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KMLZ VAT NEWSLETTER

Time limit regarding option for taxation for supply of immovable property

1. Problem

Sec. 4 no. 9a German VAT Act exempts from VAT supplies which fall under the German Real Estate Transfer Tax Act. The supply of immovable property falls under this tax exemption. However, in cases where the purchase of immovable property is connected to purchase invoices with VAT, tax exemption for the supply of immovable property might be problematic for the supplier. According to sec. 15 para. 2 sentence 1 no. 1 German VAT Act, VAT for supplies used by the purchaser of these supplies to carry out VAT-exempt supplies, is excluded from VAT deduction. Due to the VAT exemption for supplies of immovable property, deduction of input VAT for purchasing this property is not possible. Therefore, the VAT exemption can constitute a cost factor for the supplier.

In order to avoid such unfavorable constellations for the supplier, sec. 9 German VAT Act offers the possibility to opt for taxation. However, the option for taxation for supplies of immovable property may only be declared in a notarized contract. By judgment of 21 October 2015 – XI R 40/13

Tax Exemption in spite of subsequent option for taxation?

The Federal Fiscal Court recently decided that the option for taxation for the supply of immovable property is only permissible in the notarized contract regarding this supply of immovable property. A subsequent option is invalid. This does not change, even in the instance of the existence of a notarized attested option. The Federal Fiscal Court's decision contradicts the current opinion of the fiscal authorities. It remains to be seen whether the fiscal authorities will share the Federal Fiscal Court's view. Until then, it should be examined carefully whether the option for taxation is necessary and if so it should be included in the notarial purchase contract.

(published on 23 December 2015) – the Federal Fiscal Court decided upon a case in which the option for taxation was subsequently declared and therefore not within the framework of the actual property purchase agreement.

2. Facts

A taxable person (claimant) purchased immovable property in 2003 and rented it out to his subsidiary. The rental was subject to VAT. He deducted the VAT shown in the purchase invoice of the immovable property as input VAT. By notarized purchase contract of 22 October 2009, he sold the immovable property to a purchaser, who in turn rented it out to his subsidiary. There was no option for taxation in the purchase contract of 22 October 2009. The tax office changed the VAT assessment for 2009 and reduced the VAT deduction. During the legal proceedings before the tax court on 12 April 2013, the notarization of the purchase contract of 22 October 2009 was revised. In this revised



Contact: Ronny Langer
Certified Tax Consultant, Dipl.-FW (FH)
Phone: +49 (0)89 / 217 50 12 - 50
ronny.langer@kmlz.de



purchase contract, the claimant expressly opted for taxation. The tax court upheld the complaint as, in its opinion, sec. 9 German VAT Act did not refer to any time limit as to when the option should have been executed. The tax office appealed against this decision. In the tax office's view, tax assessment is formally definitive for the year in dispute. Therefore, according to sec. 9.1 para. 3 sentence 1 German Administrative Circular, there is no option available to waive the VAT exemption.

3. Decision by the Federal Fiscal Court

The Federal Fiscal Court considered the appeal by the tax office to be justified. According to the Federal Fiscal Court, the sale of immovable property was VAT exempt, as the supplier did not meet the requirements of sec. 9 para. 3 sentence 2 German VAT Act, as he did not opt for taxation in the notarized property purchase agreement of 22 October 2009. Respectively, the seller did not effectively waive the VAT exemption in accordance with sec. 4 no. 9a German VAT Act.

The Federal Fiscal Court justified this by stating that, in accordance with the wording of sec. 9 para. 3 sentence 2 German VAT Act, the option for taxation may be declared "only in the" notarized contract regarding the supply of immovable property. Therefore, it is not possible to execute this option in an agreement that was concluded later.

4. Impact on the practice

The Federal Fiscal Court has interpreted the execution of the option, in accordance with sec. 9 para. 3 sentence 2 German VAT Act, in such a way that the waiver of the VAT exemption is to be declared mandatorily in the notarial pur-

chase contract. According to the Federal Fiscal Court's opinion, it is not possible to subsequently revise the purchase contract and to opt for taxation subsequently. This contradicts the current opinion of the fiscal authorities. According to sec. 9.1 para. 3 sentence 1 German Administrative Circular, the declaration for option in accordance with sec. 9 German VAT Act, as well as the revocation of this option, may only be permissible until such time as the respective annual VAT assessments are formally definitive. However, they do not have to be declared mandatorily in the original notarial purchase contract. It remains to be seen how the fiscal authorities will deal with this judgment.

As the judgment has not yet been published in the Federal Tax Gazette, it is currently difficult to provide an answer to this question. The fiscal authorities might share the Federal Fiscal Court's opinion or stick to their current opinion by means of a non-application decree. It will also be very interesting to see whether, in the event they share the Federal Fiscal Court's opinion, they will apply this judgment only in the future or also with respect to currently pending cases.

As the judgment has not yet been published in the Federal Tax Gazette, it currently does not have any generally applicable effect. For the time being, sec. 9.1 para. 3 sentence 1 German Administrative Circular should be applied. It is, however, recommended to always declare the execution of the option in the respective notarized purchase contracts. That way, instances of doubt might be avoided from the outset.