KÜFFNER MAUNZ LANGER ZUGMAIER

12 | 2018

KMLZ VAT NEWSLETTER

Insolvency administrators keep tabs on rebate settlements

The Tax Court of Baden-Wurttemberg has decided that debit notes can be considered to be invoices in accordance with Art. 203 of the VAT Directive. As a consequence, VAT shown in debit notes would be payable.

1. Facts

The plaintiff was the insolvency administrator of a taxable person (C). For 2006, he and his supplier (S) agreed that various bonus payments would be made. In order to settle the payments, C issued monthly debit notes, as well as an annual summary debit note, to S. The debit notes referred to "WKZ" (Werbekostenzuschuss), which is the common German term used for promotional rebates. The debit notes contained a calculation for each agreed bonus payment, as well as the corresponding VAT amount. C treated the net amounts as taxable supplies in its VAT returns and paid the shown VAT amounts to the tax office. Supplier S deducted the shown VAT amounts as input VAT.

In fact, not all agreed bonus payments were consideration for advertising services supplied by C to S. Some payments represented subsequent reductions in price. Accordingly, the tax office competent for S denied the input VAT deduction with regard to the amounts, which represented price reductions. Moreover, the tax office considered the corresponding VAT amounts as undue VAT. The tax office competent for C, which was also competent for assessing the undue VAT shown by C, came to a different conclusion. Considering all of the circumstances, it is obvious that the VAT amounts had been shown for information purposes only and not to enable S to deduct these amounts as input VAT. With respect to the price reductions, C and S had applied an incorrect VAT treatment. C did not render taxable supplies. Rather, C should have amended the input VAT resulting from the supplies procured from supplier S. The amendment should have been made with respect to the period 2006, which was already time-barred.

In 2016, C cancelled the debit notes with regard to the reductions in price. By means of its application, the plaintiff, as C's insolvency administrator, requested the competent tax office's approval to cancel the undue VAT, which is a requirement for claiming the VAT amount from the tax office. The relevant VAT period would be 2016.

VAT shown in debit notes could result in VAT liability

Unusual constellation – the plaintiff, a taxable person, assumed that it would be liable for undue VAT shown on debit notes. The tax office, however, denied the VAT liability. The Tax Court of Baden-Wurttemberg agreed with the plaintiff (see decision of 11.12.2017 file ref. 9 K 2646/16). It granted approval to cancel the undue VAT shown in the debit notes, a prerequisite for claiming the VAT amount from the tax office. The decision creates significant uncertainty for other taxable persons.

Contact: Dr. Christian Salder
Lawyer, Certified Tax Consultant
Phone: +49 89 217501285
christian.salder@kmlz.de

2. Decision

The Tax Court agreed with the plaintiff and granted the approval to cancel the undue VAT. Every document showing an issuer, a customer, a service description, and a VAT amount has to be considered to be an invoice in accordance with Art. 203 of the VAT Directive. In the Tax Court's opinion, the debit notes in question met these requirements with respect to the bonus payments to be qualified as price reductions. In particular, the term "WKZ as agreed" was found to be a sufficient service description. This term creates the impression that C supplied advertising services to S. The shown VAT amounts also indicated that C intended to invoice (allegedly) supplies of services. The fact that the term "invoice" did not appear was found to be irrelevant.

3. Consequences for the practice

The decision, in the subject case, appears to be beneficial for the plaintiff. The insolvency administrator turned an act of incorrect VAT reporting, as regards past VAT periods, into a present refund claim.

In our opinion, however, the decision gives rise to a substantial degree of legal uncertainty. The Tax Court adopted a broad definition of invoices in accordance with Art. 203 of the VAT Directive. In particular, it considers the rather ambiguous term "WKZ" to be a sufficient service description. In the past, WKZ could be understood to represent both, consideration for supplied services, as well as reductions in price (see sec 10.3 para 2 sentence 4 of the German VAT Circular and Federal Fiscal Court case law, most recent decision of 07.03.1995, XI R 72/93 recital 14). Moreover, considering that a shown VAT amount shall indicate the purpose of invoicing taxable supplies, this would result in a lot of accounting documents showing undue VAT.

The decision also reveals the challenges of creating and performing distribution and purchase contracts. Both, sales and distribution, as well as procurement departments, often act very independently from their financial accounting and tax departments. This freedom to act independently contrasts with the importance of streamlining the VAT treatment of most business transactions within a company.

In particular, insolvency administrators have to check comparable constellations. They are legally obliged to claim possible refunds. For managing directors, the situation is more difficult. They must also claim refunds. However, caution is advised. A refund claim, based on cancelled undue VAT, could easily be overcompensated by additional payments and interest arising from undue VAT shown in other accounting documents, which have not yet been considered.

Taxable persons should check debit and credit notes, as well as other accounting documents as to whether or not they are relevant, from a VAT perspective. Documents, which are not intended to be invoices, should be clearly labeled as non-invoices in terms of the VAT Act. Distribution and procurement agreements should be concluded and performed with the assistance of the in-house tax department. VAT clauses (even if they are short) can help in ensuring the application of the correct VAT treatment on bonus payments. By doing so, a good business will remain a good business, rather than being thrown into reverse by preventable VAT problems.

The decision is not yet legally binding. An appeal is pending before the Federal Fiscal Court (see file ref. XI R 5/18).