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Sale-and-lease back not rental but other service subject to VAT

The Supreme Tax Court considers a sale-and-lease-back transaction as a taxable other service rather than a lease or the tax-exempt grant of a loan if the chosen scenario is a reasonable non-tax driven choice of form used to enable the seller (lessee) to enjoy certain accounting and reporting benefits.

General VAT treatment: A lease concluded after delivery of the asset to the customer is either a sale and lease-back transaction or the grant of a loan. The distinction depends on the circumstances of the case. Normally, a sale and lease-back is to be VAT-ted as a sale by the customer to the leasing company followed by a service by the leasing company to the customer (the monthly rentals). If the sale and lease-back is to be seen as a loan, it will not have VAT consequences.

In the case before the Supreme Tax Court a civil-law partnership (*GbR*) purchased electronic information systems from the seller in 2007 which the latter had developed and therefore – under then applicable law - was not allowed to record in his balance sheet as an intangible asset. The *GbR*-lessor received a loan of 2/3 of the net purchase price from the lessee (seller). The lessor assumed and declared taxable lease payments and thus claimed full recovery of the underlying input VAT. The tax office maintained that – in lieu of a transfer of ownership - the service provided was in the form of a VAT-exempt loan by the lessor and which therefore excluded VAT recovery. The Supreme Tax Court – in effect – accepted the claim by the lessor as regards a VAT recovery, albeit for other reasons.

The lessor did not loan finance the lessee and, secondly, in lieu of a transfer of ownership, no delivery/supply of equipment took place. Actually, it is viewed as a provision of other services subject to VAT (which entitles to full recovery of input VAT) rather than being a lease. Using the transaction of a sale-and-lease-back put the lessee in a position to record a respective loan and thus account for the intangible asset in his balance sheet which otherwise would not have been possible under then prevailing law (2007). This resulted in several benefits for the lessee: He was able to report a higher capital, distribute higher profits and enjoy a higher credit ranking. The Supreme Tax Court also pointed to an ECJ judgment of February 21, 2006 (case: C-223/03, *University of Huddersfield*): There, the ECJ held that a transaction may be viewed as a VAT-able service even if carried out with the sole purpose of obtaining a tax advantage. Furthermore and considering the circumstances of the case the sale and lease-back is not the grant of a loan since the lessor did not finance the total purchase price but rather 2/3 of it were in fact raised by the lessee.

Supreme Tax Court judgment V R 12/15 of April 6, 2016, published on July 20

Schlagwörter

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