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No domestic residency in case of rental of German property

The Münster Tax Court has rejected an earlier decree of the Federal Ministry of Finance according to which entrepreneurs based abroad who own a rented property located in Germany are treated as being resident in Germany if the otherwise exempt rentals are subject to VAT by way of a waiver pursuant to Section 9 VAT Act.

Background

The plaintiff, a real estate company, was domiciled in Italy. During the years 2008 to 2017, receivership was ordered for a property located in Germany, including stores, for which its four shareholders were registered as owners in the land register. The official receiver concluded rental agreements which by statute are VAT exempt but (apparently) had opted for VAT by invoking Section 9 VAT Act. In the opinion of the tax office, the plaintiff was bound by the rental agreements concluded by the receiver even after the receivership was completed unless new rental agreements had been concluded with the respective tenants.

The tax office assessed VAT against the plaintiff for 2020 and 2021 (the years in dispute). The plaintiff claimed that it had not received any copies of the relevant contracts, and that it therefore did not know whether an option had actually been exercised. In any way, it had revoked the option at the beginning of the years in dispute.

Decision of the Münster Tax Court

In the opinion of the tax court, the plaintiff had not become liable to VAT and was not considered as the taxable person pursuant to Section 13a (1) No. 1 VAT Act. The court found that the receiverhad concluded rental agreements not in the name of the plaintiff but of its four shareholders. This was also in line with the statutory obligation of the receiver who had to manage the property for the shareholders as owners of the seized property during the time of the receivership. After thereceivership ended, these four persons entered into the lease agreement with all rights and obligations.

Besides, it could not clearly be determined whether the rental agreements had been transferred to the plaintiff although the plaintiff had been registered as the owner by way of a re-registration shortly after the end of the receivership. At least in the years in dispute (2020 and 2021) no joint ownership was to be assumed as a taxable person other than the owners. At least for this reason, the plaintiff was not the service provider and did not owe the VAT.

The court went on to say that, even if the plaintiff had been an entrepreneur, it would not have been the plaintiff based in Italy, but the respective recipients of the services who would have been liable to pay the VAT under the reverse charge mechanism (i. e. transfer of the VAT liability to the recipient of the service). The rental service was also not provided via a permanent establishment located in Germany. In its decision in the “Titanium” case (<**C-931/19**) , the European Court of Justice (ECJ) stated that a rented property is not a fixed establishment if the owner of the property does not have its own staff for the supply of services in connection with the rental (a summary of the ECJ judgment to be found in our **blog post of 8 July 2021**) .

The tax court did not accept the view of the tax authorities that entrepreneurs who own a German property and where the lease is subject to VAT should be treated as a VAT resident in Germany. In the absence of identifiable staff working in Germany - as both parties confirmed at the oral hearing - the rented property cannot be regarded as a fixed establishment or permanent establishment within the meaning of Section 13b (7) Sentence VAT Act. According to Section 13b (7) Sentence 1 VAT Act „a taxable person abroad is one

who neither has his permanent address, nor usually resides, nor has a registered office, place of management or a fixed establishment in Germany (…); this also applies where the taxable person has his permanent address or usually resides in Germany but has his registered office, place of management or a fixed establishment abroad.“ Therefore, assuming that the plaintiff was the supplier, the rental was carried out directly from abroad without the involvement of a permanent establishment located in Germany.

Source:

Tax Court of Münster, decision of 29 October 2024 (15 K 399/23 U). The appeal to the Supreme Tax Court was not allowed.

Schlagwörter

permanent establishment (PE), property rental