KÜFFNER MAUNZ LANGER ZUGMAIER

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KMLZ VAT NEWSLETTER

Federal Fiscal Court partially simplifies correction in accordance with sec 14c para 1 sentence 2 of the German VAT Act

1. Facts

The Plaintiff, based in Great Britain, rented out exhibition space at fairs in Germany. The Plaintiff invoiced these supplies, including German VAT. The recipient X deducted input VAT from these invoices. However, X, being the recipient, was actually liable for the payment of the VAT. The tax office qualified the VAT liability of the plaintiff as a liability according to sec. 14c para 1 sentence 1 of the German VAT Act.

In his next VAT return, the Plaintiff made a claim for reimbursement. He had corrected the invoices in accordance with sec 14c para 1 sentence 2 in conjunction with sec 17 of the German VAT Act. The Plaintiff also forwarded the tax office a list and copies of the corrected invoices. The Plaintiff was asked by the tax office to prove that X had received the corrected invoices. Additionally, the Plaintiff was asked to prove that it had refunded the tax amount to X.

The Plaintiff forwarded the tax office his e-mail correspondence with X. However, this e-mail correspondence proved that X had not received any corrected invoices. In these e-mails, X reclaimed the VAT from the Plaintiff and the parties agreed on an assignment solution. Furthermore, the Plaintiff sent the tax office a written assignment, which was also signed by X. Therein, the Plaintiff assigned his refund claim for 2012 VAT to X. “Claim X input VAT refund” was mentioned as the reason for the assignment.

2. Legal opinion of the Federal Fiscal Court

The Federal Fiscal Court further assumed, that the Plaintiff had corrected the VAT statement on the invoices. For a correction, in terms of sec 14c para 1 sentence 2 of the German VAT Act, a document must be forwarded which refers specifically and unambiguously to the invoices to be corrected. This should indicate, if necessary by way of interpretation, that the supplier now wants to invoice excluding VAT. In doing so, the business needs must also be observed. In the Federal Fiscal Court’s view, the written

Sec 14c para 1 sentence 2 of the German VAT Act: Written assignment as correction declaration

A Federal Fiscal Court decision which has recently been published on the elimination of the tax liability in accordance with sec 14c para 1 sentence 2 of the German VAT Act (decision of 12.10.2016 – XI R 43/14) should result in simplifications for some taxable persons. Rather than an invoice correction, it is now sufficient to issue a written assignment vis-à-vis the tax office. The Federal Fiscal Court left unanswered the question as to whether the elimination of the tax liability further requires that the supplier has actually refunded the collected tax amount to the recipient. Even after the ECJ decision in the legal case *Senatex* – C-518/14 the court is of the opinion that the correction has no retroactive effect.

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assignment, which was received by the tax office, is deemed to be an effective correction. Both, the Plaintiff and X signed this document. It was therefore clear that the declaration had been issued by the Plaintiff and that X also had received it. This led to the sufficiently clear result that, the Plaintiff now wanted to invoice excluding VAT.

The question as to whether a correction, in accordance with sec 14c para 1 sentence 2 of the German VAT Act, requires that the supplier has actually refunded the VAT amount to the recipient remained unanswered by the Federal Fiscal Court. This issue was not relevant in the present case. The tax court determined, that the tax amount was reimbursed by way of assignment and offsetting in the relevant year. An assignment is deemed to be a form of refund. It becomes effective upon receipt.

Most recently, the Federal Fiscal Court held that the invoice correction, in terms of sec 14c para 1 sentence 2 of the German VAT Act, only had effect ex nunc. Despite the ECJ decision in the legal case *Senatex* (C-518/14), retroactive effect of the invoice correction was denied. Any other interpretation would be incompatible with the ratio legis, which is to avoid the risk of any loss of tax revenue.

3. Summary

According to the Federal Fiscal Court, it is decisive that the recipient of the supply received a correction declaration. Taxable persons correcting invoices in accordance with sec 14c para 1 sentence 2 of the German VAT Act should ensure that they have proof available that the recipient received that declaration.

Recognition of a written assignment, as in the present case, as a correction declaration should make it easier for taxable persons to declare a correction. This particularly applies to cases in which only a few persons received invoices in accordance with sec 14c of the German VAT Act or to cases of intragroup invoices. Where invoices, in accordance with sec 14c of the German VAT Act, have been sent out to a large number of persons, the assignment possibility will likely result in little or no simplification. E.g. this applies in circumstances where the taxable person fails to consider that the distance sales scheme applies and sends out invoices including German VAT. In these cases, where the recipients are, as a general rule, private persons, it is, in any event, left open to question as to whether the correction declaration is in fact relevant.

As regards corrections in terms of sec 14c para 1 sentence 2 of the German VAT Act, the fiscal authorities partly require that the supplier has refunded the tax amount to the recipient, see sec 14c.1 para 5 sentence 4 of the German VAT Circular. Unfortunately, the Federal Fiscal Court left unanswered the question as to whether this is legitimate. In a recent decision, the Tax Court in Münster (5 K 412/13 U) ruled against this requirement. An appeal to the Federal Fiscal Court against this decision is currently pending (XI R 28/16).

Whether the ratio legis under sec 14c of the German VAT Act rules out retroactive effect is left open to question. The principle of neutrality could in fact require quite the contrary. However in cases, where it is already initially not legitimate for the recipient of the invoice to deduct input VAT, it seems more convincing to allow the correction to have retroactive effect. At some point, the ECJ will need to decide on this issue.