KÜFFNER MAUNZ LANGER ZUGMAIER

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# KMLZ VAT NEWSLETTER

## Federal Ministry of Finance restricts VAT refund to prevent tax losses

**1. Circular letter of the Federal Ministry of Finance**

With its circular letter of 16.02.2016, the Federal Ministry of Finance added the following short but probably contradictory paragraph 1a into sec 18.11 of the German Administrative VAT Circular: "Input VAT amounts which are separately stated in invoices for export supplies or intra-Community supplies shall not be refunded where it is established that the requirements of sec 6 para 1 to 3a of the German VAT Act or sec 6a para1 and 2 of the German VAT Act are met. As regards the assessment of the refund claim under the VAT refund procedure, these cases are deemed to be unduly charged VAT in terms of sec 14c para 1 of the German VAT Act. Therefore, they cannot be deducted as input VAT by the recipient (see sec 14c.1 para 1 sentence 5 no 3 and sentence 6 as well as sec 15.2 para 1 sentences 1 and 2) and cannot be refunded under the VAT refund procedure. The VAT assessment of the supply carried out by the supplier remains unaffected."

**2. Legal basis**

The Federal Ministry of Finance upheld the principles which were determined by the Federal Fiscal Court and already included in sec 6a.2 of the German Administrative VAT Circular that the supplier must provide a formal proof that an export supply or intra-Community supply was carried out. Where the supplier cannot provide such proof in the form of documentary and accounting records in full, or not in a timely manner, it is generally assumed that the requirements for zero-rating are not met. It may, in exceptional cases, be otherwise if it is determined that the requirements of sec 6 para 1 to 3a of the German VAT Act for export supplies or sec 6a para 1 and 2 of the German VAT Act for intra-Community supplies have been met. To date, it has not been considered an unduly charged VAT in terms of sec 14c of the German VAT Act if, in these cases, invoices have been issued with VAT. Only sec 6.12 of the German Administrative Circular contains a note, albeit vague, in this respect.

### Conflict of interest re zero-rating between supplier and recipient

On 16.02.2016 the Federal Ministry of Finance published a letter as regards VAT refunds for intra-Community supplies and export supplies, which may prove controversial. The Federal Ministry of Finance denies VAT refund where the supplier invoices with VAT due to a lack of documentary evidence, despite it being determined, that the substantive requirements for zero-rating have been met. The suppliers would have to issue invoices including VAT in cases of any doubt. The recipients should be cautious. Their input VAT refund is at risk. The Federal Ministry of Finance is attempting to prevent tax losses under the VAT refund procedure. Apparently, the letter is not to be applied to the regular assessment procedure. It is to be hoped, that it is also understood by the tax offices.

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However, generally, it complies with article 4 lit. b of Directive 2008/9/EU to the extent that at least the input VAT from invoices for intra-Community supplies is not refunded through the VAT refund procedure. Germany has not implemented this restriction in national law. This has not been challenged by the Federal Ministry of Finance's letter. The Federal Ministry of Finance denies input VAT deduction in accordance with article 4 lit. a of Directive 2008/9/EU which covers unduly charged VAT in terms of sec 14c of the German VAT Act.

**3. Background: Tax losses**

Tax losses would have occurred under the refund procedure, as input VAT from invoices for intra-Community supplies and export supplies had been refunded while these invoices were corrected at a later date. Firstly, the suppliers' invoices included VAT due to a lack of evidence. If the supplier confirmed this vis-à-vis the Federal Tax Office, input VAT was refunded to the recipient. Then, suppliers cancelled the invoiced VAT at a later time and had the VAT refunded by their tax office. The foreign recipients, however, have not refunded the input VAT to the Federal Tax Office. The Federal Ministry of Finance seeks to eliminate this problem.

**4. Application is limited to refund procedure**

The Federal Ministry of Finance's letter will presumably be applied to the refund procedure only, although the mentioned principles, at first glance, could also be applied to the regular assessment procedure. This follows from the above mentioned practical background and it can also be derived from the heading of the Federal Ministry's letter and the implementation in sec18.11 of the German Administrative VAT Circular. The assessment procedure shall remain unchanged. However, it would have been better if the Federal Ministry of Finance had explicitly formulated this in its letter.

**5. Practical aspects**

Basically, only the supplier should provide evidence that the conditions for the zero-rating are objectively met. Otherwise, it could be argued, by the recipient's competent tax office, that the requirements are objectively met and input VAT cannot be deducted when the supplier is not granted zero-rating due to doubts raised by his tax office. On the one hand, it does not correspond with the German system that the supplier has to have available documentary and accounting evidence. Furthermore, the tax treatment would be left to the finance authority's sole discretion.

As regards the refund procedure, this however, becomes reality. As soon as the recipient confirms that a supply abroad has occurred, the Federal Tax Office will deny the VAT refund. Thereafter, the supplier would have to correct his invoices and issue invoices without VAT. The formal requirements in sec 6 para 4, as well as sec 6a para 3 of the German VAT Act, are thereby overruled as regards supplies to recipients which are not registered in Germany.

It is to be hoped that, in the end, we will not have two sets of weights and measures as the Federal Ministry of Finance determined in its letter that the treatment of the supply on behalf of the recipient remains unaffected. The supplier's competent tax office could therefore insist on VAT liability on the grounds of formal faults. This could be the case even if, in the Federal Tax Office's view, a case provided for in sec 14c of the German VAT Act exists, hence VAT being unduly invoiced. This could have only been prevented by the Federal Ministry of Finance giving some kind of binding effect to the Federal Tax Office's decision which would also have to be observed by the supplier's competent tax office.