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VAT'S UP
UMSATZSTEUER NEWSLETTER

ECJ: Race between a correction of unduly charged VAT and a Direct Claim?

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1 Background

Every business with cross-border operations is familiar with this situation: for each transaction, it is necessary to determine which country's VAT applies. If a misjudgement is made, correcting it retrospectively often leads to difficulties. In addition to VAT and procedural law issues – which vary from country to country – civil law questions also arise. The situation becomes even more complex if one of the parties involved in the transaction has, in the meantime, become insolvent. To protect the recipient from suffering an input VAT loss, the ECJ developed the so-called Reemtsma claim (direct claim, see KMLZ VAT Newsletter 39 | 2023). However, in its recent decision in the case *H GmbH* dated 5 September 2024 (case C-83/23), the ECJ has imposed strict requirements for its applicability in this cross-border matter.

2 Facts of the Case

The plaintiff (hereafter: P) purchased motorboats from a German GmbH. P and the GmbH agreed on net prices for the purchases. In its invoices, the GmbH charged German VAT. P paid the invoices and deducted the input VAT. The GmbH remitted the German VAT to the tax authorities. The tax office found that the boats were in Italy at the time of the sale, and no transport had taken place. Consequently, the tax office denied P's input VAT deduction, as German VAT had incorrectly been charged. P repaid all the input VAT to the tax office.

After the GmbH declared bankruptcy, the insolvency administrator corrected the invoices to P. The tax office refunded the German VAT to the insolvency administrator and noted that the administrator was required to pay VAT for these transactions in Italy. However, the insolvency administrator did not return the German VAT to P and refused to issue invoices with Italian

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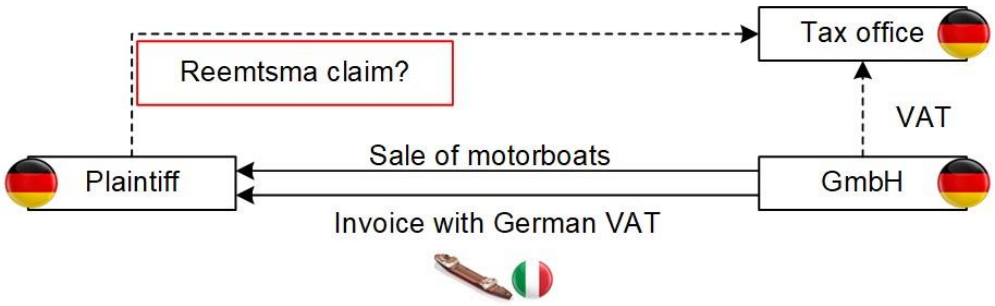
VAT. P did not file a civil lawsuit to compel the issuance of corrected invoices. Instead, it demanded the refund of the VAT directly from the tax office, citing the Reemtsma claim.



3 ECJ Decision

The ECJ ruled against P and rejected the Reemtsma claim. It justified its decision as follows:

- The direct claim for reimbursement of VAT that was incorrectly invoiced applies only to VAT that the relevant Member State received from the issuer of the invoice. However, the tax office had already refunded the VAT initially received to the GmbH. In such a case, the Reemtsma claim does not apply, as the tax authorities would otherwise be required to refund the VAT amount twice.
- The tax authorities do not need to consider the fact that the VAT refunded to the insolvency administrator was absorbed into the insolvency estate and that P may not ultimately receive reimbursement from the insolvency administrator. It would place an unreasonable burden on the tax authorities to account for this.
- Although the prevention of tax fraud is a goal of the Directive, it is not reasonable to expect German tax authorities to determine weather, under Italian law, it would constitute VAT fraud if the insolvency administrator of the GmbH fails to declare the Italian VAT in Italy.
- The Reemtsma claim is an exception. It therefore requires that the recipients of the supplies exhaust all other options to assert their rights. P could have filed a civil lawsuit against the insolvency administrator to obtain an invoice containing Italian VAT. It did not do so. The insolvency administrator would have had to subsequently register in Italy and issue P with an invoice under his tax number with Italian VAT, which would have enabled P to claim the input VAT deduction in Italy.

4 Practical Implications

The outcome is unfortunate for recipients in similar situations. If a refund of unduly charged VAT truly depends on the supplier returning the VAT amount to the recipient – as both the Federal Fiscal Court and the Federal Ministry of Finance have stated – the tax office should not have refunded the VAT amount to the insolvency administrator at all. It remains unclear whether the ECJ is thereby approving a possibly unlawful payment. All that is certain is that the supplier was quicker to reclaim the VAT amount than the recipient with the Reemtsma claim. In the *Schütte* case (C-453/22), which concerned the statute of limitations under civil law, the situation was reverse. This means that the only thing left for recipients to do is to seek a reversal as quickly as possible if they discover any errors of judgement. They should also prioritise any further civil law measures. It remains to be examined which limits apply to the subsequent deduction of input VAT in other Member States.