



KMLZ VAT NEWSLETTER

German Federal Fiscal Court: Major obstacles for liability according to sec 25d para 1 VAT Act

The fiscal and tax criminal consequences of carousel fraud still need to be addressed. For this reason, the lawmakers inserted sec 25d into the German VAT Act as a joint and several liability provision in order to curb VAT fraud. In a recent decision of the German Federal Fiscal Court of 10 August 2017 (V R 2/17) is all the more interesting given that it lays down strict requirements concerning sec 25d German VAT Act.

1. Legal background

Sec 25d para 1 German VAT Act leads to the liability of the acquirer. This is the case if the invoice issuer did not pay the required taxes and if the acquirer knew about that when concluding the purchase contract or, as a prudent businessman, he should have known about it. In general, the tax authorities bear the burden of producing evidence and proof for the fulfilment of the conditions of sec 25d para 1 German VAT Act.

Sec 25d German VAT Act: Actual knowledge of intention of tax evasion regarding specific revenues is necessary

Following the German Federal Fiscal Court's decision, liability according to sec 25d para 1 German VAT Act is subject to significant obstacles. The recipient can be held liable for VAT for supplies on a previous stage in the supply chain only in exceptional circumstances. It is not enough that the acquirer is aware that the supplier is under criminal investigation. Evidence proving that the acquirer knew of the supplier's intention not to pay VAT for the specific revenues when contracting is a precondition for the VAT liability of the acquirer.

2. Facts

In the underlying case, the Plaintiff (hereafter: "P") purchased vehicles and containers from X-GmbH in 2012. X-GmbH's invoices showed the VAT amount applicable. However, X-GmbH did not pay the VAT in the respective month. Y was the manager of X-GmbH and had previously acted for other companies that P had business relations with.

Since 2008, there had been ongoing enquiries by the tax authorities into Y for multiple instances of VAT tax evasion. P was informed by the tax investigation team about the enquiries shortly after P first received deliveries from X-GmbH. In 2014, Y was sentenced to imprisonment for VAT tax evasion regarding the deliveries to P.

The Fiscal Court in Lower Saxony did not consider P liable according to sec 25d para 1 German VAT Act. The Fiscal Court assumed that P had been aware of the investigations



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against Y since 2008. Nevertheless, the Court rejected any liability according to sec 25d para 1 German VAT Act. The tax office appealed the decision.

3. Reasons for decision

In its decision, the German Federal Fiscal Court made clear that the previous instance correctly denied the liability of P according to sec 25d para 1 German VAT Act. The tax office did not prove that P knew about the possible intention of Y or that P should have known about it in his capacity as a diligent and prudent businessman. Even if P knew about the criminal investigations against Y in 2008 – this does not mean that P was aware of the supplier's intention not to pay VAT for the deliveries to P.

The Court justifies its decision in accordance with the fact that criminal behaviour committed in taxation matters in some cases alone, does not lead to the conclusion that it will be a supplier's intention to also evade VAT regarding other future transactions.

Sec 25d para 1 German VAT Act needs to be interpreted in terms of the principle of proportionality. This means that the required "should have known" refers to indications suggesting that the invoice issuer already had the intention not to pay VAT when concluding the contract. According to the Court, there were no clues in this dispute referring to the concrete supplies to P.

4. Conclusion

This decision makes clear that increased requirements, with respect to "should have known" in the case of sec 25d para 1 German VAT Act, are required.

The Court left open the question of whether an overcompensation of fiscal damage caused in the supply chain is permitted by the tax office denying the recipient the VAT deduction as well as holding him liable according to sec 25d German VAT Act. In a decision of 23 June 2016 – 1 V 1044/16, the Tax Court Baden-Württemberg decided against the legitimacy of overcompensation (see newsletter 25/2016). This affected a case in which sec 25d German VAT Act was not applied, but in which input VAT deduction had been denied several times within the supply chain. The same should apply for sec 25d German VAT Act cases.

The findings of the Court should also be applicable to cases in which the tax office denies VAT deduction or tax exemption to a taxable person because he or she apparently knew or should have known about a fraud in the supply chain. The mere knowledge of an ongoing investigation should not increase the taxable person's scale of due diligence. Circumstances indicating an intended VAT fraud regarding very precise revenues are also necessary here.

This decision is of assistance to entrepreneurs who are fiscally or criminally facing an accusation of knowing or should-have-known.