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By PwC Deutschland | 05 January 2011

Intra-community supply not exempt on deliberate deception

The ECJ has held that the intra-community supply exemption is not available to a trader who falsifies invoices in order to conceal the identity of the purchasers from their own VAT authorities.

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A German motor car trader sold luxury cars as second-hand vehicles to Portuguese dealers. He delivered the cars to Portugal and invoiced the transactions as VAT-free intra-community supplies to another trader. However, he addressed the invoices to fictitious customers, thus allowing the true recipients of the motor cars to ignore their Portuguese obligation to return and pay the acquisition tax. Since these dealers were then able to sell their cars to final consumers without VAT, they were able to make unwarranted profits, to be shared with the other participants in the ring. Ultimately, the arrangement came to light and the German dealer received a three year prison sentence for tax evasion. The tax evaded was the VAT on his sales invoices, due by reason of his breach of the invoicing requirements for a clear identification of the customer. He appealed against his conviction on the grounds that there could be no evasion where there was no liability. In his case, there was no liability because the goods had been delivered to Portugal as an intra-community supply. The fact of delivery was not in dispute, and the cars had been sold to genuine traders. The fact that the invoices had been falsified did not change the nature of the transaction, at least not within the context of the VAT Directive. This latter reference brought the case before the ECJ.

The ECJ has now taken the view that a member state is justified in insisting on accurate identification of the recipient of goods supplied to a business in another member state. The objective of the intra-community supply exemption is to move final taxation to the country of final consumption, in this case to Portugal. That objective is dependent upon accurate information from all traders involved. It would be thwarted, if a supplier were to be allowed to conceal the identity of his customer. Indeed, a member state is, in principle, required to tax the supply in cases of deliberate deceit, as the only means of ensuring that the transaction does not escape taxation altogether. Claims that levying the tax might be disproportionate, breach fiscal neutrality or disappoint legitimate expectations cannot be invoked by a person who has deliberated participated in tax evasion and in so doing jeopardised the operation of the common system of VAT.

Interestingly, the advocate general came to an, in effect, more lenient conclusion in his opinion. His view was that it was disproportionate to tax a transaction in the state of supply (Germany) where the objective was to discourage fraud in the state of receipt (Portugal), especially as this would have the effect of shifting tax revenue from Portugal to Germany. On the other hand, there was nothing to stop Germany from penalising the evasion attempt with a fine of up to the amount of the tax concealed. He did not, however, explain why he felt the evasion objective should be the limit of the penalty, although he did mention that it was "obvious" that the authorities had no means of levying such a fine in the case at hand. (AM)

The ECJ case reference is C-285/09 R. judgment of December 7, 2010.

Keywords

deliberate deception, falsified invoices, fictitious customers, intra-community supply, invoicing requirements