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Payment to agent for free-of-charge mobile phone is third-party payment

The Supreme Tax Court has held the payment of an "equipment bonus" to a mobile phone agent to be a payment by a third-party for a taxable sale to the customer.

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A mobile phone sales agent offered potential customers a number of different schemes. One of them was a free-of-charge handset against a commitment to a two year contract with the network operator at an inflated price for phone calls. The agent purchased the free-of-charge phones from the network and deducted the input tax. It treated the output as a VAT-free sample given away to the customer. The agent was compensated with an “equipment bonus” from the network operator approximating to the cost of the handsets given away. This bonus was added to the agent’s regular commission on the credit notes issued by the network for the agent’s remuneration. This entire amount was shown as subject to VAT, the amount of which the agent deducted as input tax. The Supreme Tax Court has now held this VAT treatment to have been wrong in three respects.

The supply of the set to the customer was not a gift or a sample; it was the supply of equipment for valuable consideration. As such, it was subject to VAT. The corresponding credit from the network, the “equipment bonus”, settled the agent’s claim on the customer and was thus a third-party payment. As such, it should not have been subjected to VAT. This meant that the agent was liable to pay the VAT shown on the credit note as an incorrectly invoiced tax charge. On the other hand, the agent should have charged VAT on the supply of the telephone to the customer. This gave the customer the right to input tax deduction – if the phone was acquired for a tax-paying business.

Supreme Tax Court judgment II R 39/12 of October 16, 2013 published on November 27

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