



Federal Ministry of Finance on the treatment of VAT in preliminary insolvency proceedings

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1 Background

In its letter of 11.01.2022, the Federal Ministry of Finance comments on questions concerning the application of sec. 55 para. 4 of the German Insolvency Statute (*InsO*), i.e., VAT treatment in preliminary insolvency proceedings. Sec. 55 para. 4 *InsO* classifies, inter alia, all VAT liabilities which, in principle shall enter every registered claim into a schedule, as an exception to this rule, as debts incumbent on the estate. Until recently, a dispute existed between the tax authorities and the jurisprudence of the highest courts as to which types of tax and insolvency proceedings sec. 55 para. 4 *InsO* (old version) should apply. The tax authorities applied sec. 55 para. 4 *InsO* (old version), by legal analogy, to cases of preliminary debtor-in-possession-management. The Federal Court of Justice (decision of 22.11.2018, ref. IX ZR 167/16) and the Federal Fiscal Court (decision of 07.05.2020, ref. V R 14/19) did not consider preliminary debtor-in-possession-management to be covered by its wording. The legislator decided this dispute in favour of the tax authorities with the amendment of sec. 55 para. 4 *InsO*, effective from 01.01.2021. The legislator simultaneously limited the scope of application to VAT and a few selected types of tax. The new Federal Ministry of Finance's letter now ties in with these amendments and answers, from an administrative perspective, some previously unresolved questions.

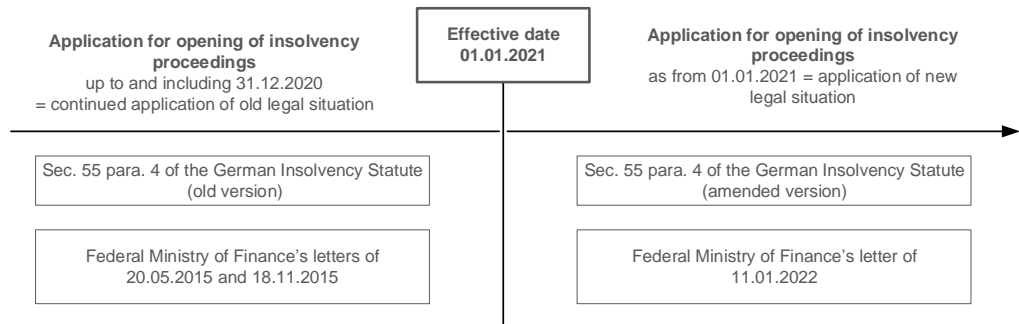
2 Content of the Federal Ministry of Finance's letter

The Federal Ministry of Finance's letter of 11.01.2022 replaces the earlier Federal Ministry of Finance's letters on this topic of 20.05.2015 and 18.11.2015. The letter applies retroactively to all insolvency proceedings filed as from 01.01.2021.



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From an objective point of view, it contains regulations concerning the period of time between the appointment of a preliminary insolvency administrator and the actual opening of insolvency proceedings. The Federal Ministry of Finance's letter, in particular, clarifies the situation for VAT debtors in preliminary debtor-in-possession-management:

- In cases of preliminary debtor-in-possession-management applied for up until 31.12.2020, sec. 55 para. 4 InsO does not apply, i.e., it does not give rise to any debts incumbent on the estate. The situation is different for cases applied for after 31.12.2020. Then, sec. 55 para. 4 InsO applies from the date a preliminary administrator is appointed (recital 3).
- The scope of sec. 55 para. 4 InsO should no longer include supplies of ancillary services under tax law. However, there is an exception for late payment penalties (recital 8).
- Jurisprudence on the adjustment of the taxable base due to irretrievability for legal reasons is now extended expressis verbis to the debtor-in-possession insolvency debtor (recitals 17, 19, 21). If the insolvency debtor has rendered supplies for consideration and the consideration remains outstanding, the VAT liability will, for legal reasons, require adjustment in accordance with sec. 17 of the German VAT Act upon the appointment of a preliminary administrator. If the debt is collected during the preliminary debtor-in-possession-management, a second adjustment of the VAT liability, in accordance with sec. 17 of the German VAT Act, will be carried out, which will result in debts incumbent on the estate in accordance with sec. 55 para. 4 InsO (= double amendment) (recitals 19, 20).
- In cases applying the cash accounting scheme, the collection during the ongoing debtor-in-possession-management, will lead to debts becoming incumbent on the estate upon the opening of the insolvency proceedings in accordance with sec. 55 para. 4 InsO (recital 23).
- The insolvency debtor must also comply with his tax reporting obligations during the preliminary debtor-in-possession-management. He must also declare supplies which are subject to sec. 55 para. 4 InsO. It is only upon the opening of the insolvency proceedings that supplies subject to sec. 55 para. 4 InsO will actually be deemed to be debts incumbent on the estate and be assessed against the estate (recitals 29 et seq., 38 et seq.).

3 Consequences for the practice

The Federal Ministry of Finance's letter provides a degree of clarification, particularly in terms of debtor-in-possession-management. Both the insolvency debtor and the preliminary administrator must, during the opening phase of the insolvency, keep in mind the later privileged access of the tax authorities to the insolvency estate. The insolvency administrator or the debtor-in-possession insolvency debtor may appeal against the VAT assessment as being categorized as a debt incumbent on the estate. The crucial factor will be at which stage of the insolvency proceedings the VAT liability arose. In particular, the double adjustment according to sec. 17 of the German VAT Act, which is applied by the tax authorities in case of provisional debtor-in-possession-management, has not been conclusively clarified for all case constellations. Jurisprudence will ultimately be relied upon to provide further clarity in this regard.