



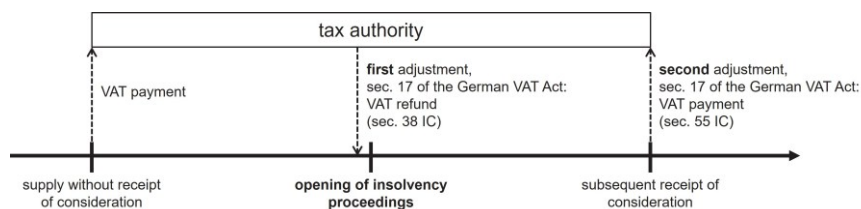
VAT and insolvency: Errors in the double adjustment may lead to “double taxation”

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1 Background: Double adjustment

The so-called “double adjustment” refers to an auxiliary mechanism developed by case law, which aims to place the VAT treatment of insolvent taxable persons on an equal legal and, as far as possible, economic footing, with that of non-insolvent taxable persons. It takes into account the fact that, in principal, VAT becomes chargeable when the goods or services are supplied, whereas the consideration is often received only at a later point in time. If a taxable person performs a supply prior to the opening of insolvency proceedings, the corresponding receivable becomes uncollectible once the proceedings are opened. For this reason, the VAT must be reduced pursuant to sec. 17 of the German VAT Act (UStG). This first adjustment takes effect in favour of the pre-insolvency assets within the meaning of sec. 38 of the Insolvency Code (IC). If the consideration for the same supply is actually collected after the opening of the Insolvency proceedings, the grounds for the reduction cease to exist. Consequently, sec. 17 UStG must be applied a second time. The VAT then arises as an estate liability and is borne by the insolvent estate within the meaning of sec. 55 IC. As a result, one and the same transaction generally gives rise to two adjustments under sec. 17 UStG: one increasing and the other decreasing the assets.



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2 Case constellation

The claimant, a limited liability company (GmbH), performed supplies subject to VAT in the period from 1 January 2019 until the opening of insolvency proceedings on 17 November 2019. The consideration for these supplies, however, was not received until after the insolvency proceedings had been opened under self-administration. For these transactions, the claimant initially correctly declared and paid VAT. Prior to the opening of the insolvency proceedings, the claimant did not carry out an initial adjustment due to the uncollectibility of the receivables pursuant to sec. 17 UStG in favor of the insolvency claims category (sec. 38 IC). The tax authorities therefore filed the tax claims they considered to exist under the insolvency plan. After the claimant actually received the consideration for the pre-insolvency supplies following the opening of the insolvency proceedings, the insolvency administrator in self-administration treated the VAT attributable thereto as an estate liability (second adjustment, sec. 55 IC). The claimant's request to retroactively carry out the omitted first adjustment for the pre-insolvency period was rejected by the tax authorities. They argued that the VAT had already been finally determined under the insolvency plan. As a result, only the second adjustment due to the post-insolvency receipt of the consideration was made to the detriment of the estate, without any corresponding relief of the pre-insolvency assets through a first adjustment. The Federal Fiscal Court (BFH) was therefore required to decide on the lawfulness of a second adjustment in the absence of a correlating first adjustment.

3 Decision of the Federal Fiscal Court

The BFH affirms in its judgment of 18 December 2025 (V R 34/23) the second adjustment upon receipt of the consideration, irrespective of whether a first adjustment due to uncollectibility was previously carried out. Tax determinations from the pre-insolvency period do not have any binding effect after the opening of insolvency proceedings due to the lack of a statutory basis (no basic assessment notice); nor do the rules governing insolvency plan proceedings establish such binding effect. Instead, the pre-insolvency and insolvency periods must be assessed strictly and separately for VAT purposes (period-by-period taxation). Otherwise, the taxable person could circumvent the mandatory second adjustment by omitting the first adjustment. Any impermissible double taxation can, at most, be remedied by legal remedies or equitable relief measures in respect of the pre-insolvency period; however, that period was not the subject matter of the dispute in the present case.

4 Practical implications

The BFH's decision underscores how crucial it is for taxable persons, as well as insolvency administrators and custodians (Sachwalter), to identify at an early stage, in situations of insolvency, circumstances that justify a first adjustment. Considerations for supplies rendered prior to the opening of insolvency proceedings are deemed uncollectible by operation of law. This constitutes a mandatory ground for reduction, which reduces VAT and relieves the pre-insolvency assets within the meaning of sec. 38 IC. If this is omitted, there is a risk of double taxation, as a second adjustment is made to the detriment of the insolvency estate without any prior relieving first adjustment. In cases of doubt, insolvency administrators and custodians should challenge the tax authorities' filing of claims in the insolvency table by all available tax and insolvency law remedies before it becomes final and binding. This preserves the possibility of carrying out the first adjustment. Moreover, the BFH identifies another approach of practical relevance: even where the pre-insolvency assessment has become final and binding, a double VAT burden is not inevitable. The omitted first adjustment may, where appropriate, be reviewed in equitable relief proceedings. From the BFH's perspective, it is particularly relevant whether the information required for the first adjustment originated from the sphere of information and activity of the taxable person, insolvency administrator or custodian, and to what extent a first adjustment by way of estimation would have been appropriate.