



ECJ: Invoices not mandatory for input VAT deduction

1 Background

The ECJ has, on several previous occasions, dealt with the significance of invoices for input VAT deduction. In doing so, it has “loosened up” the conditions and consequences of the requirement to provide an invoice in favour of the taxpayer. See, in particular, the decisions *Senatex* (ECJ, judgement of 15.09.2016 – C-518/14) and *Barlis* (ECJ, judgement of 15.09.2016 – C-516/14). These judgements were decided based on the neutrality principle of VAT. The now published judgement *Vădan* (ECJ, judgement of. 21.11.2018 – C-664/16) represents a further milestone in this development.

2 Facts

The Plaintiff was a Romanian national who sold residential real estate and building land in Romania from 2006 to 2009 (total value: approx. EUR 4 million). It was unclear whether the Plaintiff was entitled to deduct input VAT from supplies received. The Romanian tax authorities assumed that the Plaintiff was obliged to register for VAT purposes. The Plaintiff was of the opinion that natural persons were not entitled to register for VAT purposes at that time in Romania. According to Romanian law, the issuance of invoices to natural persons was not compulsory at the time the service was procured. With regard to the supplies rendered to him for the erection of the buildings, the Plaintiff received only receipts, which, in the meantime, had become illegible due to the poor quality of the printing ink used. The plaintiff had failed to retain any other accounting records. The national court referred the question to the ECJ as to whether or not the Plaintiff was entitled to deduct input VAT, even without submitting invoices. If the answer was in the affirmative, it also wanted to know whether the scope of the right to deduction could be determined by an estimation of a court-commissioned expert report.



Dr. Sandro Nücken, LL.B.
Lawyer, Certified Tax Lawyer

+49 (0) 89 217 50 12-43
sandro.nuecken@kmlz.de

3 Decision

The ECJ examined both questions together. First, the court referred to its findings in the legal case *Senatex* and distinguished between the substantive and formal conditions for input VAT deduction. From a substantive perspective, the taxable person would have to receive a supply, which he uses for the purposes of his taxable output supplies. Formally, he should have available an invoice in accordance with Art. 226 of the VAT Directive. Input VAT deduction would have to be allowed where the substantive conditions had been satisfied but certain formal conditions had not been met. With reference to its judgement in the case *Barlis*, the ECJ stressed, once again, that input VAT deduction could not be denied in the instance where an invoice did not contain all of the details required to be included on invoices but the tax authorities nevertheless had, at their disposal, all of the necessary data to check whether or not the substantive conditions had been met.

Consequently, the ECJ assumed, in the case at hand, that “*the strict application of the substantive requirement to produce invoices would conflict with the principles of neutrality and proportionality*”. Otherwise, the taxable person would disproportionately be prevented from benefiting from fiscal neutrality relating to his transactions. At the same time, the taxable person was required to provide “*objective evidence*” that the substantive conditions required for input VAT deduction were met. In the present case, the Plaintiff failed to meet these requirements. The submitted documents were illegible and were not sufficient to determine whether, and to what extent, the Plaintiff was entitled to deduct input VAT. This deficiency could not be remedied by a court-commissioned expert report.

4 Consequences for the practice

What is new about the decision is, above all, the ECJ's statement that the “strict application of the substantive requirement to produce invoices would [conflict] with the principles of neutrality and proportionality”. This is the first time that the ECJ has clarified that a taxable person need not necessarily have available an invoice for the deduction of input VAT. This is an advantage for the taxable person. In the event of disputes with the tax authorities due to a lack of invoices, this judgment provides the taxable person with a completely new avenue for argument. To date, the German tax authorities have assumed that having an invoice available is a mandatory requirement for input VAT deduction (sec 15.2 para 2 sentence 1 No. 4 of the German VAT Circular). In its recently published draft letter on the consequences of the *Senatex* jurisprudence, the German Federal Ministry of Finance once again expressly confirmed this view (Federal Ministry of Finance, draft of 15.10.2018 - III C 2 - S 7286-a/15/10001:003, DOK 2018/0792777). In our opinion, taking into consideration the present decision, the wording of the law in sec 15 para 1 sentence 1 No. 1 sentence 2 of the German VAT Act must now be interpreted in conformity with EU law, to the effect that an invoice is not mandatory for the deduction of input VAT.

Taxable persons that (have) been denied the right to deduct input VAT by the tax authorities, due to the lack of invoices, should therefore check whether or not they are able to prove the substantive requirements for the deduction of input VAT by means of objective evidence. According to the present decision, the ECJ has adopted a broad interpretation in this respect. In its opinion, documents which are held by the supplier are also sufficient. Thus, the taxpayer does not need to submit documents which are specifically addressed to him. An estimate in a court-commissioned expert opinion can supplement, but not replace, the objective evidence.