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By PwC Deutschland | 13 July 2011

VAT-freedom lost if supplier accessory to customer’s evasion

The Supreme Tax court has followed the ECJ in holding that the VAT-freedom of an intra-community delivery is dependent on the formal documentation requirements of the VAT Implementation Order, but is lost if the supplier knew of the customer’s intent to defraud.

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The Supreme Tax Court has held in two cases on intra-community supplies to customers intending to commit VAT fraud in their own member states that knowledge by the supplier of the fraudulent intent rendered the transaction taxable. In this, it followed the ECJ case C-285/09 *R* judgment of December 7, 2010.

The first case concerned the delivery of luxury cars to a series of traders in Italy. Each trader authorised the same German resident to act as its representative. In point of fact, that person had effective control over each trader. These traders purportedly re-sold the cars to the ultimate end users and asked the supplier to deliver the cars direct. The traders did not file VAT returns. Thus, the case turned on the knowledge of the supplier. If he genuinely believed in a three-party, so-called “triangular” transaction, and had otherwise taken all reasonable (and required) steps to ascertain his customers’ identities, he could not be held liable for the consequences of the fraud. If, on the other hand, he was aware of the sham, he could not claim VAT exemption on the basis of adherence to formal requirements. Rather, a sham transaction had to be reinterpreted as the transaction that it was intended to hide, that is, in this case, a delivery from a German supplier to a private customer in Italy. That supply was subject to German VAT.

Interestingly, the tax office had originally based its claim – upheld by the lower tax court – on the contention that the transaction was subject to German VAT because the formal documentation requirements for the intra-community supply had not been met. The freight documents (CMR ticket) had not been signed. This approach has now been held to be without legal foundation, as there is no requirement in German law for a freight document to be signed by the deliverer or consigner.

The second case concerned sales to an Austrian VAT “merry-go-round”. The German supplier purchased mobile phones from an apparently reputable company and sold them on to – in his view – third party customers. These “third parties” them sold the mobiles on, and ultimately back to the original supplier, who then resold them to the taxpayer, who, in the meantime, had received further orders from his, by now, established customers. Ring coordination was helped by the fact that all members, Austrian customers and German ultimate supplier, were under the direct control of the same managing director, an individual since jailed for tax fraud. The VAT was lost in Austria, on the unreported, but VAT-ted, resale within Austria giving rise to an input tax deduction for the Austrian purchaser. The Supreme Tax Court has now held that it is necessary to investigate the circumstances as they were, or should have been, apparent to the taxpayer at the time. If he truly believed in genuine transactions and had otherwise adhered to all VAT formalities, his right to deliver free of VAT within the community was not lost because his customer’s purpose was fraudulent. If, on the other hand, he was aware of the fraud, he could not avail himself of the VAT-exemption normally available for intra-community supplies.

Supreme Tax Court judgments V R 28/10 (cars) and 30/10 (merry-go-round) of February 17, 2011 published on July 13

Keywords

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