



# KMLZ VAT NEWSLETTER

## Deduction of input VAT from advance payments where supply does not ultimately take place

### 1. Facts

*Kollroß* (C-660/16) and *Wirtl* (C-661/17) ordered combined heat and power units from a company. They both made advance payments including VAT after receiving their respective invoices. The delivery to *Wirtl* was supposed to be effected 14 days after receipt of the payment, whereas the date of delivery for *Kollroß* had not yet been fixed at the time payment was made. In both cases, the units were never delivered. The supplier became insolvent. The supplier's representatives had paid the VAT to the tax office but failed to refund *Kollroß* and *Wirtl*. The former, were later convicted of fraudulent trading practices and conspiracy to defraud and of intentional bankruptcy. The plaintiffs claimed input VAT deduction from the advance payments for the year 2010. The relevant tax offices, however, denied it.

### ECJ: Deduction of input VAT from advance payments in cases of fraud

Input VAT deduction from advance payments is part of a taxable person's daily business. Where the supply does not take place, input VAT deduction can only be denied if the payer, at the time of the payment on account, knew or reasonably should have known that the supply was uncertain (judgement of 31.05.2018, C-660/16 and C-661/16, *Kollroß* und *Wirtl*). If the payer only acquires this knowledge later, he must adjust the deduction of input VAT only in circumstances where he recoups the advance payment from the contracting party.

### 2. Core Problem

In the case *Firin* (ECJ, judgment of 13.03.2014 C-107/13), the ECJ ruled that deduction of input VAT from advance payments is excluded where, at the time the payment is made, it is "uncertain" whether the chargeable event will actually take place. The first questions raised in both of the proceedings referred, dealt with the question of whether the criterion of uncertainty is to be evaluated depending on the objective facts of the case or rather depending on the (more objective) view of the party making the payment. As a second question, the Federal Fiscal Court wanted to know, whether the adjustment of the input VAT deduction from a payment on account could be made conditional upon the payer being refunded the payment on account from its contracting party.

### 3. ECJ decision

In the ECJ's view, input VAT deduction from a payment on account is ruled out in circumstances where, at the time of



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the payment on account, it is uncertain whether or not the supply will actually take place. As regards both *Kollroß* and *Wirtl*, the ECJ was of the opinion that, at the time of the payment on account, the goods, which were to be supplied, were clearly identified. All the relevant information concerning the future supply could be regarded as known to the purchaser, such that the upcoming supply appeared to be a certainty. In this regard, it is also irrelevant that, at the time of the payment on account, the date of the delivery of the items was not precisely known. Input VAT deduction can only be denied if it is established, having regard to objective elements, that, at the time the payment on account was made, the purchaser knew or should reasonably have known that it was likely that that supply would not ultimately take place.

In the case at hand it is also not necessary that the VAT deduction is corrected afterwards. German law requires an adjustment of the input VAT deduction in these cases only where the payer is refunded the advance payment from the alleged supplier. The ECJ is of the opinion that it is consistent with Union law. It justifies this with its findings in the case *Reemtsma Cigarettenfabriken*, judgment of 15.03.2007 – C-35/05). Namely, where the (alleged) supplier unduly invoices VAT and where it is impossible or excessively difficult for the (alleged) recipient to get the tax amount refunded from the contracting party, the recipient may seek reimbursement directly from the tax authorities. This is the

so-called “*Reemtsma* claim”. The ECJ applied this consideration to the cases at hand. It would be inappropriate to impose a general obligation on payers, such as *Kollroß* and *Wirtl*, to adjust their input VAT deduction, even if they have not recovered the advance payment from the contractual partner, and then refer them to the *Reemtsma* claim.

#### 4. Conclusion

Once again the ECJ decision makes it clear, that a refusal to deduct input VAT in cases of fraud must be an exception. As regards the deduction of input VAT from invoices for (allegedly) rendered supplies, the ECJ has already ruled this in numerous decisions. It has now also made it clear, that no stricter standards apply to the deduction of input VAT from a prepayment invoice. It is for the tax authority to furnish the respective evidence in this regard.

It is worth noting, that the ECJ refers to its decision in the case *Reemtsma Cigarettenfabriken* to justify its legal position on the second question referred. This makes the ECJ's fundamental position quite clear once again: Taxable persons, who have acted honestly and are therefore worthy of protection, should not remain burdened with input VAT. Even if relief by means of input VAT deduction is excluded, at least the so-called *Reemtsma* claim can be considered. Based on the present ECJ judgement, affected taxable persons should be much braver in asserting a *Reemtsma* claim.