



Focus on recent decisions on German procedural and litigation law

1 (Partial) decision on appeal: consequences for subsequent legal proceedings

In a decision dated 12 May 2022 (V R 31/20), the Federal Fiscal Court (BFH) had to deal with the question of whether the defendant tax authorities had issued a partial or a full decision on appeal. In the appeal proceedings, the treatment of two facts was in dispute (input VAT deduction and taxation of output transactions). However, the decision on appeal that the tax office then issued explicitly dealt with only one of the two facts (input VAT deduction). The tax authorities did not issue a separate partial remedial notice on the other issue (taxation of output transactions), even though a verbal agreement had been reached. In the legal action, the plaintiff only objected to the point in dispute dealt with in the decision on appeal. As a consequence, the second issue also acquired legal force after the conclusion of the legal proceedings, even though the tax authorities had not expressly ruled on it. This was because the BFH objectively interpreted the authorities' decision as a comprehensive decision on appeal, such that the plaintiff would have had to direct his legal action against both points of dispute. In doing so, the BFH focuses on various aspects, including the designation as a (complete) "decision on appeal". Plaintiffs against whom a (partial) decision on appeal has been issued should always carefully check the scope of this official decision and, in cases of doubt, object to the decision in its entirety.

2 Video hearing before the Fiscal Court and statutory judge

Upon request, the Fiscal Court may allow oral proceedings to take place by means of a "videoconference" in accordance with sec. 91a of the Code of Procedure of Fiscal Courts. In such a case, parties to the proceedings who so request will be connected to the oral proceedings by videoconference. In the context of a non-admission complaint, the BFH had to deal with a case in which only the presiding judge could be seen on screen during most of the oral proceedings before the Fiscal



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Court, rather than the entire bench. The BFH considers this to be a procedural error (BFH, decision of 30 June 2023 – V B 13/22), which leads to the annulment of the decision and referral back to the Fiscal Court. The appellant's right to the proper composition of the court hearing the case (sec. 119 no. 1 of the Code of Procedure of Fiscal Courts in conjunction with Article 101 para. 1 sentence 2 of the German Constitution) is violated. In the case of a so-called "videoconference", it must be possible to determine whether the participating judges are present and able to follow the essential parts of the hearing, just as it would be possible if they were physically present in the courtroom. This is only possible if all judges can also be seen by the participants who are only connected via videoconference. The video transmission technology is to be used without loss of the quality of the rule of law. How this is ensured is a matter for the respective court. It was also irrelevant for the BFH that the appellant did not complain about this procedural error in the oral proceedings before the Fiscal Court, but only did so, for the first time, before the BFH. Many procedural errors – also in the case of hearings by "videoconference" – are deemed to be cured if they are not objected to in due time. However, this is different in the case of an erroneous composition of the court. Failure to file a complaint before the court does not cure this error.

3 6% interest accruing during suspension of execution – is it unconstitutional?

In its decision of 8 July 2021 (1 BvR 2237/14 and 1 BvR 2422/17), the Federal Constitutional Court declared an interest rate of 6% per annum for the accrual of interest, in accordance with sec. 233a of the German Fiscal Code, to be unconstitutional. The legislator subsequently reduced the corresponding interest rate for interest periods from 1 January 2019 onwards to 1.8% per annum (sec. 238 para. 1a of the German Fiscal Code). For all other types of interest, such as interest accruing during a suspension of execution, the interest rate remains at 6% per annum according to the explicit will of the legislator. In its decision of 8 March 2023 (6 K 2094/22 E), the Münster Fiscal Court found interest accruing during a suspension of execution at the rate of 6% per annum to be constitutional. An appeal against this decision is currently pending before the BFH (VIII R 9/23). Those taxable persons affected should lodge an appeal against corresponding interest assessments and, if necessary, apply for a suspension of the appeal proceedings in order to benefit from a positive outcome of the pending proceedings. However, the unconstitutionality of the interest rate can ultimately only be determined by the Federal Constitutional Court. Taxable persons may also consider applying for suspension of execution of the interest assessment.

4 Hearing the parties as evidence

In accordance with sec. 76 para. 1 sentence 1 of the Code of Procedure of Fiscal Courts, the Fiscal Court is obliged to clarify facts ex officio. In accordance with sec. 81 para. 1 sentence 2 of the Code of Procedure of Fiscal Courts, the Court may, in particular, take a visual observation, hear witnesses and experts, consult documents and hear oral evidence from the parties involved. Parties to the proceedings may file corresponding applications to give evidence. The court may only reject these in exceptional cases. The BFH has ruled on such an application to give oral evidence and its (implied) rejection by the Fiscal Court in the context of a non-admission complaint (BFH, decision of 8 August 2023 – IX B 86/22). In principle, the clarification of the facts by means of other evidence takes precedence over the oral evidence of the parties. Nevertheless, even such an application to give oral evidence may not be rejected without stating viable reasoning. The Fiscal Court must provide reasons as to whether and how it was already able to form a conviction with the help of other evidence or why the incorrectness of a party's submission must be assumed. Otherwise, it violates its duty to exercise its discretion properly. This was the case here. The rejection of an application to give evidence cannot be challenged independently in accordance with sec. 128 para. 2 of the Code of Procedure of Fiscal Courts. However, if necessary, a later appeal or non-admission complaint can be based on the fact, that a procedural error was committed. To be on the safe side, a corresponding complaint should already be made in the course of the oral proceedings before the Fiscal Court.