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KMLZ VAT NEWSLETTER

Property developer cases: exclusion of legitimate expectations through sec 27 para 19 German VAT Act admissible (in part)

Federal Fiscal Court on the settlement of past property developer cases

The Federal Fiscal Court recently published its first two decisions in principal proceedings regarding the settlement of past property developer cases. In its view, it is admissible to assess VAT against the supplier for the past, when the property developer requests a refund. This, however, requires that the supplier has a claim against the property developer for an additional VAT payment, which he can assign. If this is the case, sec 27 para 19 of the German VAT Act cannot be challenged. Thus, property developers continue to accrue interest on their tax refund claim.

1. Background

Since its implementation, it has been doubtful whether sec 27 para 19 of the German VAT Act is actually compatible with constitutional and Union law. This provision provides for a tax assessment against the supplier with retroactive effect excludes legitimate expectations in accordance with sec 176 of the German Fiscal Code. In its decision of 27.01.2016 (V B 87/15) the Federal Fiscal Code considered an analogous application of sec 17 para 2 no 1 sentence 1 of the German VAT Act. In this instance, the tax assessment against the supplier would only be admissible in the taxable period where he collects the VAT amount from the property developer. At the same time, the property developer could claim a VAT refund from his tax office only for this taxable period. The property developer would receive no interest on the refunded VAT amount.

2. Facts

The supplier (Plaintiff) rendered supplies to a property developer (PD) in 2012. Both parties assumed that the VAT liability was to be transferred to the PD based on the administrative provisions applicable at that time.

In its decision of 22.08.2013 (V R 37/10) the Federal Fiscal Court decided that this perspective was not compatible with statutory law. Thus, the Plaintiff was liable for the payment of the VAT rather than the PD. Therefore, in 2014 the PD claimed reimbursement of the VAT for the 2012 supplies. Accordingly, the Plaintiff received an amended assessment in 2014 charging it with VAT for the year 2012. In accordance with sec 27 para 19 sentences 3 and 4, the Plaintiff assigned its civil claim for additional VAT to be paid by the PD to the tax office. The tax office rejected the assignment.

The Plaintiff contested the amended 2012 assessment and the denied assignment offer. The Tax Court in Munster ruled that the amendment of the 2012 tax assessment was lawful

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but that the denial of the assignment offer was unlawful (ref.: 15 K 1553/15 U; ref.: 15 K 3669/15 U).

3. Legal opinion of the Federal Fiscal Court

From the Federal Fiscal Court's point of view, the amended VAT assessment against the Plaintiff for the year 2012 and consequently the additional VAT was lawful. The Court found that an amendment could be carried out in accordance with sec 27 para 19 sentence 1 German VAT Act.

According to the Federal Fiscal Court, sec 27 para 19 sentence 2 of the German VAT Act, which excludes legitimate expectations according to sec 176 of the German Fiscal Code, basically cannot be challenged, either from a constitutional law or a Union law perspective. However, this applies only where the supplier is entitled to a claim against the property developer for payment of the statutory VAT, which the supplier can assign to the tax office. This requirement arises from the Union law principles of legal certainty, legitimate expectations and good faith. Already at the conclusion of the legal transaction, the entrepreneur, as tax collector on behalf of the state, must be able to recognize which obligations he will have to meet. The following implementation of the Federal Fiscal Court is also quite interesting: If the fiscal authorities trigger certain behaviour in the taxpayer, by means of an administrative act, he or she may refer to the principle of the protection of legitimate expectations. This also binds the courts.

The Federal Fiscal Court affirms such transferable entitlement based on sec 313 para 1 of the German Civil Code. Sec 313 of the German Civil Code gives the plaintiff the possibility of charging VAT to the property developer. The contracting parties originally assumed another person to be the taxable person owing the VAT amount vis-a-vis the tax authorities. This assumption has now changed profoundly. It is therefore unacceptable for the plaintiff to adhere to the original contract.

In its decision from January 2016, the Court considered an analogous application of sec 17 para 2 no 1 German VAT Act (≙ Art: 90 VAT Directive) as being appropriate, however it has now retreated from this view. The Court simply states that the application of this regulation is not decisive.

In the Federal Fiscal Court's view, the tax office is obliged to accept the supplier's assignment offer. The tax office has no discretion in this regard.

4. Conclusion

The decisions of the Federal Fiscal Court are likely to reignite property developer cases. Although these cases were decided from the perspective of the plaintiff suppliers, they nevertheless also allow conclusions to be drawn about the treatment of the property developer. The Federal Fiscal Court will not apply sec 17 of the German VAT Act to the supplier if there is an assignable claim. Where a tax assessment, with retroactive effect to 2012 as regards the supplier is possible, it therefore follows that the property developer be granted a reimbursement claim with retroactive effect to this taxable period. Hence, the property developer would be entitled to both a tax refund and interest. Consequently, property developers should continue to pursue their claims for reimbursement. Where the supplier is not entitled to an assignable claim, he should be granted legitimate expectations based on this decision.