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KMLZ VAT NEWSLETTER

Formalities for VAT refund claims

VAT refund applications made by taxable persons established in a third country must be filed within six months following the end of the respective calendar year. Applications for 2014 have to be filed by 30 June 2015, at the latest. Applicants have to ensure that their applications are complete. In the last few months, some significant judgments concerning this issue have been handed down.

VAT refund procedure for taxable persons established in third countries

1. Facts

Foreign companies are often burdened with German VAT, although they are not registered in Germany for VAT purposes and therefore cannot deduct German VAT by filing a VAT return. Therefore, the VAT law provides the VAT refund procedure. According to sec. 61a para 2 of the German VAT Implementation Code, VAT refund applications made by taxable persons established in a third country must be filed within six months following the end of the calendar year in which the right to a VAT refund has arisen. The deductible input VAT has to be proven by submission of original invoices. If the original invoices are not submitted by the application deadline, an input VAT deduction will generally be denied.

2. Preclusive period and obligation to submit original invoices

With its judgment of 19 November 2014 – V R 39/13 the Federal Fiscal Court clearly confirms that the VAT refund of companies established abroad in accordance with sec. 18 para 9 of the German VAT Act has to be claimed within six months following the end of the calendar year in which the right has arisen. The taxable person has to have the original invoices available in order to prove the deductible input VAT. The application period, in accordance with sec. 18 para 9 of the German VAT Act, is a preclusive deadline. The deadline can only be met by filing a complete application which corresponds, in detail, with the official form. Therefore, all original invoices and import documents have to be attached to the refund application. Copies are generally not sufficient. In the Federal Fiscal Court's view, only in exceptional cases, it is disproportional to demand original invoices when a refund application is filed. This is the case if the

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applicant cannot be held responsible for not providing the original invoices in due time. Sec. 110 para 1 of the General Fiscal Code provides for restitutio in integrum in certain circumstances where the respective person cannot be held responsible for not observing the deadline.

3. Certificate of Incorpration

The strict requirements to attach the original entrepreneur certificate to the refund application have, in the past, proven difficult. According to sec. 61a para. 4 of the German VAT Implementation Code, the applicant needs to prove, by means of an official certificate of the state in which he is based, that he is indeed listed as an entrepreneur with the corresponding VAT-ID-No. This is especially difficult in countries such as the USA and Hong Kong, where there is no comparable VAT system.

The tax court Cologne has commented, in its decision of 11 February 2015 – 2 V 3334/14, on the requirements regarding a valid certificate of incorporation. The necessary certificate of incorporation for the refund of VAT of a company that is not based in the Member State needs to cover the refund period and provide information to the effect that the applicant is an entrepreneur in accordance with the German VAT Act. The US certificate provided by the applicant (form 6166 of the IRS) did not explicitly state that the applicant was an “entrepreneur in accordance with the German VAT Act”. As the US tax law does not have a VAT system comparable to the European one, the US tax authorities are not able to certify that the applicant is indeed an entrepreneur in accordance with the German VAT Act. However, the certificate showed that the applicant was engaged in economic activities. This was sufficient for the US-based applicant. This decision might bring relief to applicants from countries that do not have a comparable VAT system. However, it is still recommended that US companies meet the requirements of the German VAT Implementation Code and ask for certificates that include the statement “VAT only – not applicable to income taxes” as well as “Tax Year”. Nevertheless, if one follows the decision of the tax court Cologne, it is sufficient to at least state the economic activities and the year.

4. Chargeable event if VAT is shown incorrectly

A recent Federal Ministry of Finance’s circular of 2 April 2015, IV D 2 – S 7270/12/10001 deals with the matter of tax arising after issuing an invoice with incorrect tax. VAT is normally due at the time tax arises for supplies, at the latest, however, at the time of issuing the invoice. According to para. 13.7 of the German Administrative Circular, VAT arises at the time of the supply even if the invoice is issued at a later date than the one when the supply actually took place.

As long as it is unclear whether an entrepreneur active in the domestic territory is based abroad or at home, he can claim VAT in the general taxation procedure if he has issued invoices in accordance with sec. 13b of the German VAT Act. Although, in instances where the reverse-charge mechanismapplies, he will be obliged to state VAT due in accordance with sec. 14c para. 1 of the German VAT Act, in the general taxation procedure. This was decided by the Federal Fiscal Court in its judgment of 19 November 2014 – V R 41/13. By doing this, an entrepreneur based abroad was able to be sent back to the assessment procedure retroactively by issuing invoices in accordance with sec. 14c of the German VAT Act.

The Federal Ministry of Finance clarifies that it “does not seem to be feasible in practice“ and holds out the prospect of

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a corresponding change to the German VAT Implementation Code. By doing this, the Federal Ministry of Finance intends to prevent tax optimized considerations which enable the entrepreneur to be sent back to the assessment procedures, which do not have any limitation period and have less formal requirements by issuing invoices according to sec. 14c of the German VAT Act.

5. Statements in box 9a

In box 9a of the VAT refund applications, the applicant needs to state that all of the items listed in the VAT refund application, as well as supplies, were used for the purposes of the company. The tax court Cologne confirmed, in its judgment of 21 March 2013 – 2 K 586/10, that a VAT refund application needs to be complete and also needs to include the statement provided in para. 9 letter a of the application that the items listed, as well as the supplies, were used for the purposes of the company. In the past, the tax court Cologne has decided, several times, (see *judgment* of 09 April 2014 - 2 K 2550/10; *judgment* of 09 April 2014 - 2 K 1049/11; *judgment* of 06 May 2014 - 2 K 2601/11), that these statements are mandatory for an effective VAT refund application and that if these statements are missing, this might lead to the application being rejected.

There is an appeal currently pending before the Federal Fiscal Court for the procedure 2 K 586/10. The Federal Fiscal Court has to decide whether an application for a VAT refund, which was submitted within the legal limitation period but not in the correct legal form or not with all necessary statements having being made, is ineffective.

It also needs to be clarified whether it is possible to provide the information according in accordance with para. 9 letter a of the application, on the use of the listed items for the purposes of the company, after the deadline for filing the refund application has elapsed.

6. Conclusion

The VAT refund application is still subject to strict formal requirements. There might be some relief for applicants due to recent developments. However, it should be noted that all information needs to be complete and correct in order to prevent any risks arising in relation to the submission of VAT refund applications, as formal mistakes cannot be undone once the limitation period has ended.

The case law of the past shows that VAT refund applications may be ruled ineffective if statements are incomplete or inaccurate and if documents are not submitted by the prevailing deadline. Therefore, it should be ensured, in advance, that all formal requirements have been met.

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