



KMLZ VAT NEWSLETTER

Late success for property developers – Federal Fiscal Court puts Federal Ministry of Finance in its place

1. Federal Fiscal Court, judgment of 22 August 2013

A property developer commissioned a general contractor to construct a building. As the property developer assumed the application of the reverse-charge-scheme, he declared and paid VAT according to sec. 13b of the German VAT Act. Subsequently he claimed, in his annual VAT return, that he had not carried out any sustainable construction work and therefore did not owe VAT. The tax authorities rejected this assertion, stating that the property developer and the general contractor had agreed upon applying sec. 13b of the German VAT Act.

Initially, the Federal Fiscal Court stayed the proceedings and referred the question to the European Court of Justice, as to whether sec. 13b of the German VAT Act was compatible with EU law. The ECJ affirmed this (see ECJ, judgment of 12 December 2012, C-395/11, *BVL*), however, also pointed out that the national courts are required to consider the principle of legal certainty when applying sec. 13b of the German VAT Act.

The Federal Fiscal Court was pleased to “take on board” this „order“ and has since declared the following administrative rules to be incompatible with the principle of legal certainty:

German Federal Fiscal Court restricts German practice of reverse-charge-scheme

By judgment of 22 August 2013 (V R 37/10), the Federal Fiscal Court decided that the reverse-charge-scheme for construction work in relation to immovable property according to sec. 13b of the German VAT Act in principle is no longer applicable for supplies to property developers. However, the decision of the Federal Fiscal Court is not only of importance to property developers. It has put the tax authorities in their place as it has dismissed various regulations by the tax authorities due to the breach of the principle of legal certainty. This decision also has an effect on other areas as the general simplification rules according to sec. 13b of the German Administrative Circular no longer provide certainty and the 10% hurdle for the qualification as a reseller of power and gas may become invalid.

- The so-called 10% hurdle for the determination of „sustainable construction work“ in sec. 13b.3 para 1 and 2 of the German Administrative Circular is not suitable as the contractor is not able to reliably assess whether he or his customer is liable to pay the VAT.
- The Federal Fiscal Court also considers the determination in sec. 13b.3 Abs. 10 of the German Administrative Circular to be too general, after which the conduct of construction work is sufficient without there being the need of a direct link between the received and carried out construction work.
- Furthermore, the Federal Fiscal Court dismisses the so-called simplification rule in sec. 13b.8 of the German Administrative Circular. According to this rule, there would be no objections if both parties were to amicably assume the application of the reverse-charge-scheme despite the conditions not being fulfilled. The Federal Fiscal Court points out



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that such an agreement between the contracting parties contradicts the legal provisions as this provision does not put the applicability of the reverse-charge-scheme at the participants' disposal.

2. Effects on property developers

This judgment is a late success for property developers. Reminder: At the time of the introduction of the reverse-charge-scheme for construction work, the tax authorities assumed that property developers would not become liable to pay the VAT according to sec. 13b of the German VAT Act, as they do not carry out construction work themselves but rather, provide cultivated land. The Ministry of Finance subsequently changed its opinion as documented in its circular of 16 October 2009. „Clarification“ was later provided when the Ministry of Finance pointed out, in its circular of 11 March 2010, that this latest opinion is to be applied with respect to all pending cases concerning supplies which were carried out as from 1 January 2010.

In the circumstances, the following now applies:

- When selling on residential buildings that have already been fully completed or renovated at the time of the purchase, one has to assume a supply of goods. The property developer did not carry out a supply including installation and therefore is not considered to have carried out construction work according to sec. 13b para 2 no. 4 sentence 1 of the German VAT Act. In these cases, the property developer is not liable to pay the VAT regarding the construction work rendered by his subcontractors.
- However, if the contractor sells land during the construction phase and the customer is still able to influence the construction, the Federal Ministry of Finance will take a supply including installation for granted. If supplies including instal-

lations take place, the reverse-charge-scheme according to sec. 13b para 2 no. 4 of the German VAT Act will apply.

This amended legal opinion has especially caused problems for property developers who have failed to recognize the reverse-charge-scheme. In most of these cases, the tax authorities have not demonstrated any leniency and have demanded the time-consuming rectification. This procedure becomes a serious problem in circumstances where the property developer has, in the interim, become insolvent or is no longer available to attend to the correction of the invoice. Not only did the property developers in these cases have to pay interest according to sec. 223a of the German General Fiscal Code but they were also charged double the amount of VAT.

Due to the Federal Fiscal Court's judgment, these old cases can now be re-opened unless the statute of limitation prevents this. For the future, the following applies: Property developers are no longer liable to pay the VAT, if they do not carry out construction work. This only changes if they have acted as a general contractor. If so, whether they are liable to pay the VAT will depend on the use of the construction work obtained by them.

3. Effects on other areas such as gas and power supplies

The Federal Fiscal Court's decision also affects all of the administrative practice in cases of sec. 13b of the German VAT Act, as the agreements made by both parties regarding the application of sec. 13b of the German VAT Act according to the simplification rules no longer provide any certainty. The same applies for the 10% hurdle. In the future, it will no longer be applicable. Hence, the qualification as “reseller” for gas and power supplies that the Ministry of Finance also wants to make dependent on the 10% hurdle (sec 3g.1 para 2 and 3 of the German Administrative Circular) may be invalid.