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No VAT on decentralized use of electricity generated in a combined heat and power plant

In a recently published decision, the Supreme Tax Court confirmed its earlier judgment in the case of decentralized use of energy: The electricity generated in a combined heat and power plant (CHP) which is consumed locally by the operator of the plant (decentralized use) cannot be considered as a taxable supply to the electricity network operator nor as a subsequent return delivery (re-delivery) to the plant operator.

Background

The plaintiff is an institution under public law and had built a combined heat and power plant (CHP) on its premises to generate electricity and heat. The CHP unit was connected to the plaintiff's own power grid on its premises as a so-called "customer plant". In addition, the plaintiff's electricity grid was connected to the general supply grid of the electricity provider.

The plaintiff consumed almost all the electricity generated in the CHP unit itself (decentralized). It was not fed into the grid of the electricity grid operator. With regard to the electricity generated in the CHP unit, the tax office assumed fictitious deliveries (to and from the electricity operator) with resulting VAT consequences.

Decision

The Supreme Tax Court held that the electricity generated in the CHP unit is neither factual nor fictional (deemed to be) supplied to the electricity grid operator and is thus not a taxable delivery as defined in Section 3 (1) of the German Value Added Tax Act (VAT Act).

The Supreme Tax Court went on to say that the plaintiff does not provide any services to the network operator that are relevant for VAT purposes regarding the electricity generated and used on a decentralized basis. There is no supply of electricity to the network operator for lack of transfer of the power to dispose over the asset ("procurement of a power of disposal"; Section 3 (1) Sent. VAT Act). Since the electricity which is generated in the CHP unit and consumed on a decentralized basis is indisputably not fed into the general electricity grid of the electricity network operator, neither the substance nor the value or yield of the self-generated electricity is transferred.

Likewise, it cannot be assumed that there is an exchange of a taxable service (rather than a delivery) pursuant to Section 3 (9) VAT Act (“*Supply of services shall be defined as any supplies that are not deemed to be a supply of goods*”). For the Supreme Tax Court, it is not evident what the reason for such a service should be. The plant operator does not in return receive any consumable benefit regarding the electricity which he consumes locally himself. Rather, he had retained it at all times.

Source:

Supreme Tax Court, decision of 11 May 2023 (V R 22/21), published on 17 August 2023.

Schlagwörter

power plant