KÜFFNER MAUNZ LANGER ZUGMAIER

16 | 2018

KMLZ VAT NEWSLETTER

ECJ: Cut-off periods for input VAT deduction only permitted under limited conditions

Input VAT deduction despite limitation periods

The ECJ repeated in its *Biosafe* decision (judgment of 12.04.2018 – C-8/17), the reasoning contained in the case *Volkswagen AG*, namely that a national regulation, regarding a limitation period is not applicable in certain circumstances. Whereas the case *Volkswagen AG* considered an input VAT refund claim according to Directive 2008/9/EU, the case *Biosafe* concerned the regular taxation procedure. This decision may also have an impact on the German regulation regarding the Statute of Limitations, sec. 169 ff. German General Fiscal Code.

1. Facts

The plaintiff, Biosafe, sold rubber granules to the company Flexipiso, from February 2008 to May 2010. Biosafe applied the reduced VAT rate of 5%. In a tax audit in 2011, the tax authorities found that the regular tax rate of 21% was, in fact, applicable.

Biosafe paid the extra VAT to the tax authorities. At the same time, in October 2012, Biosafe claimed the relevant amount, in civil proceedings, from its contractual partner, Flexipiso. Flexipiso refused to make the payment on the grounds that it could not reclaim this amount from the tax authorities as a refund. The limitation period of four years for applying for a refund, under Portuguese law, starts to run at the time the original invoice is issued. At the time Biosafe made its request for payment from Flexipiso, in October 2012, the period of limitation had already expired with respect to all pre-October 2008 sales. In the circumstances, Biosafe was solely responsible for this situation as a result of having chosen the wrong VAT rate.

2. Legal opinion of the ECJ

The ECJ interprets Union law in a way that the deduction of additionally calculated VAT must provide a party, such as Flexipiso, with the possibility of deduction. The Portuguese ruling, to the effect that the limitation period began with the issuance of the original invoice, containing the incorrect VAT rate, was held to violate Union law.

The remarks made by the ECJ are essentially in accordance with those made in the case of *Volkswagen AG*, judgment of 21.03.2018 – C-533/16 (cf. KMLZ-newsletter 14/2018). Whereas the *Volkswagen AG* case was in the context of a VAT refund procedure in accordance with Directive 2008/9/EU, the present case concerned a VAT refund in a regular taxation procedure. However, this procedural background did not make any difference, from the perspective of the ECJ.

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

The Portuguese Government was of the opinion that Biosafe and Flexipiso had partially committed deliberate and repeated systematic tax evasion or tax avoidance in this disputed case. The ECJ did not preclude this. However, it left it to the national court to decide if this was the case. According to the information provided by the national court, it was found that choosing the wrong VAT rate was Biosafes' mistake.

Under these circumstances, in the view of the ECJ, it was impossible for Flexipiso to exercise its right to fully deduct the VAT amount before the correction of the invoices. This was due to the fact that Flexipiso had previously neither an invoice, showing the higher VAT rate, nor was it aware of the additional VAT amount ultimately due.

Prior to receiving the request for payment from Biosafe, Flexipiso was not accused of insufficient thoroughness and was unaware of any misuse or any collusive interaction between the two companies. Therefore, the limitation period could not have begun with the issuance of the original invoices.

3. Conclusion

The decision is important for the assessment of limitation periods for an input VAT deduction. The national German VAT law does not foresee a comparable limitation period. However, the ECJ's view could, for example, be significant for national regulations regarding the statute of limitations in sec. 169 ff. German General Fiscal Code. In general, it is the national legislator's task to regulate national procedural law. However, the principles of equivalence and effectiveness, which the ECJ also mentioned in this case, place certain constraints upon the national legislator. If, as in the period prior to the *Senatex* decision (judgment of 15.09.2016 – C-518/14), the retroactive effect of a correction of invoices was denied, the present decision of the ECJ would probably be of no particular importance.

However, if a retroactive effect, concerning the correction of invoices is acknowledged as in the case *Senatex* (at least for certain criteria of an invoice), the decision may become important in cases where the retroactive effect extends into periods with respect to which the statute of limitations has already expired. If the recipient had, from the perspective of the material law, a right to deduct input VAT, but only received an incomplete or incorrect invoice in this period, and if he had never received the input VAT refund, he would no longer benefit from the retroactive correction of the invoice.

If the taxable person has exercised due caution, it should be obvious, on the basis of the present assessment of the ECJ, that such taxable persons must be granted retroactive VAT deduction by means of the non-application of the national statute of limitations. It will then be decisive whether the taxable person, who applies for the VAT deduction, has acted with sufficient thoroughness. The fact that, in this case, the deduction was made from an incorrect invoice is not, at least generally speaking, regarded as harmful by the ECJ. If the relevant party has acted with sufficient thoroughness, as the present case shows, the deduction will be allowed. If the statute of limitations is applicable or not will probably have to be decided case by case.