



Focus on new decisions on German procedural and litigation law

60 | 2020

1 Late-payment penalties may be unconstitutional

According to the Federal Fiscal Court's current jurisprudence, late-payment penalties may, in addition to interest, be unconstitutional. In accordance with sec. 240 para. 1 sentence 1 of the German Fiscal Code (AO), these penalties amount to 1% of the overdue VAT amount per month. The Federal Fiscal Court has allowed the appeal against a Hessian Fiscal Court judgment without any additional grounds insofar it concerns late-payment penalties for the period after 31 December 2009 (decision of 14 April 2020 – VII B 53/19). A further appeal, which was allowed by the Fiscal Court in Hamburg to clarify this question, is also pending before the Federal Fiscal Court (VII R 55/20). Taxable persons who have paid late-payment penalties to the tax office for periods as from 31 December 2009 onwards or who have been requested by the tax office to make a corresponding payment should take action against this in order to benefit from the possible unconstitutionality of these late-payment penalties.

2 General reference in a Fiscal Court judgment to criminal investigation report

In its recent decision, the Federal Fiscal Court dealt with the question of whether a procedural violation exists if a Fiscal Court makes a general reference, in its grounds for judgment, to a criminal investigation report to which the tax office has already referred at the time it issued the VAT assessment (decision of 17 August 2020 – II B 32/20). The general principle is that Fiscal Courts are required to specifically state their grounds for judgment (sec. 105 para. 2 no. 5 of the Code of Procedure of Fiscal Courts (FGO)). In accordance with sec. 105 para. 5 FGO, a Fiscal Court may exceptionally dispense with the need for a presentation of the grounds on which its judgment is based insofar as it follows the reasoning of the contested administrative act or decision on appeal and makes a statement to this effect in its decision. In the present case, however, the Fiscal Court had failed to establish that it would comprehensively follow the criminal investigation



Dr. Thomas Streit, LL.M. Eur.
Lawyer

+49 (0) 89 217 50 12-75
thomas.streit@kmlz.de

report to which it had referred. It merely described the report's findings as being comprehensible and conclusive in the context of its own "assessment". From the Federal Fiscal Court's point of view, this mere reference could not replace substantive grounds of a judgment, since otherwise it would not be apparent which findings and considerations were decisive for the Fiscal Court's decision. Consequently, the Federal Fiscal Court affirmed a procedural error. However, the Federal Fiscal Court expressly left open to question whether a reference to a criminal investigation report can be considered sufficient in terms of sec. 105 para. 5 FGO. The Federal Fiscal Court set aside the judgment and referred the case back to the Fiscal Court.

Plaintiffs, against whom a negative judgment has been issued, should carefully examine any references to other grounds for the particular judgement (VAT assessment, decision on appeal, criminal investigation report) in order to determine whether any of these could result in a possible procedural error that could constitute grounds for leave to appeal.

3 Violation of the right to be heard

The right to be heard by a court is one of the central procedural rights pursuant to Article 103 para. 1 of the German Constitution (GG). If this right is infringed, this constitutes a procedural violation and thus grounds for leave to appeal in accordance with sec. 115 para. 2 no. 3 FGO. In its decision of 13 August 2020 (X B 26/20), the Federal Fiscal Court ruled that the Fiscal Court had violated this right. In previous legal proceedings before the Fiscal Court, the plaintiff and the defendant tax office had reached an agreement and subsequently mutually declared the legal dispute to be settled. The tax office subsequently issued an amended VAT assessment. The plaintiff again appealed against this assessment (by means of an appeal and a legal action) since it contained an obvious error in terms of sec. 129 AO. The Fiscal Court misunderstood the plaintiff's request to the extent that it assumed that the plaintiff wanted to raise doubts concerning the previously reached agreement and thus failed to even examine the requirements of sec. 129 AO. The Federal Fiscal Court regarded this as an infringement of the right to be heard. The right to be heard, in the form of the so-called obligation to observe, is violated if the Fiscal Court fails to take note of statements made by one of the parties to the proceedings on issues that are crucial to the decision - including legal issues - or obviously does not take them into consideration when making its decision.

Plaintiffs, whose arguments are relevant to a decision, but which are not taken into account by a Fiscal Court, may consider a corresponding complaint concerning leave to appeal.

4 Access to files

In accordance with sec. 78 para. 1 FGO, the parties to legal proceedings have the right to inspect the case files. In accordance with sec. 78 para. 3 FGO, inspection of paper files is to be granted in the offices of the courts or the authorities concerned. In its jurisprudence, the Federal Fiscal Court has confirmed that the offices of legal representatives do not constitute official offices in this context (decision of 13 June 2020 VII B 149/19). Therefore, the fact remains that both the parties to legal proceedings and their legal representatives may only inspect the relevant files on the premises of the court or the authority. Only in very limited exceptional cases, can files be sent to the legal representatives for viewing. This requires a discretionary decision to be made by the Fiscal Court in the individual case.

5 Special electronic mailbox for lawyers - Bremen

By order of 8 December 2020, the Senate Administration in Bremen instructed that, as from 1 January 2021, correspondence from lawyers must be filed electronically via a special electronic mailbox.