



# KMLZ VAT NEWSLETTER

## Over-compensation for fiscal damage caused by a VAT carousel – tax court grants suspension of enforcement (hardship situation)

### 1. Facts

The dispute concerned input VAT deduction from self-billing invoices for the purchase of silver granulates. The Applicant, a German GmbH, was trading in precious metals. It purchased silver granulate and resold it to its customers.

The purchase price and also the sales price were agreed to be the stock exchange price minus a fixed discount. This left the Applicant with a 3% margin. The Applicant handed over part of the purchase price, in cash, to the supplier's driver, when the driver delivered the granulate to it. The balance was transferred directly to the supplier. The supplier paid tax on its supplies. The customer collected the granulate from the Applicant on the same day it was delivered by the supplier.

The tax fraud investigation assumed that the Applicant and other pre-suppliers were involved in a VAT carousel. The tax authorities were of the opinion that, the Applicant

### Tax court in Baden-Wuerttemberg: suspension of enforcement regarding alleged VAT carousel

From time to time, taxable persons find themselves accused of being involved in VAT carousels. The tax court in Baden-Wuerttemberg recently granted a suspension of enforcement to such a taxable person. If there is VAT fraud in a supply chain, denying the input VAT deduction for every purchase in the chain is more than the principle of neutrality requires. Furthermore, the suspension was granted, as the enforcement of the VAT assessments would have resulted in significant financial hardship for the Applicant.

should have known about it. This assumption on the part of the tax authorities arose from a series of abnormalities: The quantity of the granulate was not customary. Approx. 100 kg per week would have been usual. The Applicant purchased significantly more than this amount. Shortly after its establishment, the Applicant generated revenues in the amount of millions of euros and paid for the majority of its purchases in cash. The silver granulate was transported, uninsured, in a passenger car. The Applicant purchased the silver granulate at a price below the stock exchange price. There could be no reason for this other than the granulate having criminal origins. As an expert in this sector, the Applicant's managing director should have understood these circumstances and their implications. Nevertheless, he purchased the granulate. Other competitors abstained from involving themselves in these transactions.

The Applicant instituted proceedings in the tax court against the denied input VAT deduction and claimed suspension of



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enforcement. The Applicant claimed that there were well-founded doubts regarding the lawfulness of the tax assessments. Amongst other things, the Applicant pointed out that it had satisfied itself of the proper conduct of the supplier's business operations on site, collected information from the supplier's tax consultant and obtained a legal opinion prior to buying the granulate.

## 2. Legal evaluation by the tax court

The tax court granted a suspension of enforcement (decision of 23.06.2016, 1 V 1044/16). On the one hand, there were doubts regarding the lawfulness of the tax assessments denying the VAT deduction. On the other hand, the enforcement of the assessments would result in significant financial hardship for the Applicant.

In the tax court's opinion, all of the requirements for input VAT deduction were met. In particular, the self-billing invoices were correct. Input VAT deduction could not be denied because of participation in an act of tax evasion: the tax court referred to settled case law, according to which the fiscal authority has to prove, on the basis of objective factors, that the taxpayer knew about the tax evasion or should have known about it. The tax court took the view that the necessary evidence had not been provided and that in fact there was an absence of any conclusive evidence. No party involved in the supply chain made a confession and none of the parties had previously been accused or sentenced by a criminal court. The tax fraud investigation failed to find any damaging agreements between the parties. In addition, it was noted by the Court that the Applicant had carried out control measures, which had to be taken into consideration.

The tax court, which made an overall assessment of the supply chain, ultimately made a remarkable statement: Due to the fact that not only the Applicant, but also all pre-suppliers and the customer were to be denied input VAT deduction, the alleged fiscal damage in the supply chain was compensated beyond what was necessary with regard to the principle of fiscal neutrality.

It is also significant, that the tax court granted a suspension of enforcement on the grounds of financial hardship. It is, permissible for the court to grant such a suspension e.g. in circumstances where a taxpayer's continued existence would be jeopardized by the enforcement of the contested assessments. The tax court's opinion that the Applicant's existence was jeopardized was based on the balance sheets, the Applicant's P + L and on the fact that the Applicant's business had come to a standstill. In this case, even slight doubts as regards the lawfulness of the assessments justified a suspension of enforcement.

## 3. Conclusion

The tax court's decision is welcome in several respects: It indicates that the tax authority's mere presentation of numerous pieces of alleged evidence to prove that a party "should have known" it was participating in a tax carousel is insufficient. The tax court also takes a clear position on the question as to what extent the fiscal authorities can repeatedly be held harmless in the same supply chain in the case of fiscal damage. Taxable persons filing an application for suspension of enforcement should be aware of the possibility of gaining a suspension based on financial hardship and provide the court with the respective arguments and supporting evidence.