



ECJ: Input VAT deduction at the time of payment if supplier is subject to cash accounting scheme

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1 Background

The German VAT Act does not specify the time at which the right to deduct input VAT arises with the same clarity and detail that sec. 13 of the Act does with respect to the time at which VAT on supplies becomes chargeable. In the legal case C-9/20 (*Grundstücksgemeinschaft Kollaustraße 136*, ECJ, judgment of 10 February 2022), the ECJ comments on the timing of input VAT deduction in cases where the supplier calculates VAT on the basis of the remuneration received, instead of the remuneration agreed, according to sec. 20 of the German VAT Act (cash accounting scheme). The decision may be relevant for all taxable persons. How the supplier calculates its VAT is (at present) usually not apparent to the recipient.

2 Facts of the case

The plaintiff was both tenant and lessor of a property. Both the plaintiff and its lessor waived the VAT exemption for the rental. They were both subject to the cash-accounting scheme. The contract served as a proper invoice.

Due to a partial deferral, the plaintiff paid part of its rent for the years 2009 to 2012 during the years 2013 to 2016. The plaintiff claimed its input VAT deduction – irrespective of the rental period concerned – in the period of the payment. The tax office was of the opinion that the input VAT deduction should have been claimed at the time of the supply. However, for these years the statute of limitations has partially expired.

The Fiscal Court Hamburg considered the view of the tax office to be correct under German law. According to sec. 15 para 1 sent. 1 no. 1 of the German VAT Act, the right to deduct input VAT arises when the supply is rendered. This is the



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case, regardless of when the VAT becomes chargeable to the supplier and whether the supplier calculates its VAT based on the remuneration agreed or received. However, the Court expressed doubt about whether the German law is compliant with the VAT Directive and referred the matter to the ECJ for a preliminary ruling.

3 ECJ decision

The ECJ makes it clear that, according to Art. 167 of the VAT Directive, the right to deduct input VAT arises at the time the deductible VAT becomes chargeable. In the present case, this was at the time of payment as the supplier was subject to the cash accounting scheme. The German VAT Act, as read by the Fiscal Court, would be contrary to Union law in this respect. The ECJ points out that the EU legislator has linked the timing of the input VAT deduction specifically to the time the VAT becomes chargeable – which is variable by the cash accounting scheme – and not to the provision of the supply.

The ECJ clearly rejects the argument put forward by the Fiscal Court that Art. 167 of the VAT Directive is not to be understood as a mandatory rule, but merely sets out a "guiding idea" from which deviations can be made. The ECJ also denies that Art. 167a of the VAT Directive has an impact on the question referred. According to this provision, the German legislator is allowed to provide that taxable persons, subject to the cash accounting scheme (in their role as recipients), can only exercise their right to deduct input VAT upon payment. Only in these cases would the time link between a VAT deduction and a VAT claim be lifted. However, the German legislator has not, to date, made use of this authorization.

4 Consequences for the practice

The decision can be relevant for all taxable persons. It does not concern taxpayers subject to the cash accounting scheme, but rather their recipients. In the case in question, the plaintiff, as recipient, was also subject to the cash accounting scheme. However, this was not decisive for the ECJ. Only the VAT calculation of the supplier is decisive.

According to the current view of the tax authorities, the right to deduct input VAT arises when the supply is rendered, irrespective of the taxation of the supplier (sec. 15.2 para. 2 of the German VAT Circular). What is decisive are the provision of the supply and the receipt of the invoice. The payment is irrelevant (unless an advance payment has been made). Insofar as the supplier is subject to the cash accounting scheme, this view is contrary to Union law. Under Union law, input VAT must be deducted upon payment. However, until there is a change in the law or the tax authorities' opinion, taxable persons can rely on the provisions of the German VAT Circular. The input VAT deduction upon provision of the supply – with its pre-financing effect for the recipient – is therefore still possible, at least for the time being. However, taxable persons should check whether the decision could be advantageous for them. If, for example, the input VAT deduction was forgotten in a period for which the statute of limitations has already expired, it may still be possible to deduct the input VAT. The decisive factor is that the supplier is subject to the cash accounting scheme according to sec. 20 of the German VAT Act.

For the future, it remains to be seen when and what conclusions the tax authorities and legislators will ultimately draw. In order for an interpretation or adaptation of the existing regulations in line with Union law to be feasible in practice, the obligation to indicate the cash accounting scheme of the supplier on invoices, as provided for in Art. 226 No. 7a of the VAT Directive, is absolutely necessary. Only in this way would recipients of services be able to identify a supplier as being subject to the cash accounting scheme and thereby determine the correct time for their input VAT deduction. Taxable persons would then have to differentiate the timing of the input VAT deduction according to the taxation of the supplier.