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VAT NEWSLETTER

German Federal Fiscal Court: Invoice without correct VAT amount cannot be amended with retroactive effect

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1 The problem: possession of an invoice as a formal prerequisite for the deduction of input VAT

The ECJ and the German Federal Fiscal Court (BFH) have already, on several occasions, dealt with the significance of the invoice when it comes to the deduction of input VAT. The ECJ has relaxed the requirements for an invoice entitling a taxable person to an input VAT deduction and the consequences of incorrect or missing information in favor of the taxable person. In doing so, the ECJ ruled that the possession of an invoice is required for the exercise of the right to deduct input VAT (judgment of 21.10.2021 - C-80/20 Wilo Salmson, KMLZ VAT Newsletter 37 | 2021). However, the ECJ has repeatedly stated in the past that the category of invoices, which are deemed not correctable, is limited to those documents which are so deficient that the national tax administration lacks the required information to verify the right for input VAT deduction.

The BFH followed the ECJ, but it has previously applied stricter standards in the past. In its view, an invoice can only be corrected retroactively if it contains five core features (issuer of the invoice, recipient of the supply, description of the supply, remuneration and separately stated VAT amount). These principles were adopted by the tax authorities in an official statement dated 18.09.2020 (KMLZ VAT Newsletter 49 | 2020). Previously, it was sufficient for the eligibility of the invoice for correction, that the core features were incorrectly included in the erroneous invoice. Now the BFH has pulled the legal strings even tighter.

2 Facts of the case

The plaintiff was a company incorporated under Luxembourg law. It received services from German companies. The service providers assumed a shift of tax liability to the recipient of the services. Consequently, the invoices were issued with VAT 0% and EUR 0 VAT or with a total amount and the indication that the reverse charge mechanism applied. The plaintiff

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declared the services in Luxembourg as reverse charge supplies in their VAT returns. In the course of a tax audit, it was determined that the plaintiff was established in Germany, so that the service provider was liable for the VAT incurred in Germany. As a result, the invoices were corrected, and the service providers invoiced 19% VAT. The plaintiff then requested the input tax deduction retroactively. The Fiscal Court of Lower Saxony ruled in favor of the plaintiff, which was followed by an appeal by the tax authorities.

3 The ruling of the court

The BFH considered the appeal to be well-founded because a document without a domestic VAT statement cannot constitute an invoice. As justification, the BFH stated that, on the one hand, the documents were so faulty that the tax administration lacked the necessary information and, on the other, that only the amount of VAT invoiced could be deducted as input VAT. Furthermore, the BFH stated that the retroactive effect of an invoice correction affirmed by the ECJ related, among other things, to the fact that the recipient of the service had paid the VAT. In contrast, the plaintiff did not possess any invoices showing domestic VAT in the year in dispute and accordingly had not paid any VAT shown in any invoice.

4 Consequences for the practice

Unfortunately, the ruling does not bring with it any clarity, but rather raises more questions than it answers. According to the development of German case law, it would appear that only a correctly issued invoice will soon be eligible for correction. This would render the previous ECJ ruling meaningless. According to the VAT Directive, the right to deduct input VAT arises in the amount of the VAT due at the time the supply is rendered. The payment of the VAT is not relevant. The right to exercise the input VAT deduction arises when an invoice is received for the first time. There is no other legal approach here. And the ECJ has repeatedly stated that the term "invoice" must be understood broadly.

The plaintiff was in possession of an invoice, which probably contained all of the compulsory invoice information. The document even contained a VAT statement, even if this was materially incorrect. Thus, the invoice not only complied with the characteristics prescribed by the ECJ, but it also even contained the minimum information required in Germany. According to the previous opinion, this information could be incorrect. It could not, however, be so vague, incomplete or obviously incorrect that it resulted in the invoice being found to have missing information. Perhaps this is also a reason why these minimum requirements were not referred to in any detail in the BFH's decision.

Rather, the BFH stated that the document was so deficient that the tax authorities could not assess whether a net or gross agreement had been made. When looking at the Administrative VAT Guidelines of the German tax authorities (UStAE), this seems surprising. After all, in the case of a transaction where the VAT liability is shifted to the recipient, a net agreement is assumed (sec. 13b.13 para. 1 sentence 1 UStAE). Thus, the tax authority could have calculated the VAT amount. The BFH also linked the fact that the VAT was not paid. This was done despite the consistent ECJ case law to the effect that the right to deduct input VAT may not be made dependent on actual payment. In this case, the plaintiff even declared the transaction and paid the VAT (in the wrong country).

Therefore, it is a bit of a pity that we will not be hearing an opinion from Luxembourg on this case. The previous ECJ judgments on similar issues have generally been rather surprising in terms of the very strict German view. Even the German Advocate General has chosen to take a rather strict position and has followed the BFH. As is well known, the ECJ did not follow this position (KMLZ VAT Newsletter 37 | 2021).