



# KMLZ VAT NEWSLETTER

## Property development cases: Federal Fiscal Court decides on sec 27 para 19 VAT Act

Several tax courts have been dealing with the settlement of past property development cases as regards the suspension of enforcement. A first Federal Fiscal Court decision, a first principle proceeding published by a tax court and a first civil court decision are now available as regards this issue.

### 1. Federal Fiscal Court decision

In the proceeding XI B 84/15, the Federal Fiscal Court had its first opportunity to comment on the application of sec 27 para 19 of the German VAT Act. The rule provides for a provision, as regards cases where the parties involved assumed that the liability for the payment of the VAT is transferred to the recipient (= reverse charge mechanism), and this proves to be incorrect. Sec 27 para 19 of the German VAT Act allows for a retrospective tax assessment against the supplier and excludes legitimate expectation pursuant to sec 176 of the German Fiscal Code. Accordingly, the rule enables the supplier to meet his obligation to pay the VAT by assigning his civil claim to additional VAT from the recipient, under certain preconditions, to the tax office. In the case before the Federal Fiscal Court, the

### Constitutional doubts as regards sec 27 para 19 VAT Act – Federal Fiscal Court grants suspension of enforcement

The settlement of past property developer cases is in full swing. For the first time, the Federal Fiscal Court comments on the unconstitutionality of sec 27 para 19 of the German VAT Act. The Court considers it to be possible and grants the supplier of property development services suspension of enforcement. The tax court in Lower Saxony has just denied the unconstitutionality in a recently published principle proceeding. There is also a first civil-law decision available. It confirms the supplier's civil claim vis a vis the property developer.

supplier of construction work had rendered supplies to a property developer in the period 2011 to 2013. Both parties assumed that the reverse charge mechanism applied. Accordingly, the property developer paid the VAT. After the Federal Fiscal Court decision of 22 August 2013 (V R 37/10) the property developer applied for a VAT refund at the tax office. This resulted in tax assessment notifications, containing additional tax claims, to be issued to the supplier of the construction work. He filed an appeal against the tax assessment notifications and claimed suspension of enforcement. The tax court granted the suspension of enforcement for 2011 and 2012. The tax office launched a complaint before the Federal Fiscal Court in this case.

The tax office's complaint was denied by the Federal Fiscal Court in its judgment of 17 December 2015. It ruled that the tax court was right to grant the suspension of enforcement for 2011 and 2012. The court's reasons are short: There is



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some disagreement whether sec 27 para 19 of the German VAT Act violates the German constitution by allowing a retrospective amendment of the tax assessment in favour of the supplier of construction work, excluding legitimate expectations. This unclear legal situation would be sufficient for granting the suspension of enforcement. The Federal Fiscal Court, however, expressly does not exclude that sec 27 para 19 of the German VAT Act might meet the constitutional provisions and rules of EU law, in the particular case, so that legitimate expectation would be excluded. This could be considered in cases where the supplier of construction work is not threatened by a financial loss. A decision will, however, only be made in the main proceedings.

## 2. Decision of the tax court in Lower Saxony

The tax court in Lower Saxony published a decision on 29 October 2015 (Ref. 5 K 80/15) as regards sec 27 para 19 of the German VAT Act. It rejected the supplier of construction work's complaint as regards the amended VAT assessment for 2009. It ruled that the VAT assessment had been rightly amended pursuant to sec 27 para 19 of the German VAT Act. Sec 27 para 19 of the German VAT Act, which excludes legitimate expectations, was held to be constitutional. According to the tax court, this was to be evaluated on the basis of whether, for the period in which the tax assessment was to be amended, the VAT period for assessment had already expired or not. The tax court denied the expiry of the period of assessment for 2009. Sec 27 para 19 of the German VAT Act was justified to prevent tax losses.

In the case before the tax court in Lower Saxony, the claimant was also given the opportunity to assign his civil claim,

to additionally claim VAT from the property developer, to his tax office. This claim was found not to have been time barred. The civil limitation period only began on the date of recognition of the claim. Recognition could only be assumed at the time the Federal Fiscal Court decision of 22 August 2013 (V R 37/10) was published. Therefore, the limitation period ended at the end of 2017, at the earliest. The tax court in Lower Saxony allowed an appeal to the Federal Fiscal Court.

## 3. Decision of the regional court in Cologne

First civil courts are also dealing with cases where suppliers of construction work are making additional claims for VAT from property developers. In its judgment of 30 October 2015 – 7 O 103/15 the regional court in Cologne upheld a complaint in this respect. The regional court derived the supplier's civil claim by way of the supplementary interpretation. The parties agreed on the reverse charge mechanism. Therefore, the court concluded that the parties agreed that the property developer would be liable for the payment of the VAT. According to the regional court's evaluation, the claim had not yet expired. The limitation period started with the recognition of the claim. The essential factor was when the property developer filed his application for refund at the tax office and when the supplier of construction work gained knowledge of it.

## 4. Tips for the practice

The Federal Fiscal Court decision allows for the supplier to obtain a suspension of operation by the tax offices. Final clarity on sec 27 para 19 of the German VAT Act will only be obtained by a Supreme Court principle proceeding.