



VAT NEWSLETTER

Invoice Amendment in the case of Incorrectly Applied Reverse Charge Scheme

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1 Background

Since the ECJ ruling in the *Senatex* case, it has been clear that invoices can be amended with retroactive effect (see KMLZ VAT Newsletter 27 | 2016). As a result, the German Federal Fiscal Court abandoned its opposite view. However, it limited the retroactive effect to only those invoices containing, at the very least, details of the invoice's issuer, the customer, the supplied goods or services, the amounts of consideration and VAT (see KMLZ VAT Newsletter 01 | 2017). The German fiscal authorities also changed their practice and applied the new case law. However, the German VAT Circular was only amended, after quite a lengthy delay, by the ministerial letter of 18 September 2020 (see KMLZ VAT Newsletter 49 | 2020). Contrary to the Federal Fiscal Court, the fiscal authorities assume that a VAT amount is not required for an invoice amendment with retroactive effect in the event of (alleged) **domestic reverse charge** (recital 23). What is required is an invoice remark referring to the (alleged) reverse charge scheme. An amendment shall not have retroactive effect in cases of (alleged) **reverse charge for intra-Community supplies of services** (see article 196 of the VAT Directive). In two judgments of 17 September 2020 (ref. 11 K 323/19 and 11 K 324/19), the Fiscal Court of Lower Saxony contradicts the fiscal authorities and affirms the retroactive effect of invoice amendments in such cases.

2 Facts

In **case 11 K 324/19** the plaintiff, a former Société Anonyme (S.A.) with its registered seat in Luxembourg, procured various services from suppliers established in Germany. Accordingly, the parties assumed that the services were subject to Luxembourg VAT at the plaintiff's registered seat and that he was liable for VAT. The suppliers invoiced their services



Jörg Scharrer
Lawyer, Dipl.-Kaufmann

+49 (0) 89 217 50 12-33
joerg.scharrer@kmlz.de

either showing 0% VAT or without showing VAT referring to reverse charge.

In **case 11 K 323/19**, the plaintiff, a taxable person established in Germany, procured transport service supplies from an Société Anonyme (S.A.) with a registered seat in Luxembourg. Accordingly, the parties assumed that the services were subject to German VAT at the plaintiff's place of establishment and that he was liable for VAT. The S.A. invoiced its supplies without showing VAT referring to the plaintiff's VAT liability.

In fact, in both cases, the S.A.s' directors were carrying out their activities from Germany. Therefore, the S.A.s were deemed, for VAT purposes, to be established in Germany (see sec. 10 of the German Fiscal Code). Hence, in both cases, the services were within the scope of German VAT, and the respective supplier was liable for the VAT. The suppliers issued new invoices showing German VAT. In their legal actions, both plaintiffs claimed input VAT deduction with retroactive effect.

3 Court Decision

The judgments are almost identical. First, the Fiscal Court confirms that the deduction of input VAT requires a proper invoice showing all invoice details (recital 24). It also acknowledges that the minimum invoice details required by the Federal Fiscal Court are permissible. It is the responsibility of the customer to check the invoices carefully. If the customer fails to do so, it shall not benefit from retroactive invoice amendments (recital 45). However, the VAT amount cannot be considered a minimum invoice detail if the parties incorrectly apply the reverse charge scheme. In the case of reverse charge, it is prohibited to show a VAT amount on the invoice. Instead, reference should be made to the reverse charge mechanism (recitals 44 et seq.). An appeal against the judgment in the case 11 K 324/19 has been lodged with the Federal Fiscal Court (ref. V R 33/20). The judgment in the case 11 K 323/19 is final.

4 Consequences for the Practice

If the judgments prevail, invoice amendment will be enriched by a further aspect. If the parties incorrectly apply the reverse charge scheme, all VAT and input VAT correction will have a retroactive effect. The latter applies not only to cases of (alleged) domestic reverse charge (see ministerial letter of 18 September 2020, recital 23), but also in cases of (alleged) reverse charge for intra-Community supplies of services (see Art. 196 of the VAT Directive). However, the requirement was, is, and remains that the invoice shows the minimum details and, thus, can be amended. Instead of showing VAT on the invoice, a reference to the (alleged) reverse charge mechanism is required. As a result, the customer could benefit from interest on refunds in the future.

Additionally, the judgments trigger a couple of questions relevant to the practice. (1) The retroactive effect would have to be limited if the customer's VAT assessment of the relevant period is already definitive (see KMLZ VAT Newsletter 16 | 2018). The same applies if the deadline for VAT refund has expired (KMLZ VAT Newsletter 14 | 2018). (2) The Court's reasons also apply to supplies that are incorrectly treated outside the scope of VAT, zero-rated, or VAT exempt (see recital 43). Also in these cases, the invoice should not show any VAT. (3) Legal succession, insolvency, and VAT groups also give rise to further issues.

The judgments are favourable in simple cases in the event of large input VAT amounts. Then the customer can benefit from interest on the refunds. In complex cases, in the event of small VAT amounts, or everyday accounting, the additional work required and new legal uncertainty quickly outweigh any interest on refunds. Also, the correct handling of invoice amendments requires additional accounting know-how. Therefore, taxable persons should give priority to ensuring that purchase and sales invoice processes are correct. The easiest invoice amendment is the one that is not required.