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No input tax deduction on acquisition of intangibles to be placed at disposal of partnership

The ECJ has held that a German tax consultant cannot deduct the input tax on the acquisition of an intangible from one partnership for use by another for lack of his own economic activity.

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A German tax consulting partnership transferred its client base to its three partners on dissolution. These transfers were subject to VAT. The former senior partner (with a 60% share) placed his share of the client base at the disposal of a second partnership (in which he held a 95% interest) free of charge. The tax office refused him a deduction for the input tax on the transfer as the asset acquired had not been used for a commercial activity.

The ECJ has now agreed with the tax office. The tax consultant had allowed his second partnership access to his client base free of charge. This permission had been granted without consideration. It had also been granted without any expectation of earning income. The tax consultant had thus paid input tax on a purchase for which there was no valid output transaction. Accordingly, he could not deduct the input tax. The court went on to examine a possible breach of the principle of fiscal neutrality, but did not change its conclusion. Rather, it held that fiscal neutrality was a principle of interpretation and not an absolute principle in its own right. It could therefore not be followed in direct contradiction of unambiguous provisions of the VAT Directive. Reference was also made to the *Polski Trawertyn* judgment (C-280/10 of March 1, 2012) in which the court had insisted on an input tax deduction for partners acquiring capital goods for transfer to a future partnership. However, the court refused to apply the same principle by analogy, as the *Polski Trawertyn* judgment addressed a situation where the national law excluded an input tax deduction, regardless of how the transaction was structured. This contrasted with the present case where the tax consultant had deliberately chosen an unfavourable arrangement in disregard of the other available options. There was thus no need to force a deduction at variance with the letter of the law as the only way of achieving the overriding purpose of the system.

The ECJ case reference is C-204/13 *Malburg*, judgment of March 13, 2014.

Keywords

input tax, intangibles, partnership