



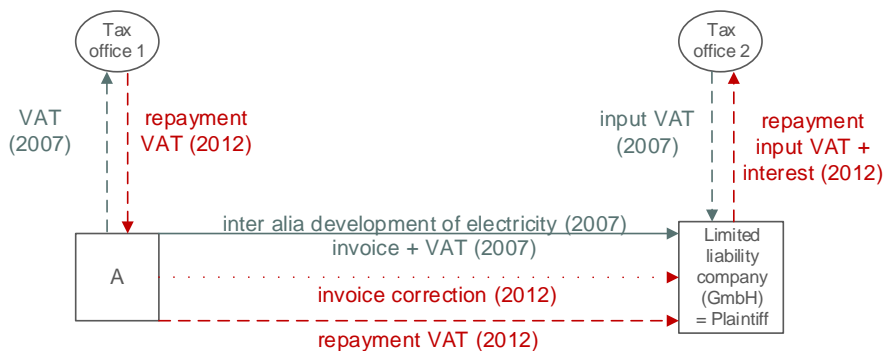
VAT NEWSLETTER

## Federal Fiscal Court: Correction of an Invoice – Retroactive Effect to the Detriment of the Recipient

22 | 2020

### 1 Facts

The underlying facts of the Federal Fiscal Court decision of 22 January 2020 (XI R 10/17) were, in summary, as follows: In 2007, the Plaintiff purchased goods and services and deducted input VAT from the respective invoices showing VAT. In 2012, the tax office claimed back the input VAT plus interest. The reason for the tax office's action is that it assumed supplies of construction work had been carried out and therefore also assumed the reverse charge rules were applicable. Thereupon, the parties mutually agreed to correct the invoices by cancelling the old invoices and producing new invoices not showing VAT in accordance with sec. 13b of the German VAT Act. The supplier refunded the VAT to the Plaintiff. The Plaintiff then continued to claim an input VAT deduction for 2007 and applied for interest remission. The tax court granted the input VAT deduction and dismissed the action for remission of interest as being inadmissible. The key question to arise out of this decision is whether input VAT deduction was possible for 2007, despite invoice correction.



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## 2 Opinion

The Federal Fiscal Court denied the Plaintiff's input VAT deduction. The invoice correction carried out in 2012 would have a retroactive effect back to 2007 at the expense of the Plaintiff. The Federal Fiscal Court left the question open as to whether the original invoices showing VAT were correct. It referred to the ECJ judgment in the *Senatex* case (judgment of 15 September 2016 - C-518/14). According to this judgement, invoices that contain incorrect or missing information can be corrected with retroactive effect. In the Federal Fiscal Court's view, this retroactive effect applies if it works to the taxpayer's benefit, but also if it is to the detriment of the taxable person. In any case, this applies if the invoice contains the five core invoice characteristics. In the case *Pannon Gep* (judgment of 15 July 2010 - C-368/09) it was decided that an invoice can also be corrected by cancelling the original invoice and issuing a new one. In accordance with sec. 31. para. 5 sentence 1 of the VAT Implementing Regulation, an invoice can be corrected if it does not contain all of the information in accordance with sec.14 para. 4 or sec. 14a of the German VAT Act or if this information is incorrect. The Federal Fiscal Court interpreted this standard in conformity with Union law. An invoice is also "incorrect" in this sense if it is fully reversed by agreement of all of the parties involved and the VAT paid is refunded by the supplier to the recipient.

## 3 Consequences for the practice

It was probably the interest charges that motivated the Plaintiff to initiate the legal proceedings. The judgment's impact branches off in several directions. On the one hand, recipients must bear in mind that they lose the right to input VAT deduction retroactively in the event of a cancellation invoice. This applies, in any case, if the cancellation is made in agreement with the supplier and the supplier refunds the VAT to the recipient. If the cancellation is made against the will of the recipient, the invoice is not incorrect by virtue of the will of the parties. Therefore, it seems to be decisive if the invoice cancelled is objectively (substantively) incorrect.

However, the decision will also be important as regards cases where an invoice in accordance with sec. 14 para. 4 of the German VAT Act is created by means of cancellation and reissue, from which the recipient claims the input VAT deduction. If the original invoice contained all of the five core elements of an invoice, a retroactive correction would also occur in this case. The input VAT would have to be deducted retroactively. In some cases the statute of limitation may be an obstacle then.

What can taxable persons, finding themselves in our Plaintiff's situation, do? This needs to be considered on a case-by-case basis:

- If the recipient accepts an invoice cancellation, an action concerning input VAT will not be successful. However, an action for interest remission could be successful. In its judgment of 26 September 2019 (V R 13/18), the Federal Fiscal Court confirmed interest remission in a situation similar to the present one. In the present case, no subsequent appeal was filed, so the Federal Fiscal Court did not have to decide on this.
- If there is no invoice cancellation, an action concerning input VAT deduction may be successful. Insofar as the recipient does not (temporarily) repay the input VAT to the tax office and is granted suspension of the execution, there is a threat of interest accumulating on suspension of execution if the tax court denies the input VAT deduction and applies the reverse charge rules. However, even in this case, an interest remission should be granted in the benefit of the recipient.

The case shows that the interest regulations – in addition to other regulations of the German Fiscal Code such as the statute of limitation – are, for VAT purposes, urgently in need of reform.