



# KMLZ VAT NEWSLETTER

## ECJ: input VAT deduction in the case of an invoice showing VAT subsequently being issued

### 1. Facts

Between 2004 and 2010, Hella supplied Volkswagen with moulds for the manufacture of illuminants for vehicles and invoiced Volkswagen for these supplies. Hella assumed these transactions should be classified as pure financial compensation, which is not subject to VAT. Therefore, Hella initially did not include VAT in its invoices.

In 2010, Hella became aware of its error and then proceeded to invoice VAT in separate invoices and pay VAT on these supplies. In 2011, Volkswagen filed a claim for a VAT refund in Slovakia. The Slovak authorities granted the request only for the time period 2007 to 2010. The limitation period of five years provided for by national law had already expired as regards the years 2004 to 2006. Therefore, the claim was rejected insofar. The right to a VAT refund had already arisen at the point in time the goods were supplied. Thus, the deadline had already expired.

### Input VAT deduction despite limitation period

Where a taxable person subsequently invoices VAT in invoices for supplies, which previously he had treated as being VAT exempt, this does not result in the recipient's input VAT deduction, by means of a VAT refund, being disallowed. Any possible limitation periods are irrelevant in cases where the recipient was unable to claim the refund within time, due to the fact that he did not have an invoice and was unaware of the VAT liability (ECJ, decision of 21.03.2018 - C- 533/16 *Volkswagen AG*). Here, substantive law prevails over procedural law.

It was for the Supreme Court of the Slovak Republic to determine the date of commencement of the five year period. The court referred several questions to the ECJ for a preliminary ruling. One of the court's questions was whether both the Directive 2008/9 and the right to deduct input VAT cumulatively require that, with respect to the item supplied or the supply of service rendered, the respective VAT amount be shown in the invoice. Further, the court asked whether it is in accordance with the principle of proportionality and neutrality for the time limit for the VAT refund to be calculated from a point at which not all of the substantive law conditions required to exercise the right to a VAT refund are satisfied.

### 2. Legal Opinion of the ECJ

First, the ECJ repeated its legal findings from previous decisions. The right to deduct input VAT is a fundamental principle of VAT law. It is intended that the taxable person's economic activity is completely relieved of VAT, provided



Contact: Dr. Thomas Streit,  
LL.M. Eur., Lawyer  
Phone: +49 89 217501275  
thomas.streit@kmlz.de

that the activities are subject to VAT. Although the right to deduct input VAT may be exercised immediately, it must, however, satisfy formal and substantive conditions. These conditions basically arise from the VAT Directive. The right to deduct input VAT is generally to be exercised in the time period in which the tax became chargeable. However, the right can only be claimed after receipt of a proper invoice.

The ECJ is of the opinion that the principle of legal certainty, however, requires a temporal limit for exercising the right to deduct. Where a taxable person has not been sufficiently diligent, a limitation period is permitted as a sanction where the limitation period meets the principles of equivalence and effectiveness. Further, Art. 273 of the VAT Directive provides for measures to prevent tax fraud.

Nevertheless, in the present case, the ECJ came to the conclusion that the limitation period did not apply. It was impossible for Volkswagen to exercise its right to a refund before the invoice correction, as, prior to that, it had not been in possession of the invoices nor aware that the VAT was due. It was only in the period following the corrections that the substantive and formal conditions giving rise to a right to deduct VAT were met. Further, in the ECJ's view, Volkswagen did not demonstrate a lack of diligence, nor was there any suggestion of abuse or fraudulent collusion. The ECJ did not foresee any risk of tax evasion or non-payment of the VAT. Taking into consideration these circumstances and in order to protect the recipient, the limitation period was not considered to have commenced at the time the goods were supplied.

### 3. Conclusion

In light of the decision in the legal case *Senatex* (decision of 15.09.2016 – C-518/14), those expecting the Volkswagen decision to yield further guidelines regarding the question of correcting invoices with retroactive effect, were probably disappointed with this decision. The court does not really state for which period a VAT refund will be granted and if, in the present case, the invoices were corrected with retroactive effect. The court does not refer to Art. 14 para 1 letter a of the Directive 2008/9, according to which the refund application must basically refer to the input VAT invoiced during the refund period. It seems that the decisive outcome for the ECJ was that substantive law prevailed over the limitations of formal law. Thus, the Volkswagen decision is in line with numerous other ECJ decisions showing a clear tendency: Taxable persons exercising a sufficient degree of diligence will be protected.

An argument for a retroactive effect in the case at hand is, that Volkswagen was not burdened with the VAT at the time it paid the subsequently invoiced VAT amount to Hella. Rather, Volkswagen was burdened with the VAT when paying the supposed net amount to Hella, which in reality was a gross amount containing VAT. The principle, that the right to deduct input VAT is exercisable immediately might require the addition of retroactive effect.

The decision is, in particular, interesting for VAT refund applications in countries such as Italy and the Czech Republic where comparable limitation periods exist for regular VAT returns.