



KMLZ VAT NEWSLETTER

Federal Fiscal Court acknowledges invoice corrections with retroactive effect

1. Facts

The plaintiff is a GmbH, which operates dental laboratories. It entered into consultancy agreements with both a lawyer and a company (GbR) offering business consulting services. The plaintiff was required to pay a flat rate fee plus VAT for the received consulting service supplies.

In the view of the tax court, the consulting services supplied were not correctly specified in the invoices the plaintiff received during the years from 2005 to 2007.

In the invoices, the lawyer specified the services supplied as follows: "We herewith invoice the agreed advisory fee as follows:" The GbR invoices specified "...for our general economic advice during (time period) we invoice you the agreed lump-sum" and "for additional business consulting (time period) we invoice you the agreed lump-sum". The invoices did not refer to any further documentation from which details contained in the contract and the agreement could be derived.

Invoice correction possible until the end of the hearing before the tax court

Only a few weeks ago, the ECJ published its judgment in the legal case *Senatex*. Therein, it acknowledged that an invoice may be corrected with retroactive effect for the purpose of input VAT deduction. In its decision of 21 December 2016, the Federal Fiscal Court referred to the *Senatex* case. It amended its case law and acknowledged that invoice correction, with retroactive effect, is possible at any time prior to the end of a hearing before the tax court.

The tax office ultimately denied input VAT deduction from these said invoices due to the fact that the service supplies rendered were not properly specified. This resulted in the plaintiff commencing proceedings in the finance court in 2011.

After the decision had been taken by the tax office, but during the course of the proceedings before the tax court, the plaintiff provided the tax office with corrected invoices which properly specified the services supplied.

Nevertheless, the tax court in Berlin-Brandenburg (Az. 7 K 7377/11) dismissed the action with its decision of 10 June 2015. The tax court rejected the invoice correction with retroactive effect for the years 2005 – 2007. The court ruled that, where a corrected invoice was provided only after the final decision of the tax office, concerning that particular invoice had already been taken, an invoice correction with retroactive effect would be excluded. The plaintiff subsequently filed a successful appeal with the Federal Fiscal Court against this decision.



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2. Legal opinion of the Federal Fiscal Court

The Federal Fiscal Court set aside the tax court's decision and granted the plaintiff input VAT deduction with retroactive effect for the years 2005 to 2007. In its decision (V R 26/15), the Federal Fiscal Court refers to the ECJ decision in the legal case *Senatex* (C-518/14) in which the ECJ expressly confirmed that it is possible to correct invoices with retroactive effect (see KMLZ Newsletter 27/2016). In so doing, the Federal Fiscal Court expressly abandoned its previous case law, which stated that invoice corrections only had effect *ex nunc*. The Court has now indicated that it interprets sec 15 para 1 sentence 1 no 1 of the German VAT Act and sec 31 para 5 of the German VAT Implementation Code in line with EU law and acknowledges an invoice correction to have retroactive effect from the date the invoice was originally issued.

In *Senatex*, the ECJ left open the question of whether an invoice has to meet minimum requirements before it can be corrected retroactively. Based on its current case law, the Federal Fiscal Court assumes this to be the case where a document contains, at the very least, such information as the identity of the issuer of the invoice, the recipient, the description of the supplies, the remuneration and VAT, separately stated.

The Federal Fiscal Court maintains a business-friendly attitude, as regards the time limit for an invoice correction. In the Federal Fiscal Court's view, it is sufficient if the issuer corrects the invoice by the end of the last hearing before the tax court. No other time limit can be derived from either

national or EU law. Here, the Federal Fiscal Court refers to the documentary evidence in accordance with sec 6 para 4 of the German VAT Act in conjunction with secs 8 ff of the German VAT Implementation Code, which, according to current case law, can also be provided by the end of the hearing before the tax court.

Contrary to the view of the ECJ in *Senatex*, which deems an invoice to be only a formal criterion, the Federal Fiscal Court maintains its view that the invoice is a material requirement for input VAT deduction.

In line with the ECJ's view, the Federal Fiscal Court also assumes that, in the case of an invoice correction, from an EU law perspective, interest on additional payments must not arise.

3. Conclusion

It is good that the Federal Fiscal Court quickly adopted a clear position as regards the basic question of invoice corrections with retroactive effect. Based on the *Senatex* case, it is no surprise that the Court acknowledges this retroactive effect. It is also pleasing that the Federal Fiscal Court does not refer to the alleged time limit of the last administrative decision, which has often been discussed. It is, however, surprising, that the Federal Fiscal Court continues to consider an invoice to be a material requirement for input VAT deduction, whereas the ECJ has expressly stated that an invoice constitutes merely a formal requirement. Taxable persons should continue to have their incorrect invoices corrected as soon as possible.