția Generală Regională a Finanțelor Publice București — Administrația Fiscală pentru Contribuabili Nerezidenți

Subject matter of the main proceedings

Administrative law action whereby Wilo Salmson France SAS asks the Tribunalul București (Regional Court, Bucharest, Romania) to annul the defendants' decisions rejecting the application for a refund of the value added tax (VAT) relating to purchases made in 2012, in respect of which the supplier issued invoices in 2015

Subject matter and legal basis of the request for a preliminary ruling

Interpretation is sought, pursuant to Article 267 TFEU, of Articles 167 and 178 of Directive 2006/112/EC and the first sentence of Article 14(1)(a) of Directive 2008/9/EC.

Questions referred

1. As regards the interpretation of **Article 167 of Directive 2006/112/EC, read in conjunction with Article 178 thereof**, is there a distinction between the moment the right of deduction arises and the moment it is exercised with regard to the way in which the system of VAT operates?

To that end, it is necessary to clarify whether the right to deduct VAT may be exercised where no (valid) tax invoice has been issued for purchases of goods.

2. As regards the interpretation of **Articles 167 and 178 of Directive 2006/112/EC, read in conjunction with the first sentence of Article 14(1)(a) of Directive 2008/9/EC**, what is the procedural point of reference for determining the lawfulness of the exercise of the right to a refund of VAT?

To that end, it is necessary to clarify whether an application for a refund may be made in respect of VAT which became chargeable prior to the ‘refund period’ but which was invoiced during the refund period.

3. As regards the interpretation of **the first sentence of Article 14(1)(a) of Directive 2008/9/EC, read in conjunction with Article 167 and Article 178 of Directive 2006/112/EC**, what are the effects of the annulment of invoices and the issuing of new invoices in respect of purchases of goods made before the ‘refund period’ on the exercise of the right to a refund of the VAT relating to those purchases?

To that end, it is necessary to clarify whether, in the event of the annulment, by the supplier, of the invoices initially issued for the purchase of goods and the issuing of new invoices by that supplier at a later date, the exercise of the right of the recipient to apply for a refund of the VAT relating to the purchases is to be linked to the date of the new invoices, in a situation where the annulment of the initial invoices and the issuing of the new invoices is not within the recipient’s control but is exclusively at the supplier’s discretion.

4. May national legislation make the refund of VAT granted under [Directive 2008/9/EC] conditional upon the chargeability of the VAT in a situation where a corrected invoice is issued during the application period?

Provisions of EU law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Articles 62 and 167, Article 168(a), Article 169(a) and Article 178(a)

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, Article 2(1) and (3), first paragraph of Article 6, Article 7 and Article 14(1)(a)

Opinion of the Advocate General in *Volkswagen* (C-533/16), points 57 to 59

Opinion of the Advocate General in *Biosafe — Indústria de Reciclagens* (C-8/17), point 56

Provisions of national law relied on

Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 laying down the Tax Code), Article 145, which governs the right of taxable persons to deduct the VAT relating to purchases, Article 146, which provides that, in order to exercise that right, the taxable person must be in possession of an invoice, and Article 147²(1)(a), which provides that a taxable person who is not established in Romania but is established in another Member State, and who is not registered for VAT purposes and is not required to register itself for such purposes in Romania, may receive a refund of the VAT paid in respect of imports and purchases of goods or services in Romania

Hotărârea Guvernului nr. 44/2004 privind Normele metodologice de aplicare a Codului fiscal (Governmental Decree No 44/2004 laying down detailed rules for implementing the Tax Code), which provides, in paragraph 15 of point 49 thereof, that the refund application is to cover ‘*purchases of goods or services invoiced during the refund period, paid until the date of the refund application. Invoices which have not been paid until the date of the refund application shall be included in the refund applications relating to the period in which they were paid*’, and, in paragraph 16 of that point, that, ‘*in addition to the transactions referred to in paragraph 15, the refund application may also cover invoices or import documents not covered by previous refund applications and relating to transactions completed during the calendar year in question*’

Succinct presentation of the facts and the main proceedings

- 1 Pompas Salmson SAS, a company with the seat of its economic activity in France, concluded a contract with ZES Zollner Electronic SRL, a company established and registered for VAT purposes in Romania, for the purchase of manufacturing equipment, delivered within Romania, which was made available to the supplier by means of a contract for the supply of equipment, for the purposes of using that equipment in the process of manufacturing goods that were subsequently delivered to Pompas Salmson.
- 2 The goods produced by Zollner Electronic making use of that equipment were delivered from Romania to France, to the seat of Pompas Salmson, which used them for its own taxable activities.

- 3 The supplier Zollner Electronic issued invoices in 2012 in respect of the purchases of manufacturing equipment made by Pompas Salmson.
- 4 Pompas Salmson, a company neither established nor registered for VAT purposes in Romania, applied for a refund of the VAT paid in Romania pursuant to Directive 2008/9/EC and Article 147²(1)(a) of Law No 571/2003 laying down the Tax Code, read in conjunction with point 49 of Governmental Decree No 44/2004.
- 5 By decision of 14 January 2014, the Romanian tax authorities rejected the refund application relating to the period running from 1 January 2012 to 31 December 2012 in respect of a sum of RON 449 538.38 on grounds connected with the documentation accompanying the application and the non-compliance of the attached invoices.
- 6 Having been informed of that decision, the supplier Zollner Electronic cancelled the invoices initially issued (in 2012) and issued new invoices relating to the purchases (albeit not until 2015).
- 7 In 2014 Pompas Salmson SAS carried out a merger by absorption with Wilo France SAS, thereby becoming the applicant company Wilo Salmson France SAS, which assumed all the rights and obligations of Pompas Salmson.
- 8 In November 2015 the applicant submitted an application for a refund of the VAT paid in Romania on the basis of the new invoices issued by Zollner Electronic in the period running from 1 August 2015 to 31 October 2015.
- 9 The tax authorities rejected the application for a refund of VAT as unfounded, stating that the applicant had not complied with the provisions of paragraph 16 of point 49 of Governmental Decree No 44/2004 and that it had already applied for a refund from the invoices of items 1 to 6 in the list of transactions.
- 10 The applicant brought a tax complaint against that refund decision on 13 June 2016, which the Direcția Generală Regională a Finanțelor Publice București — Administrația Fiscală pentru Contribuabili Nerezidenți (Regional Directorate-General for Public Finance, Bucharest — Tax Administration for Non-Resident Taxpayers) rejected as unfounded, considering that the VAT in respect of which the refund was sought had already been the subject of another refund application and that the transactions in respect of which a VAT refund was sought related to 2012 and not 2015.
- 11 The applicant brought an administrative law action against those decisions of the tax authorities before the Tribunalul București.

The essential arguments of the parties to the main proceedings

- 12 The applicant considers that satisfaction of the substantive conditions of the right to deduct requires an analysis of the moment at which that right arises and the scope of that right, which arises at the moment the tax becomes chargeable or, more specifically, in its case, at the moment of delivery of the purchased goods.
- 13 From a procedural point of view however, in order to exercise that right it is obliged to be in possession of an invoice which satisfies the conditions laid down by law.
- 14 In addition, the period for exercising the right to deduct cannot be determined exclusively depending on the moment of delivery of the purchased goods, because this constitutes only the fulfilment of the substantive condition for asserting that right and not the fulfilment of the procedural condition, that is, the possession of a valid invoice.
- 15 The applicant argues that the provisions applicable in this area take into consideration the usual situation, in which the supply of goods and valid invoicing take place simultaneously. Accordingly, in view of the fact that those moments are simultaneous, it is logical that the VAT becomes chargeable and the possibility of exercising the right to a refund of that VAT arises at the same time.
- 16 From a procedural standpoint, the moment at which the refund application may be made, according to Directive 2008/9, is the moment at which the invoice is issued, which, in the present case, took place in 2015. The chargeability of the VAT constitutes a substantive reference point, it being necessary for the VAT to have become chargeable (exclusively from the point of view of exercising the right to apply for a refund) either before the issuing of the invoice or at the moment of invoicing.

Succinct presentation of the reasons for the reference

- 17 The referring court notes that the central element of the case before it is the possibility of a refund of the VAT relating to purchases made in 2012 but in respect of which valid purchase tax invoices were not issued until 2015.
- 18 It describes the factual situation before it as atypical from the point of view of Directives 2006/112 and 2008/9, in a situation where: **(i)** the supplier issued invoices in respect of the purchases made by the applicant, which invoices were subsequently annulled; **(ii)** invoices were issued in respect of those same purchases which were valid only for 2015; **(iii)** the applicant exercised its right to a refund of VAT by means of the 2015 refund application which included the invoices issued in 2015; and **(iv)** the applicant has still not received a refund of the VAT.

- 19 Accordingly, given that Directive 2006/112 does not expressly govern the period for exercising the right to deduct, the issue arises as to whether the date on which that period starts to run can be established exclusively depending on the moment when the delivery of the goods took place, without taking any other relevant circumstances into account.
- 20 Although Article 167 of Directive 2006/112 provides that the right to deduct arises at the moment when the tax becomes chargeable, Article 178 of that directive provides that the exercise of that right becomes possible only from the moment when the taxable person comes into possession of an invoice in which the delivery of the goods is entered.
- 21 Accordingly, the possession of a valid invoice is essential for the exercise of the right to deduct/the right to a refund, and yet the issuing of that invoice is at the supplier's discretion and is at no time within the control of the holder of the right to deduct, who is also the recipient of the delivery.
- 22 Consequently, if the Court were to decide that, in the light of the first sentence of Article 14(1)(a) of Directive 2008/9, refund applications may concern purchases of goods or services that were invoiced during the refund period, regardless of whether or not the related VAT became chargeable before or during that period, then it would be possible to challenge the tax authorities' position. The referring court considers that the Opinions delivered in *Volkswagen* (C-533/16) and *Biosafe — Indústria de Reciclagens* (C-8/17) are also relevant in that regard.
- 23 With regard to Questions 1 and 2, the referring court notes that the tax authorities have not distinguished between the date of the issuing of the invoice, as the procedural aspect, and the date on which the VAT became chargeable, as the substantive aspect. However, it seems that the EU legislature wishes those two moments to produce distinct effects from a tax point of view.
- 24 With regard to Questions 3 and 4, the referring court notes that the tax authorities considered that the invoices issued in 2015 in respect of the purchases made in 2012 could not be the subject of a refund application for 2015, inasmuch as there had been previous invoices that had then been cancelled by the supplier. However, because the cancellation of the 2012 invoices was done unilaterally by the supplier, but, under national law, that cancellation deprives the invoices issued of their effect in a way similar to annulment, the invoices issued in 2015 are the only documents that can testify to the fact that the purchases took place and that can serve as a basis for the refund application.
- 25 The referring court cites, in that context, Articles 169 and 178 of Directive 2006/112 and the first sentence of Article 14(1)(a) of Directive 2008/9. The latter provision establishes that, from a procedural point of view, the refund application is to be based exclusively on invoices issued during the refund period and the only condition laid down by that provision is that the VAT becomes chargeable before

or at the same time as the invoicing takes place, which is not limited to a particular moment.

- 26 The referring court also raises the issue of possible discrimination, in so far as resident companies have, under national legislation, a limitation period of 5 years within which to apply for a refund of VAT, whereas non-resident companies have, under Directive 2008/9, a period of only 1 year for exercising that right.

WORKING DOCUMENT