



# KMLZ VAT NEWSLETTER

## VAT refunds for property developers – Federal Ministry of Finance follows Federal Fiscal Court

The reverse-charge-scheme is no longer applicable for supplies to property developers. The administrative rules of the fiscal authorities are incompatible with the German VAT Act. Furthermore, they are incompatible with the principle of legal certainty. The fact is based on the decision of the Federal Fiscal Court (V R 37/10) of 22 August 2013 (Newsletter 33/2013).

### 1. Circular of the Federal Ministry of Finance

The fiscal authorities have now responded to the Federal Fiscal Court's jurisdiction by means of a circular of the Federal Ministry of Finance dated 5 February 2014.

#### 1.1 Direct application for construction work

The fiscal authorities have retreated from their view concerning the concept that an entrepreneur is only regarded as a property developer if he earned more than 10 percent of his turnover in the previous calendar year by providing construction work. This means it is only decisive when the purchased construction work is directly being used for the

### Tax authorities open wallet for property developers

The tax authorities follow the Federal Fiscal Court's jurisdiction by means of a circular of the Federal Ministry of Finance. Significant VAT refunds incl. interest, for wrongly paid past VAT, are in store for property developers.

Due to the clear and direct assignment of the input transactions, furthermore, the circular of the Federal Ministry of Finance has far-reaching consequences: Companies may now become liable for VAT when purchasing construction work although they have, to date, not fallen within the scope of sec. 13b of the German VAT Act.

supply of construction work. Only in this case is the reverse-charge-scheme applicable.

For example, if a contractor has the heating in his machine hall renewed, the fiscal authorities do not assume direct use for the supply of construction work. The machine hall only indirectly serves the supply of construction work.

#### 1.2 Exemption certificate only indication

The fiscal authorities now regard the determination of the nature of a property developer by means of the exemption certificate within the meaning of sec. 48 of the German Income Tax Act to be merely a source of guidance.

#### 1.3 Omission of the simplification rule

If the requirements of the reverse-charge-scheme were doubtful, the contracting parties were able to refer to the application of sec. 13b of the German VAT Act, if both par-



ties agreed on the application and the customer taxed correctly (para 13b.8 of the German Administrative Circular old version).

The simplification rule is no longer applicable to construction work. It is incomprehensible, however, that the simplification rule is still applicable for other sectors such as the supply of gas and electricity by German entrepreneurs or the supply of scrap.

## **2. Effects on property developers**

The fiscal authorities apply the Federal Fiscal Court's judgment to all open cases. This means that property developers are not considered as liable to VAT and can therefore claim the wrongly paid VAT. However, it is not objected to if the contracting parties still assume application of the reverse-charge-scheme until the publication of the circular of the Federal Ministry of Finance.

## **3. No general statement regarding legitimate expectations**

There was no general statement made by the fiscal authorities regarding legitimate expectations. If the contracting parties have agreed on the application of the reverse-charge-scheme regarding the exchanged supplies after the publication of the Federal Fiscal Court's judgment and the customer claims VAT, the property developer does not enjoy legitimate expectation. VAT can be claimed according to the fiscal authorities' opinion. There will be another circular of the Federal Ministry of Finance concerning all other cases. However, property developers should always refer to the application of the legitimate expectation of the German General Fiscal Code.

## **4. Effects on other branches**

Due to the newly regulated direct assignment of the input transactions for similar output transactions, there are changes concerning other branches, too.

In the cleaning sector, the reverse-charge-scheme can only be applied if cleaning services are directly purchased for cleaning services.

In a VAT group, the group's direct output transaction is decisive. Considering the 10 percent limit of the individual division in the VAT group is no longer expected. If construction work has been obtained and charged within a VAT group, the reverse-charge-scheme only applies if the VAT group directly supplies construction work with it.

Entrepreneurs who have carried out less than 10 percent of construction work are now also liable for VAT if they purchase construction work and use it directly for the supply of construction work, e.g. if an entrepreneur purchases and charges construction work to another company.

## **5. Recommendations for practice**

Property developers should file an application claiming the wrongly paid past VAT.

In the building industry, invoices should be issued with VAT in case of doubt. If the customer intends to use the construction work directly for construction work, an agreement should be made in which the customer confirms the direct use. Furthermore, this agreement should also include a tax clause in case the fiscal authorities have a different opinion.

All entrepreneurs should check their purchases of construction work if it is directly used for charging the costs to another company. Entrepreneurs would not be entitled to deduct the input VAT.