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Builders’ reverse charge applies to all construction work

The ECJ has held that Germany has been authorised to reverse charge all construction work for other builders, regardless of whether the service or the goods element of the supply predominates.

In the interests of combatting mass VAT “missing trader” fraud in the building industry, Germany was authorised in 2004 to levy VAT on construction work invoiced to other VAT-payers by reverse charge. However, German implementation of this measure has only been partial, the building industry reverse charge being restricted to supplies of goods and services serving the construction, maintenance, alteration or demolition of buildings if invoiced to business customers in the building industry. A building firm is now disputing a tax office claim that it should have reverse charged a construction project completed in the previous year and invoiced without VAT. In this, it accepts that it should have done so under the VAT Act, but argues that the relevant provision is an incorrect transposition of the EU “derogation” and thus invalid. More particularly, it argues that the derogation applied to “construction works” and therefore to services only and that Germany had no right to restrict its application to transactions within the building trade.

The ECJ has now held that the derogation applies to both goods and services without making a distinction between the two. It reached this conclusion from the premise that, although “construction work” is not defined in the VAT Directive, common language usage would suggest making no distinction between goods and services. The purpose of the derogation, to defeat tax fraud, too, should be taken into account. That purpose would only be achieved if the reverse charge applied equally to both types of transaction, as both were equally susceptible to fraud. In any case the distinction would generally be a complex matter to be decided on the circumstances of each case and thus, itself, prone to error. The derogation therefore had to be applied to construction work regardless of its national law classification as delivery of goods or the performance of a service.

The ECJ also accepted in principle the German restriction of the derogation to the building trade. Derogations were exceptions to the general rule and should therefore be interpreted narrowly, provided their effectiveness was not compromised and tax neutrality was observed. Keeping the reverse charge within the building trade did not render it ineffective as a curb on building industry tax fraud, and tax neutrality was also preserved. The reverse charge when made did not lead to a payment obligation for those involved and also burdened neither the state nor the EU budget. Its effects were therefore in no way disproportionate. The ECJ’s one reservation lay in the question of a possible impingement of the German building trade restriction on the legal certainty of application of the derogation. There was, indeed, no specific suggestion that legal certainty had in any way been compromised; however, the ECJ felt moved to suggest the referring court review this question for itself.

The ECJ case reference is C-395/11 *BLV*, judgment of December 13, 2012.

Schlagwörter

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