KÜFFNER MAUNZ LANGER ZUGMAIER

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KMLZ VAT NEWSLETTER

The ECJ denies reduction of reimbursement interest

Statutory reimbursement interest cannot be altered individually

Member States must pay the total amount of the reimbursement interest regulated in their legislation. In the view of the European Court of Justice, this also applies if the interest is higher in a particular case than the actual financial disadvantage suffered by the taxpayer (judgment of 28 February 2018 – C-387/16 – *Nidera*). This decision may impact on the discussion concerning the lawfulness of the German interest on arrears (6% p.a.).

The ECJ has, on several occasions, dealt with the issue of interest on reimbursement claims. Case-by-case measures taken on the part of the Member States in order to reduce reimbursement interest may now finally be unlawful.

1. Facts

The Dutch plaintiff bought commodities locally in Lithuania in early 2008. However, it was only in August 2008, namely after the supply was received, that the plaintiff was registered for VAT purposes in Lithuania. In its VAT return for August 2008, the plaintiff requested the refund of the VAT paid, from the Lithuanian tax authorities (approx. € 3.4 million).

In November 2008, the tax authority initiated a tax audit of the plaintiff and ultimately refused the VAT refund. The reason given was that the claimant had not been registered for VAT at the date of supply. This was a precondition for the entitlement to deduct VAT, according to national law. In November 2010, the commission for tax disputes admitted that the plaintiff was entitled to VAT deduction in accordance with the jurisprudence of the ECJ. Consequently, the tax authority refunded the claimed input VAT, but without interest. The plaintiff subsequently appealed, resulting in the tax authority paying interest, but only for the period from the date of the commission for tax disputes' judgment until the refund of the input VAT (November – December 2010). Thereupon the plaintiff claimed interest for the period between the time the tax audit was commenced and the refund of input VAT (November 2008 – December 2010).

The referring court had already acknowledged, in the reference for a preliminary ruling, that default interest should be calculated as from 30 days after receipt of the refund application. The court now wanted to know from the ECJ whether national authorities, including the courts, are permitted to reduce the interest owed based on the particular circumstances of the individual case. Such circumstances could be the relation between the interest and the amount of the reimbursement, the period and reasons for why the reimbursement had not been paid, as well as the actual losses of the taxpayer.

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Contact: Dr. Sandro Nücken, LL.B.
Lawyer, Specialist lawyer for tax law
Phone: +49 89 217501243
sandro.nuecken@kmlz.de

2. Reasons

In the view of the ECJ, the Member States and their courts cannot reduce generally regulated reimbursement interest on a case-by-case basis. This applies, at least in the instance where the tax assessment is not reduced as a result of the taxpayer's conduct.

This was concluded by the ECJ from Art 183 of the VAT Directive. The regulation makes no statement about interest. Interest regulations lie within the procedural autonomy of the Member States. Nevertheless, Member States are not free from Union law control when reimbursing VAT surpluses. In particular, limits arise from the principle of neutrality of VAT. It requires Member States to provide a system of tax refunds, which does not lead to any financial risk for the tax payer. According to the ECJ, the financial losses of a taxpayer, which occur because of a reimbursement that was not made in due time, must be compensated by default interest being paid to the taxpayer. An individual reduction in default interest would expose taxpayers to the risk that their financial disadvantage would not be compensated for the entire period of non-payment. Furthermore, the tax authority would have no incentive to make refunds promptly. Finally, the actual losses of the taxpayer are not decisive as this would force the taxpayer to provide evidence for his actual losses, which is usually quite difficult to do.

3. Impact on the practice

In the view of the ECJ, the Member States are readily allowed to provide for generalized default interest. For an efficient tax administration this is essential. However, such a system inevitably leads to the result that the amount of compensation paid by default interest does not regularly equate to the actual financial loss suffered by the taxpayer. In such a system, it is not the actual damage that is compensated, but rather the damage that the taxpayer may suffer (according to the evaluation of the national legislator). The ECJ explicitly stated this in the present judgment. Once a Member State has decided to pay generalized default interest, it cannot simultaneously provide the possibility of limiting or even refusing the payment of default interest.

For reasons of legal certainty, the judgment of the ECJ is welcome. Problems with the rate of refund claims occur repeatedly, especially in Eastern EU Member States. This is due to differences in the amount and the commencement date of accrual of reimbursement interest. Hence, for companies that expect tax refunds in these countries, the ruling may potentially provide immense support. The result of this judgment, together with the earlier ECJ judgments *Maritsa Iztok 3* (judgment of 12.05.2011 - C-107/10) and *Rafinăria Steaua Română* (judgment of 24.10.2013 - C-431/12), is that the Member States should not be permitted to reduce interest payments by initiating tax audits or other case-by-case measures. It is questionable whether the debate over the (too high) German interest on arrears will now be discontinued as a consequence of the judgment. In our opinion, this is unlikely as, in the present case, the amount of the interest rate was not in issue. The Lithuanian law provides for a variable interest rate.

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