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By PwC Deutschland | 24 April 2012

VAT-free business transfer despite only short-term lease of premises

Following an opinion of the ECJ the Supreme Tax Court held that a sale of a shop’s stock and fittings accompanied by an indefinite lease on the premises cancellable at three month’s notice can be VAT-free as the sale of an entire business, if, in the circumstances, the items transferred are sufficient to enable the purchaser to operate on a lasting basis.

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The owner of a shop in Germany sold her business to a successor free of VAT under the exemption for sales of complete businesses or self-contained business units capable of their own independent economic existence. The actual transfer was of the ownership in the stocks and in the shop fittings at an agreed value and of the premises by way of a lease. The lease was for an indefinite period, but cancellable short-term by either side, i.e. at three month's notice. The tax office refused to accept that the sale was free of VAT, as the premises – necessary for the business operation – had not been effectively transferred for any significant length of time. It referred in this connection to a Supreme Tax Court judgment holding that a 10-year lease of necessary premises could be seen as indicating an effective business transfer with VAT exemption for the other assets sold. The seller disagreed with the implication that a lease cancellable at will indicated only a short-term business transfer where there was no actual intention to give notice on the lease. She claimed that official insistence on a long-term lease went beyond the requirements of the Sixth Directive (now the VAT Directive). In view of this the Supreme Tax Court had earlier referred the case to the European Court of Justice (ECJ). The ECJ was of the opinion that a sale of a shop's stock and fittings accompanied by an indefinite lease on the premises cancellable at three month's notice can indeed be VAT-free as the sale of an entire business, if, in the circumstances, the items transferred are sufficient to enable the purchaser to operate on a lasting basis. Accordingly, the final decision of the Supreme Tax Court was in favour of the seller.

VAT-exemption cannot be dependent on the lease term alone, as that would necessarily differentiate between businesses on owned, and on leased, premises. The court saw the conditions for VAT-exemption as met since the assets transferred were sufficient to enable the transferee to carry on a business operation on a lasting basis. It made the point that whilst a shop needed premises, it was not necessarily tied to any specific location and added that the intentions of the transferee were also important. An immediate decision to sell the assets acquired would indicate a taxable purchase of individual assets, whilst a continued business operation under the new owner for the following 23 months (the actual period until the shop was finally closed in the case at hand) showed that there was no immediate intention of winding it up. Thus VAT-exemption could not be refused on that ground alone. (mh)

Supreme Tax Court judgment XI R 27/08 of January 18, 2012 - published on March 7, 2012

Keywords

VAT-free business transfer, sale of entire business, self-contained busniness, short-term lease