



KMLZ VAT NEWSLETTER

Focus on procedural law

1. Doubts re constitutionality of the interest rate

In accordance with sec 233a and 238 para 1 sentence 1 of the German Fiscal Code, the current interest rate is 6% per annum. In view of the persistent low interest rate phase, the question rises whether the interest rate applied is constitutional. To date, the Federal Constitutional Court has only decided for periods up until March 2006 that there is no reason to question the constitutionality of the interest rate (decision of 03.09.2009 BvR 2539/07). The Federal Constitutional Court has not yet made a decision concerning periods post March 2006. There are currently several proceedings pending before the Federal Fiscal Court (cases VIII R 36/16, VIII R 25/17, X R 15/17). Taxable persons who want to benefit from a possible positive decision by the Federal Fiscal Court or subsequently by the Federal Constitutional Court should appeal against the assessment of the additional interest payment.

2. Minimum content of a claim

An action filed with the Tax Court will only be considered if it contains the minimum contents in accordance with sec 65 of the German Code of Procedure of Fiscal Courts. This includes the names of both the Plaintiff and the Defendant,

Recent developments in fiscal procedural law

Whether legal remedies lodged in VAT related proceedings are successful not only depends on substantive law, procedural law can also be of decisive importance. For example: Appeal against assessment of interest ++ Sufficient determination of the claim ++ Liability of the managing director in the case of insolvency ++ Burden of proof re the place of supply ++ Amended tax assessment issued between the pronouncement of judgment and notification of judgement.

the subject matter of the case and the contested tax assessment, along with the decision rejecting the objection.

Only recently, the Federal Fiscal Court dealt with the question of when a claim is sufficiently determined (decision of 14.11.2017 – IX B 66/17). According to the Court, a claim is sufficiently determined where reference to the contested tax assessments is made and the respective decisions are attached. This, however, does not apply in those cases where the specific issues, which can be the subject of the legal proceedings, cannot be identified from the decision. Then, the claim must contain further explanations, the burden of providing which lies with the Plaintiff. If this does not happen, the application will be rejected.

3. Liability of the managing director – exclusion of objection for uncontradicted inclusion in the insolvency table

Where a tax office includes a tax claim against an insolvent GmbH in an insolvency table, this can be contested. If this does not happen, the GmbH's managing director can be held liable for the tax claims of the GmbH in accordance with sec 69 of the German Fiscal Code.



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Only recently, the Federal Fiscal Court decided, that the absence of the Managing Director's objection to the tax office's inclusion of the tax claim in the insolvency tables results in the tax office's claims being equivalent to an uncontested tax assessment (decision of 27.09.2017 – XI R 9/16). A managing director, who could have been in the position to object to the included claim, must accept the validity of the claim. In accordance with sec 166 of the German Fiscal Code, the managing director cannot effectively object to the amount of the claim. Managing directors seeking to avoid these negative consequences must object at the time the claims are included in the insolvency table.

4. Liability of the managing director following the appointment of a provisional insolvency administrator

Where a provisional insolvency administrator is appointed for a GmbH (general right to reserve approval in terms of sec 21 para 2 no 2 of the German Insolvency law; no general prohibition of disposals), the GmbH's managing director still has the right to administer and dispose of assets. Thus, the managing director must continue to ensure that the tax is paid using the recourses of the GmbH. In the case before the Federal Fiscal Court, the GmbH was granted a deferment of payment with respect to the import VAT due. The managing director failed to pay this tax on the due date. In the Federal Fiscal Court's view, the managing director should have given priority to the payment of the tax, regardless of any other payment obligations. The Court confirmed the managing director's full liability for the payment of the import VAT in accordance with sec 69 of the German Fiscal Code (decision of 26.09.2017 – VII R 40/16).

5. Burden of proof

The burden of proof is of vital importance in legal proceedings. In cases where circumstances relate to transactions effected abroad, the participant must clarify these circumstances and procure the necessary evidence (see sec 90 para 2 of the German Fiscal Code, sec 76 para 1 sentence 4 of the German Code of Procedure of Fiscal Courts). In particular, this applies to the place of supply where it is determined by the recipient's location (art. 44 EU-VAT-Directive) and where the Plaintiff assumes that the place of supply is located abroad. The Plaintiff bears the burden of proof in this regard. Where a tax court, on the application of these principles, comes to the conclusion that the place of supply abroad cannot be determined, it may, as a consequence, determine the place of supply to be within the domestic territory (decision of 28.11.2017 – V B 60/ 17).

6. Amendment of a contested tax assessment following the pronouncement of judgement

Where a tax assessment, which has been contested by appeal or action is amended or replaced, the new tax assessment becomes, by act of law, the subject matter of the ongoing appeal proceedings (sec 68 of the German Code of Procedure of Fiscal Courts). According to current Federal Fiscal Court case law, this also applies where an amended tax assessment is issued during the time between the pronouncement and notification of the judgement. Where this tax assessment contains another complaint, the taxable person must appeal against the judgement as notified (decision of 29.09.2017 – I B 61/16).