

## **Court: entitlement to 4% interest on refunds of VAT levied contrary to EU law**

On June 4, 2020, the District Court Noord-Nederland rendered judgment on the obligation of the Dutch tax authorities to refund late payment interest as referred to in Section 28c Tax Collection Act (*Invorderingswet*; IW). Section 28c IW provides that if the tax collector is obliged to refund tax because it has been levied contrary to EU law, it must, at the taxpayer's request, reimburse late payment interest on that refund for the period between the time of payment and the refund of the unduly paid tax. The District Court ruled that the phrase 'taxes levied contrary to EU law' should be interpreted neutrally. No conditions were imposed as to the reason for or cause of the undue payment. According to the District Court, it is irrelevant whether the taxpayer is to blame for the, in hindsight, undue tax. There may thus be entitlement to 4% interest on recently received VAT refund decisions from the moment that the VAT was wrongly remitted.

### **Background**

The taxpayer in this case is a business that in particular trades worldwide in parts for classic motorcycles. It sends the parts from its Dutch warehouse to VAT and non-VAT taxable persons, both in the Netherlands and abroad. Following a letter from the Finnish tax authorities in 2016, it appears that the taxpayer mistakenly did not apply the rules for distance selling (Article 33 of the EU VAT Directive and Section 5a VAT Act 1968 ('VAT Act')). Dutch VAT was paid on sales to non-VAT taxable persons from other EU Member States, while VAT should have been paid in the EU Member State where these customers were established. At the beginning of December 2016, the taxpayer requested a refund of the VAT incorrectly paid in the Netherlands in the years 2011 through 2016. These requests were granted, the amounts were determined in VAT refund decisions and refunded to the taxpayer. As a result of the correct application of the rules for distance selling, no VAT was on balance payable for the years in question by the taxpayer, but it would have been entitled to a refund. The refund decisions therefore concern the VAT previously remitted as well as a VAT refund.

When making the refund decisions, the tax inspector failed to reimburse default interest (*heffingsrente*) (2011) and interest on tax due (*belastingrente*) (2012-2016), while the taxpayer is entitled to this by virtue of the legal provisions. The default interest for 2011 ran from April 1, 2012. As the refund request was not decided within eight weeks, interest on tax due was payable from then on for the years 2012 through 2016. The taxpayer responded within six weeks of the refund decisions. It also requested a refund of late payment interest pursuant to Section 28c IW. This request covers the period between the payment of the undue VAT and the time of its refund, after deduction for the period for which default interest and interest on tax due was paid. For 2011, this involves a small amount in respect of the period between the date of the undue payment of VAT and April 1, 2012. For the years 2012-2016, however, this relates to interest for the period from the time the VAT was remitted until the beginning of February 2017 (eight weeks after the refund request). And this in accordance with the applicable late payment interest rate (from April 1, 2014: 4%).

The tax inspector granted the taxpayer's notice of objection and reimbursed default interest and interest on tax due in accordance with the legal provisions. He also paid

interest to compensate for the delay, calculated over the period from the date of the ex-officio refund decisions (when the default interest and interest on tax due should have been determined) until the date of payment of this interest.

On the other hand, the tax collector rejected both the request for the refund of late payment interest and the notice of objection filed by the taxpayer. The taxpayer appealed this decision.

### **Judgment of the court**

In dispute are two questions concerning the interpretation of Section 28c(1) IW. The first question is when tax is levied *contrary to EU law*. And the second question is whether a VAT refund (because the recovery of input tax exceeded the tax payable) should also be regarded as tax that *is levied*.

#### *Levied contrary to EU law*

It was not disputed that the taxpayer and its accountant wrongly failed to recognize and apply the rules for distance selling. The taxpayer has a preference for a broad interpretation of the phrase 'levied contrary to EU law', which boils down to 'not levied in accordance with EU law'. According to the taxpayer, the cause of the observed inaccuracy is irrelevant. The tax collector, on the other hand, believes that this does play a role. Since the taxpayer itself incorrectly applied the rules for distance selling, the tax collector believes that tax was not levied contrary to EU law and that the taxpayer is not entitled to a refund of interest. According to the tax collector, this entitlement only arises if the conflict at issue follows from a judgment by the European Court of Justice ('CJEU'), a judgment of the Supreme Court or if the Deputy Minister of Finance refers to case law from lower courts.

With reference to legislative history, the Court holds that with the introduction of Section 28c IW the legislator wanted to implement the CJEU judgment in the Irimie case (CJEU April 18, 2013, C-565/11), and therefore takes this judgment as its starting point. The Court subsequently concluded that the conflict with EU law is a neutral assessment. The amounts concerned were not available to the taxpayer because of an undue payment contrary to EU law. According to the Court, the CJEU does not impose any conditions as to the cause of the undue payment. This is logical according to the Court because, as follows from the case law of the CJEU, the requirement of effectiveness implies that the interest paid offsets the losses incurred by the taxpayer as a result of the undue payment. This is thus an economic approach which, according to the Court, should be viewed from the perspective of the taxpayer and not that of the Dutch tax authorities. The finding that VAT was wrongly levied in the Netherlands on the basis of the incorrect application of the rules governing distance selling by the taxpayer is then sufficient for the entitlement to payment of interest to arise. It does not matter that the taxpayer is to blame for the, in hindsight, incorrect levy of tax.

#### *Tax levied*

The Court ruled that, with regard to the basis for the interest payment, no distinction should be made between a repayment of previously remitted VAT and a refund of VAT

(because the recovery of input tax exceeded the tax payable). In support of this judgment, the Court refers to CJEU case law from which it follows that the right to payment of a surplus amount of VAT is equivalent to a refund and that this, too, may qualify as tax levied contrary to EU law. Thus, in line with the neutral and economic approach mentioned above, interest will be paid on the entire amount of tax refunded.

### **Practical consequences**

This judgment provides new insights into establishing when tax is levied contrary to EU law. The position of the tax collector that this is only the case if the conflict follows from a court ruling does not seem correct to us. We concur with the conclusion that an incorrect application of the VAT rules by the taxpayer (such as the rules for distance selling in this case) may also be contrary to EU law. We also refer in this context to the KrakVet case (C-276/18), in which the CJEU ruled on June 18, 2020 in a similar manner on a situation in which the rules for distance selling were at issue. In this case, the CJEU confirms its earlier rulings that the refund of unduly levied VAT falls within the scope of the right to reclaim what was unduly paid, which is intended to neutralize the economic burden that has been unduly imposed.

However, the District Court's conclusion does not necessarily mean that every supplementary VAT return that leads to a VAT refund can be characterized as a refund of tax levied contrary to EU law. As an example, we should mention a supplementary VAT return that rectifies an administrative error in an earlier period. The incorrect application, as in the present case, of the rules for distance selling appears to be quite different to an administrative error within the proper application of EU law.

In addition, it is not clear how the Court would have ruled in the situation where the, in hindsight, unduly levied VAT would have been charged to a Dutch taxpayer that would have deducted the VAT. The Court ruled that the right to a refund of interest must be based on the perspective of the taxpayer and not on that of the Dutch tax authorities. The fact that the unjustified payment by the supplier is offset by an unjustified recovery of input tax by the customer may then play no role in assessing whether the supplier is entitled to a refund of late payment interest. The refund of such unduly charged VAT is subject to the condition that the supplier refunds the unduly charged VAT to the taxable customer and that the taxable customer adjusts the recovery claimed. The customer may be liable to pay interest on tax due when adjusting the recovery of input tax. It is advisable to take this into account in the commercial agreements.

### **What can you do now?**

On the basis of the Court's judgment, in the event of a refund of tax levied contrary to EU law, it may also be possible to request an additional 4% interest payment, despite the fact that the taxpayer was to blame for the incorrect levy of tax. It is not yet known whether the Dutch tax authorities will appeal the Court judgment. If you have recently received a VAT refund decision, we recommend that you not only check whether the interest on tax due has been correctly determined, but also whether you can file a request for 4% late payment interest pursuant to Section 28c IW. The request for late payment interest must be filed within six weeks of the date of the VAT refund decision.

If you would like to discuss this judgment, please feel free to contact the advisors of Meijburg & Co's Indirect Tax Group or your usual advisor.

Meijburg & Co  
June 2020

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