By PwC Deutschland | 29. Juni 2011

VAT on hire of self-employed persons

An ECJ advocate general has suggested the court rule that the special rules on the place of staff supply should also apply to staff at the disposition of, but not employed by, the hirer.

A German specialist employment agency made a business of hiring self-employed lorry drivers to, in particular, a pool of Italian haulage companies. The agency concluded agency agreements with the drivers and hiring agreements with the customers. The drivers invoiced the agency at agreed rate scales; the agency charged on the amounts to the customers after adding an uplift of between 8% and 20%. The agency's tax office held that the special provision then making the supply of staff taxable in the country of assignment only applied to employees of the supplier (law in force up to December 31, 2009). Accordingly, the supply of non-employees - in this case, the self-employed drivers - was taxable in Germany, the country of the service provider. The agency accepted this view on the assumption that the Italian customers would be able to recover the VAT through the refund procedure for foreign businesses. Unfortunately, the Central Tax Office, the German body responsible for processing foreign refund claims, took the opposite view, that the supply of staff included all personnel placed at the disposal of the customer, regardless of their formal employment status. Accordingly, the supply was VAT-free in Germany, and any VAT actually shown on an invoice had been shown in error and could not be refunded. The Italian customers saw this clash of views between two German tax offices as an internal German affair and refused to pay the VAT to the agency. Market forces prevented the agency from increasing the bill to Italy in order to cover the difference, and the 8%-20% agency margin at home was not high enough to cover an irrecoverable VAT charge of (now) 19% of the customer billing. Unable to solve the dilemma, the agency was forced out of business. Its liquidator is seeking redress before the German courts, largely in the hope of recovering the non-deductible VAT paid. The tax court concerned has turned to the ECJ on the correct place of supply under the Sixth (and now the VAT) Directive and on whether there is a community law requirement forcing different authorities within a member state to apply VAT rules consistently in respect of any one transaction.

The advocate general on the case agrees that the Sixth Directive reference to the supply of staff is unclear in itself and that the various analogies available from other parts of the directive or from other provisions of community law are either contradictory or irrelevant. However, reverting to the first principles of the VAT system, and in particular to the consistency of treatment of like transactions, he suggests there can be no justification for taxing the supply of personnel differently depending on their formal employment status. The one relationship has no direct relevance to the other, and making the distinction would be illogical in theory and difficult to control in practice. He therefore suggests the court hold that the supply of staff in the present circumstances be taxed in the country of assignment, even if the staff are only linked to the supplier with an agency agreement, rather than an employment contract.

The second question is also unclear in law for want of an explicit provision. The Commission argues that member states are under a duty of loyal cooperation to administer the VAT system in the spirit of community law. They must therefore protect its neutrality by ensuring that irrecoverable amounts do not become a cost to business. In particular, they must prevent situations arising where one party to a transaction is forced to charge VAT which the other party is unable to recover. However, the advocate general has allowed himself to be persuaded by the counter-arguments of the German government, to the effect that to require different authorities within a member state to treat both sides of a transaction alike would be fraught with legal and

practical difficulties, particularly where a final decision on one aspect has already become binding on one of the parties. This was the case here, in that the Italian customer did not appeal against the Central Tax Office refusal to refund the VAT at issue. Why the customer should appeal as opposed to asking the supplier to reinvoice the transaction, is not discussed in the opinion.

This case has lost much of its future relevance with the change in the provisions on the place of supply which took effect on January 1, 2010. From then on, basically all B2B services are taxable in the country of the customer (by reverse charge if the supplier is not registered there for VAT). The distinction between the supply of personnel and other services is therefore now only relevant to staff loaned to non-business customers in non-member states.

The ECJ case reference is C-218/10 *ADV Allround* opinion of June 28, 2011.

Schlagwörter

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