



Insolvency and VAT: Payment by a Third-Party Debtor as an Insolvency Claim

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1 Background

In principle, the tax office determines VAT in the tax assessment procedure by issuing a tax assessment notice in accordance with sec. 155 para. 1 sent. 1 of the General Fiscal Code (GFC). If insolvency proceedings have been opened against a taxpayer, this is only possible to a limited extent. The reason for this is that under sec. 87 of the Insolvency Code (IC) insolvency creditors may pursue their claims solely in accordance with the provisions that govern the insolvency proceedings. If a VAT claim qualifies as such an insolvency claim (sec. 38 IC), the tax office must register it in due time in the insolvency schedule (sec. 175 IC) pursuant to secs. 28 para. 1, 174 IC and, if necessary, establish it by virtue of an (ordinary) written administrative act (secs. 179 para. 1, 185 para. 1 sent. 1 IC, 251 para. 3 GFC). In this situation, an assessment by means of a tax assessment notice is unlawful. This restriction does not apply to estate liabilities (sec. 55 IC). These must be satisfied with priority in accordance with sec. 53 IC, and are therefore to be assessed, as usual, by means of a tax assessment notice (specifically addressed to the insolvency administrator, sec. 34 para. 3, para. 1 GFC). Since the classification of a (VAT) tax claim as an insolvency claim or an estate liability is crucial for its prospects of satisfaction, disputes frequently arise between the parties involved in the proceedings. Due to the preferential treatment of estate liabilities pursuant to sec. 53 IC, the tax office regularly seeks to classify claims as such, whereas the insolvency administrator aims to classify them as insolvency claims in order to preserve the insolvency estate. This issue arose in a recently published case decided by the Federal Fiscal Court (judgement dated 29 August 2024 – V R 17/23).

2 Facts of the Case (simplified)

In mid-June 2016, the insolvency court appointed the plaintiff (hereinafter: P) as the preliminary insolvency administrator of the assets of the insolvency debtor (hereinafter: D), who was a natural person engaged in self-employed commercial activity.



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Dispositions by D were only effective with P's consent. Additionally, P was authorised to collect D's receivables into a trust account. D held a checking account with a bank. In June 2016, the C-GmbH (hereinafter: C), to whom D had provided supplies, transferred several amounts to this account as a third-party debtor of D, unaware of the pending preliminary insolvency proceedings. The pay reference specified invoices that D had issued for the supplies he rendered to C. At the beginning of July 2016, the insolvency proceedings were opened against D. The defendant tax office assessed VAT for 2016 against P, thus burdening the insolvency estate. The tax assessment also included the amounts that C had transferred to D. The action brought against this assessment was successful.

3 Decision of the Federal Fiscal Court

The Federal Fiscal Court upheld the view of the lower Fiscal Court. From its perspective, C's payment constituted an insolvency claim. Consequently, the VAT liability did not diminish the insolvency estate:

- The lower Fiscal Court correctly ruled that the requirements for an estate liability, within the meaning of Sec. 55 para. 4 IC, were not met. Such liabilities can only be incurred by the weak preliminary insolvency administrator or – with the administrator's consent – by the debtor within the scope of the administrator's legal powers.
- The relevant point in time for this determination is the moment when the consideration is received.
- If the preliminary insolvency administrator does not receive the payment, within the framework of their granted authority to collect receivables, an estate liability is only incurred if the collection occurs in connection with other legal powers of the preliminary insolvency administrator.
- This requirement is not met if the payment leads to the discharge of the preliminary insolvency debtor's receivable not because of the preliminary insolvency administrator's consent, but due to other insolvency law provisions – without the involvement of the preliminary insolvency administrator.
- This was the case here. The Federal Fiscal Court acknowledged that D was no longer authorised to receive C's payment without P's consent. However, in cases where these disposition restrictions, as set out in sec. 21 para. 2 sent. 1 no. 2 alt. 2 IC, are violated, the good-faith protection provisions of secs. 81, 82 IC apply accordingly, pursuant to sec. 24 para. 1 IC. Since C had no actual knowledge of the preliminary insolvency proceedings, it was able to discharge its debt with legal effect by making payment to D.
- When, as in this case, sec. 82 IC results in the discharge of D's receivable against C arising from their legal relationship, this must also be taken into account for VAT purposes. D definitively received the payment, and this occurred without any action being taken by P.
- Consequently, no estate liability, within the meaning of sec. 55 para. 4 IC, could be assessed against P. In fact, the VAT claim was directed against D's pre-insolvency assets. Any subsequent dispositions by P, such as obtaining the consideration paid by C or subsequently approving D's dispositions, did not alter this.

4 Practical Implications

With this decision, the Federal Fiscal Court has provided legal certainty. Debt-discharging payments made by a third-party debtor to the insolvency debtor during preliminary insolvency proceedings, without any involvement of the weak preliminary insolvency administrator, do not constitute estate liabilities. At least for VAT purposes, this principle continues to apply even after the amendment of sec. 55 para. 4 IC. Going forward, it should be noted that the revised version of this provision also now applies to debtor-in-possession proceedings.