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No VAT avoidance through clash of concept in mail order business

The Supreme Tax Court has held that the mail order provision in the VAT Act cannot be avoided by having the customer formally request the foreign supplier to arrange for transport on his behalf.

A GmbH arranged for delivery of medicines by its Dutch subsidiary (registered as a chemist – apothecary) to a series of German chemist’s shops to be picked up by the end customer against a previously placed customer order. The customer order form gave the customer the choice between delivery to the chemist’s shop for a fixed fee (€0.50 per item) or personal pick-up in Holland. The Dutch subsidiary arranged the transport through its GmbH parent, retaining the difference between that company’s actual charges and the €0.50 paid by the customer as “commission” for arranging the transport. That subsidiary claimed exemption from VAT in Holland under the mail order exception making mail order deliveries to private consumers taxable in the country of the consumer (unless the total annual supply did not exceed a set limit of – in Germany – €100.000). In Germany, the subsidiary took the position that the business model was not mail order as the transport had been arranged at the specific request of the customer and therefore on his or her behalf as a separate supply. It explained its different conclusions in the two countries on the basis of a slight difference in wording between the mail order provisions of the respective VAT acts. The tax office, though, saw the whole arrangement as mail order from Holland, subject to German VAT.

The Supreme Tax Court has now agreed with the tax office. The customer had no choice as to the means of transport and the personal pick-up option was clearly of only theoretical interest as shown by the minimal use made of it. The actual transport had been arranged by the supplier through its own parent company and its cost had no effect on the standard charge the customer was asked to pay. This standard charge was minor, and could only be justified in economic terms on the basis of bulk shipments in a fully loaded van. The court also pointed out that the language difference claimed was not the only one relevant to the case at issue, citing the English and French versions as further examples. Accordingly, the purpose of the provision must be taken into account, too, and this was to tax large-scale mail order business in the country of the consumer in order to avoid major shifts to countries with low VAT rates. Full exemption from VAT was most certainly not the objective of the provision in the VAT Directive.

Supreme Tax Court judgment XI R 2/13 of May 20, 2015 published on November 4

Keywords

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