



Annual Tax Act 2020 (Part 13): Invoice correction: no retroactive under the German General Fiscal Code

1 Background

If a taxable person receives an incorrect invoice, he is entitled to have it corrected by the supplier. Depending on which information contained in the invoice, in accordance with sec. 14 para. 4 of the German VAT Act, is incorrect (e.g. VAT-ID-No.), the recipient can deduct input VAT retroactively for the reporting period in which he received the incorrect invoice (see KMLZ Newsletter 01/2017). However, two procedural questions concerning the German General Fiscal Code have not yet been conclusively clarified in this context:

- What happens in cases where the reporting period, to which the invoice correction applies with retroactive effect, can no longer be amended for procedural reasons, e.g. because the period of limitation for the assessment has already expired? In this case, the amendment regulation, in accordance with sec. 175 para. 1 sentence 1 no. 2 of the German General Fiscal Code, which makes a correction possible in the case of a so-called "event with retroactive effect", despite the expiry of the period of limitation for the assessment, could help. The period for assessment only starts to run from the expiration of the calendar year in which the event with retroactive effect occurs. It is currently unclear whether an invoice correction, which has a retroactive effect for the purpose of input VAT deduction, also has a retroactive effect for the purposes of the German General Fiscal Code. This question is controversially discussed. In the draft of a letter from the German Federal Ministry of Finance on invoice correction, the tax administration has assumed that the invoice correction is not a retroactive event within the meaning of the German General Fiscal Code.
- Another issue that has been left unclarified is the effects of the retroactive invoice correction on interest in accordance with sec. 233a of the German Fiscal Code. If the recipient has already deducted input VAT from the



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originally incorrect invoice, interest for late payment could be omitted upon receipt of the invoice correction document (if interest has already started to accumulate after the 15-month waiting period). If the recipient has not yet deducted input VAT from the originally incorrect invoice and the invoice correction has a retroactive effect, the recipient could now be entitled to claim interest on refunds from the tax office (also depending on the 15-month waiting period). Both would, however, only apply, if the invoice correction did not represent an event with retroactive effect according to sec. 233a para. 2a of the German General Fiscal Code. If the invoice correction did constitute such an event, a different interest period would apply. The interest period would only start to run 15 months after the expiry of the calendar year in which the event with retroactive effect occurred. Further details on the calculation of interest in this case are governed by sec. 233a para. 7 of the German General Fiscal Code.

2 Legal regulation

By introducing a new provision in sec. 14 para. 4 sentence 4 German VAT Act, the legislator now wants to create legal certainty on these points. The new regulation clarifies that "the correction of an invoice for missing or incorrect information" does not represent a retroactive event in the sense of sec. 175 para. 1 sentence 1 No. 2 and sec. 233a para. 2a German General Fiscal Code. The legislator justifies this by the fact that the right to deduct input VAT arises independently of an invoice. An invoice is merely a prerequisite for exercising this right. An input VAT deduction is therefore only possible within the limits of the general change regulations of the General Fiscal Code. Since the legislator denies a retroactive event, within the meaning of the German General Fiscal Code, the deviating interest run, according to sec. 233a para. 2a General Fiscal Code, is not applicable.

3 Consequences for the practice

To the extent that the tax assessment for the taxable period, into which the invoice correction is retroactive, is still changeable, because it was issued under preliminary assessment subject to review according to sec. 164 para. 2 German General Fiscal Code, the application of sec. 175 German General Fiscal Code is, in any event, not required. In this respect, the change in the law does not lead to any change in the result. It is different, however, if the limitation period had already expired. In the absence of the application of sec. 175 German General Fiscal Code, the result for the recipient of the supply is a final loss of his input VAT deduction. National periods of limitation are basically permissible under Union law. The European Court of Justice has taught us in the cases *VW* and *Biosafe* (see KMLZ-Newsletter 14/2018 and 16/2018) that, in instances in which the recipient, through no fault of his own, does not receive a proper invoice until later, it may be necessary under Union law to "break through" an already expired assessment period. Both ECJ cases concerned a 5-year preclusive period. Against this background, it appears questionable whether the proposed regulation, which does not provide for any exceptions, complies with the requirements of Union law.

The wording of the planned legal text of sec. 14 para. 4 sentence 4 German VAT Act, which requires a correction for individual features, could make it appear questionable whether a correction by means of a cancellation invoice and a new invoice also falls under this provision. The Federal Fiscal Court considers supplementary invoice documents and cancellation invoices to be equivalent to each other (see KMLZ Newsletter 22/2020). The legislator would do well to provide some clarification here. The current draft does not include the question of interest where the recipient loses his right for input VAT deduction retroactively through a cancellation invoice (see KMLZ Newsletter 22/2020). The ECJ does not consider a strict sanction with interest to be permissible, regardless of fault (judgement of 15.09.2016 - C-518/14 - *Senatex*). A more fundamental change in the law in this area is needed.