



KMLZ VAT NEWSLETTER

Provisionally no additional tax claims for property developers – granting of legitimate expectation

1. Legal background to the decision

By judgment of 22 August 2013, (V R 37/10), the Federal Fiscal Court decided that the reverse charge scheme does not apply for construction work purchased by property developers. Rather, it is the supplier who owes VAT. However, the administrative guidelines previously regarded the reverse charge scheme as being applicable in such cases. By circular of 5 February 2014, the Federal Ministry of Finance followed the Federal Fiscal Court's point of view. Following this development, many property developers claimed back the VAT amount they had incorrectly paid in the past, applying the reverse charge scheme. Since then, the question has arisen whether VAT was correctly claimed from suppliers in previous cases. This would not be the situation if the supplier referred to legitimate expectation. With effect from 31 July 2014, the legislator "created" sec. 27 para. 19 of the German VAT Act. Sentence 2 of this section serves to exclude legitimate expectation for suppliers. The question then arose whether this regulation is compatible with the constitution.

First court decision regarding the settlement of past property developer cases

The settlement of past property developer cases is in full swing. The additional claim of VAT due from the supplier of construction work, as well as the granting of legitimate expectations, are being controversially discussed. The tax court Berlin-Brandenburg was the first to comment on this issue, when it granted legitimate expectation to the supplier. It is seriously doubtful whether sec. 27 para. 19 sentence 2 of the German VAT Act, which excludes legitimate expectation, is compatible with the German Constitution and European law.

2. Decision of the tax court Berlin-Brandenburg

In its decision of 3 June 2015, the tax court Berlin-Brandenburg found, in the course of interim measure proceedings, that the applicant should be granted legitimate expectation. There are serious doubts whether sec. 27 para. 19 sentence 2 of the German VAT Act, which excludes legitimate expectation, is compatible with the constitution. There is strong evidence which suggests that this regulation, which entered into force with genuine retroactive effect, is unconstitutional. At the same time, this regulation may even go so far as to violate the principle of legal certainty. Furthermore, the particular applicant might ultimately suffer significant financial loss if he is unable to claim additional VAT for 2009 from the property developer concerned, due to a civil law limitation. Further examination of the constitutionality of this matter has been reserved for the main proceedings.

3. Consequences of the decision

Suppliers could benefit from this decision and attempt to gain legitimate expectation.