



VAT Insolvency Law - Subsequent Liability of the Taxable Person for VAT Debts

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The Düsseldorf Fiscal Court recently ruled on another unresolved issue at the interface between VAT and insolvency law (ruling of 13.07.2022, 4 K 1280/21 AO). Specifically, the question of the extent to which a taxable person might

- be liable for VAT debts incurred by the insolvency administrator, and if
- applicable, whether this subsequent liability is limited to the assets formerly belonging to the company's insolvent estate.

The Düsseldorf Fiscal Court itself ruled against the plaintiff, however, it subsequently granted permission for its judgement to be appealed. In the end, the case will be decided by the 11th Senate of the Federal Fiscal Court (ref. no. XI R 23/22).

1 Underlying facts

Insolvency proceedings were opened against the plaintiff's company. The responsible insolvency administrator continued the business during its insolvency. This subsequently triggered VAT claims by the tax office. The defendant tax office assessed VAT claims established during the period of insolvency as debts of the insolvent company. However, the administrator did not pay these VAT amounts to the tax office. After eight years, the District Court terminated the insolvency of the company with a decision on the discharge of residual debt. The District Court discontinued the insolvency proceedings after notification of the insufficiency of assets pursuant to section 211 German Insolvency Code.

The tax office then enforced the company's overdue VAT debts directly against it by way of a so-called subsequent liability claim. The taxable person - the plaintiff in these proceedings - was of the opinion that he should not be held liable for these VAT debts. After all, the VAT had been accrued by legal acts carried out by the administrator – not because of the action of the plaintiff.



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2 Legal Opinion of the Düsseldorf Fiscal Court

According to the Düsseldorf Fiscal Court, the plaintiff owes the tax office the outstanding VAT. The court states that it was irrelevant that the VAT debts were triggered by the actions of the insolvency administrator. The fact that the plaintiff lost his power to manage and exercise command over his company in favour of the insolvency administrator upon the opening of insolvency proceedings, pursuant to sec. 80 para. 1 German Insolvency Code was also found to be irrelevant. The insolvency debtor's liability during the proceedings was also limited to the assets of the insolvent estate. Neither of these facts changed the outcome, namely that the plaintiff must be fully liable for all of the VAT liabilities of his company after insolvency. The post-insolvency liability of the taxable person, the plaintiff, was not limited to the assets of the insolvent company that had formerly belonged to the insolvent estate. In this respect, there was no limitation of liability under insolvency law. This had already been decided by the highest court for income tax debts (cf. Federal Fiscal Court, ruling of 28.11.2017, ref. no. VII R 1/16). Following this, the Düsseldorf Fiscal Court applied the Federal Fiscal Court's guiding principles on income tax liabilities analogously to VAT liabilities. Due to the fundamental importance of this case, the Düsseldorf Fiscal Court's ruling included permission for an appeal to the Federal Fiscal Court.

3 Legal considerations and implications for practice

The plaintiff rightly raises the question of whether the Federal Fiscal Court's decision on income tax debts is also applicable to VAT debts. After all, in the case of income tax debts, there is no contribution to action directly attributable to the insolvency administrator. It was different in this case, where the VAT debts were accrued as a direct result of a legal act on the part of the insolvency administrator.

If the Federal Fiscal Court were to confirm the legal opinion of the Düsseldorf Fiscal Court in the appeal proceedings, this would mean that the formerly insolvent, now rehabilitated company, with new assets not belonging to the former insolvent estate, would have to assume unlimited liability for the tax office's estate liabilities, even after the insolvency proceedings had concluded. The insolvency proceedings would therefore have resulted in a bitter aftertaste for the newly rehabilitated company. It would immediately have to overcome what could be a massive financial hurdle for a new entrepreneur. From a legal point of view, such an interpretation would represent a departure from the so-called principle of limitation of liability inherent in the proceedings in favour of insolvency tax debtors. Accordingly, the liability of the insolvent debtor during the insolvency proceedings is generally limited to the assets belonging to the insolvent estate (cf. Federal Supreme Court, partial judgment of 24.09.2009, ref. no. IX ZR 234/07). This is also in the interest of the parties. It is because the insolvent debtor loses the possibility to manage and exercise any command over the remaining assets, at the latest when insolvency proceedings are opened. The fate of the insolvent debtor lies in the hands of the insolvency administrator who administers and takes charge of the insolvent estate. The administrator is also liable for submission and payment obligations of VAT debts under sections 69, 34 para. 3 Fiscal Code as an "administrator of assets". In contrast, the liability of the managing bodies under tax law for VAT liabilities is generally suspended until the conclusion of insolvency proceedings.

Taxable persons who are exposed to a VAT claim by the tax office that arose during insolvency proceedings should take action against it. A suspension of the objection procedure, until the Federal Fiscal Court's decision in the pending proceedings is available (XI R 23/22), appears expedient. An application for the granting of corresponding suspension of enforcement can be considered, taking into account the risk of a 6% suspension of enforcement interest.