

After years of legal uncertainty, a new amendment of the German VAT Act now resolves the risk of an acquirer of a receivable to be liable for unpaid VAT.

The new law has ended a period of uncertainty that has lasted over a decade due to judgments of courts and circulars issued by the tax administration going back and forth. The original version of Section 13c provided for a liability of the acquirer of a receivable (whether by way of sale or security assignment) if the assignor of such receivable had not paid the respective VAT to the relevant tax authorities. Under the new version of Section 13c, the acquirer of the receivable will not be liable for the payment of such VAT if the seller of the receivable does not pay the VAT included in the relevant receivable to the relevant tax authorities, provided that the seller has received the consideration for the sale of such receivable from the acquirer and may freely dispose over such consideration.

On 24 May 2004, the German Federal Ministry of Finance issued a decree regarding the Application of the German VAT Act (*Umsatzsteueranwendungserlass*) and a circular pursuant to which it has been the practice in the German factoring and securitisation market to hold that Section 13c of the German VAT Act shall not apply to the extent that the acquirer of the relevant receivable has paid a purchase price to the assignor thereof, which the assignor is entitled to keep and which is paid on an account that the acquirer has no access to.

On 16 December 2015, the German Federal Fiscal Court (*Bundesfinanzhof*, BFH) issued a judgment that overturned the prevailing opinion that payment of a purchase price for a VAT bearing receivable can avoid the liability of the acquirer of the receivable under Section 13c of the German VAT Act for any non-payment of the VAT portions for the sold receivable. The BFH held that the payment of the purchase price for the receivables by the factoring company to the seller was of no relevance and that the above mentioned decree regarding the Application of the German VAT Act is an internal rule applicable within the tax administration only and is not binding on German courts. Consequently, the BFH decided that, where a seller of receivables goes into insolvency and does not pay the VAT portions contained in the relevant receivables, the competent tax authority may claim payment of the relevant VAT from the factoring company pursuant to Section 13c of the German VAT Act.

Although the BFH proposed that the factoring company should directly pay the respective VAT portion of the receivable to the

competent tax authority and only the purchase price remaining after deduction of the VAT portion should be paid to the relevant seller, it was perceived that such a route would make factoring and securitisation transactions in Germany more complicated. The decision of the BFH meant that the acquirer of trade receivables had to at least closely monitor (during the lifetime of the relevant transaction) that the seller of the receivables duly complied with its VAT payment obligations.

This judgment created a new risk for the receivables finance industry and the German legislator has now reacted.

Now, the new law re-establishes the legal regime under the decree regarding the Application of the German VAT Act: if and to the extent that the purchaser of a receivable pays the consideration for the purchase of such receivable to the seller in freely disposable funds, the purchaser cannot be held liable by the German financial authorities, should the seller fail to pay the VAT contained in such receivable to the competent tax authorities. Of course, even under the decree regarding the Application of the German VAT Act, there was a risk of liability for the portion of any discounts or reserves (usually 5-15% of the nominal amount of the receivable) applied to the nominal amount when calculating the purchase price for the relevant receivables. It is to be expected that such risk remains under the new law. However, at least the liability risk is limited to the VAT contained in such discount or reserve portion.

The new law applies retroactively as of 1 January 2017.

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