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Intra-community supply exemption lost if customer concealed

The finance ministry has followed an ECJ and a Supreme Tax Court case in a decree refusing tax exemption on intra-community supplies to traders in breach of formalities, despite ability to demonstrate the actual delivery to a customer in another member state, if the trader has concealed the identity of his customer, thus facilitating a VAT fraud in the country concerned.

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On December 7, 2010, the ECJ held that a German dealer in luxury cars sold to Portuguese dealers could not claim VAT exemption on the intra-community supply, because he had invoiced the deliveries to fictitious recipients. He was, in the circumstances, able to demonstrate delivery to Portugal, but, so the ECJ, had connived at the Portuguese VAT fraud of his customers by deliberately concealing their identity. This entitled the German tax office to levy VAT as though the sales had been made directly to private individuals. Later, the Supreme Tax Court relied on this case in taking the same stance in another case involving the sale of mobile phones by a German dealer to Austrian and Italian customers in the same beneficial ownership as his German supplier. The beneficial owner of the customers and the supplier had, in the meantime, been jailed for VAT fraud. If the German intermediary was an innocent party acting with all due care, his right to exemption on his intra-community supplies could not be denied. If he was not, he would lose the exemption, despite apparent adherence to the spirit of the regulations.

The finance ministry has followed up on these two cases with a decree to the effect that intra-community supplies will not be exempt where the documentation and recording obligations have been breached and where the supplier has attempted to conceal the identity of the customer, thus allowing this person to conceal the acquisition in his own country. In such cases, it will no longer be open to the supplier to demonstrate actual intra-community delivery by other means.

The case references are ECJ C-285/09 *R* judgment of December 7, 2010 and Supreme Tax Court V R 30/10 judgment of February 17, 2011.

Keywords

exemption, intra-community supply