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By PwC Deutschland | 08 March 2019

Input tax deduction for advance payment despite non-delivery of ordered goods

The purchaser of thermal power units, which were not delivered due to fraud, shall not be denied the right to deduct input tax from an advance payment if the supply appeared to be certain at the time of payment. In three decisions, the Supreme Tax Court follows a judgment of the European Court of Justice (ECJ), to which it has referred the cases earlier for a preliminary ruling.

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Background: In September 2016 the Supreme Tax Court has referred questions to the European Court of Justice (ECJ) first in connection with the deduction of input tax on thermal power units (heat and power plants) by the purchaser (plaintiff) and second relating to the adjustment of the deduction of input tax paid on a payment on account. The cases under review concerned supplies which did not take place due to fraud and where an adjustment of the input tax deduction was claimed by the tax office. The Supreme Tax Court suspected at the time that no input tax deduction was possible because the future supply of the thermal power unit was uncertain. After closer examination by the ECJ, the situation looks different.

In its judgment of May 31, 2018 (joint cases C-660/16 and C-661/16, *Kollroß / Wirtl*) the ECJ decided as follows:

Input tax deduction on down payments possible despite non-delivery of thermal power units: If - at the time of payment - the buyer knows all relevant information of the future supply and if the supply of those goods appeared to be certain, input VAT-deduction is possible. However, a VAT deduction by the purchaser is not possible if objective circumstances show that he knew or should reasonably have known at the time of payment that the performance of that delivery was uncertain. This, however, was not true in the case at hand, as established by the Supreme Tax Court in its final follow-up judgment.

As regards the second question, the ECJ was of the opinion that an adjustment (correction) of input- VAT is subject to repayment of the deposit. The Supreme Tax Court – in its final judgment - held that in the case of dispute a subsequent adjustment of the input tax deduction couldn’t be required by the tax office, as the fraudulent seller did not repay the purchase price.

Source

Supreme Tax Court judgment of December 5, 2018 (cases XI R 44/14, XI R 8/14, XI R 10/16), published on March 6, 2019

Keywords

fraudulent supplier, input VAT deduction, non-delivery