

Federal tax court clarifies timing of capitalization of tax refund claims

In a recent case (case reference [X R 19/10](#), BStBl II 2012 p. 190) decided by the Federal Tax Court (BFH), an operator of gambling machines initially subjected its services to German VAT, which was in line with the German VAT guidelines at the time. However, on the basis of a case pending before the European Court of Justice (ECJ), the operator then submitted an application requesting a revised VAT assessment and a refund of the overpaid VAT, plus interest. The local tax office dismissed the application; the decision on the subsequent appeal of the taxpayer was deferred.

In 2005, both the ECJ and the BFH determined that the German VAT guidelines were not in line with EU law. The BFH decision was published in the Federal Tax Gazette in late 2005. On this basis, the local tax office decided in 2006, by a final assessment, to repay the VAT, plus the interest thereon. Since the final decision on its pending appeal was made in 2006, the taxpayer did not capitalize the VAT refund (and interest) in its financial statements for 2005, but did so in 2006. The tax auditor, however, took the view that the VAT refund should have been capitalized in the 2005 financial statements. The case was brought before the BFH.

According to the BFH, a tax claim has to be capitalized once it is economically substantiated and if a potential acquirer would take the claim into account when calculating the purchase price for the business. The court presumes that this would be the case if:

- The final decision of the local tax office is predictable. In the case, this was assumed to be the case because under internal guidelines which are binding on the tax authorities, once the BFH decision is published in the Federal Tax Gazette it must be followed; and
- No procedural law or administrative obstacles apply (e.g. statute of limitations).

The BFH specifically left open the question as to whether an ECJ decision would be sufficient in terms of a predictable final decision (this question was irrelevant in the case, both decisions were issued in 2005).

The BFH, therefore, held that the tax refund should have been capitalized in 2005 and ruled in favor of the tax auditor.

Although the decision only results in timing differences, it will be relevant for all pending tax appeals. The publication of tax court decisions in the Federal Tax Gazette (as well as other tax publications and notifications of the tax authorities) need to be monitored closely. In particular, if a relevant decision is published, affected taxpayers should determine whether a claim needs to be capitalized.

If you have any questions, please contact the authors of this article at gtln@deloitte.de or your regular Deloitte contact.

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