



VAT NEWSLETTER

Payment by instalments: German Federal Fiscal Court implements ECJ legal opinion

36 | 2019

1 Background

In mid-2017, the German Federal Fiscal Court submitted fundamental questions to the ECJ concerning the so-called taxation based on agreed consideration of payment by instalments. The ECJ responded with its decision *baumgarten sports & more GmbH* (judgement of 29.11.2018 – C-548/17) (see KMLZ VAT Newsletter 52/2018). As a result of this, the German Federal Fiscal Court is applying the ECJ's provisions to national law in a now published decision (German Federal Fiscal Court, judgement of 26.06.2019, V R 8/19 (V R 51/16). In doing so, the German Federal Fiscal Court, referring to the VAT Directive, is ignoring the requirements of the national law.

In the case decided by the ECJ at that time, the Plaintiff was an agency handling professional football players. It received commissions from clubs for the players it placed. The commission payments had to be made in instalments by the clubs over the term of the player's employment contract. The issue in dispute was whether the Plaintiff was required to pay VAT in full for the agency service in the year of the agency transaction or only after receiving the respective instalment. The ECJ replied to the German Federal Fiscal Court that there was probably a supply within the meaning of Art. 64 para 1 of the VAT Directive. In this case, VAT would not arise at the time the agency service was provided, but rather only at the end of the period to which the payments (by instalments) referred.



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2 Decision

According to the current judgement of the German Federal Fiscal Court, the Plaintiff may refer to a direct application of Art. 64 para 1 of the VAT Directive. The corresponding rule in national law, sec 13 para 1 no 1 letter a sentence 3 of the German VAT Act, does not comply with Union law and, given its contrary wording, cannot be interpreted in conformity with the Directive. The provision requires a divisible supply, which Art. 64 para 1 of the VAT Directive does not require. The conditions for a direct application of Art. 64 para 1 of the VAT Directive were also met. The rule was found to be unconditional and sufficiently defined. It was sufficient, for the applicability of Art. 64 para 1 of the VAT Directive, that supplies gave rise to successive settlements or payments. These conditions were met in the present case. It was not necessary that - as in the case of a transfer of use - a period-related supply existed. Agency services which, after the supply, were limited to the placement of a particular even were also found to fall under Art. 64 para 1 of the VAT Directive.

3 Consequences for the practice

Following the ruling of the ECJ, the German Federal Fiscal Court was faced with the challenge of implementing its legal opinion in national law. Art. 64 para 1 of the VAT Directive corresponds, in national law, to sec 13 para 1 letter a sentence 2 and 3 of the German VAT Act. Art. 64 para 1 of the VAT Directive merely requires that the supply "gives rise to successive settlements or payments". Sec 13 para 1 no 1 letter a sentence 1 of the German VAT Act, on the other hand, presupposes that an "economically divisible supply" exists. The national rule is thus stricter than the Union rule. The literature partly took the view that sec 13 para 1 no 1 letter a sentence 3 of the German VAT Act had to be interpreted in conformity with Union law against this background. The German Federal Fiscal Court rejected this view in the present decision. The reason for this is the wording of the rule itself, which was always the limit for any interpretation of the law.

Instead, the German Federal Fiscal Court clears the way for a direct application of Art. 64 para 1 of the VAT Directive. If the taxable person refers to this rule, VAT only arises at the end of the period to which the payments relate. This means that the taxable person no longer has to pay VAT in advance in the case of payment by instalments agreements which are not based on divisible supplies. In many cases, this also eliminates the sometimes difficult question of whether an economically divisible supply exists at all (see sec 13.4 German VAT Circular).

However, this is only an option for the taxable person. If no reference is made to Art. 64 para 1 of the VAT Directive, he may, under national law, pay VAT in full during the VAT return period of the supply (e.g. the agency service). Considering the issue of cashflow, it should be carefully examined what the best solution for the taxable person in the individual case actually is.

After the decision of the Federal Fiscal Court, it remains unclear how the input tax deduction is to be made on the part of the recipient of the supply. Under current national law, the recipient could claim the full input tax amount upon receipt of the invoice without having paid the corresponding VAT to the service provider. However, as the service provider has to pay the VAT at a later date, there would now be pre-financing by the tax authorities. The problem here is that the recipient of the service does not usually know whether the service provider is invoking Art. 64 para. 1 of the VAT Directive or not. It should not be ruled out that the tax authorities will make clarifications on this point.