

By PwC Deutschland | 21 December 2020

No VAT exemption for heat supplies provided by homeowners' association

The European Court of Justice (ECJ) held that the supply of heat by a homeowners' association to its members, the residential property owners, is subject to VAT. Accordingly, the proportionate input VAT allocable to the acquisition and operation costs of the heat generating power plant will be deductible. The case was referred to the ECJ by the Lower Tax Court of Baden-Wuerttemberg.

Background

Section 4 No. 13 of the German VAT Act exempts from VAT: (...) *'services supplied by associations of residential property owners (...) to the residential property owners and co-owners, in so far as the services consist in making the common property available for use, maintenance, repair and other management purposes, as well as the supply of heat and similar goods.'*

Case of dispute

A homeowners' association (WEG) built and operates a heat generating power plant and supplies heat to the residential property owners (homeowners) who are also members of the association. The homeowners own the land on which the power plant is located. The German tax office denied the input VAT deduction on the acquisition cost and operational expenses of the combined heat and power unit attributable to heat generation, stating that the supply of heat by WEG to the homeowners is tax-exempt from VAT under Sec. 4 No. 13 of the German VAT Act and therefore precludes the deduction of input VAT. The Lower Tax Court of Baden-Wuerttemberg had suspended the proceedings and referred the following question to the ECJ for a preliminary ruling:

'Are the provisions of [the VAT Directive] to be interpreted as precluding legislation of a Member State under which the supply of heat by associations of residential property owners to its owners is exempt from VAT?'

ECJ decision

The supply of heat by associations of residential property owners to the homeowners is not a VAT-exempt transaction but in principle subject to VAT. The German VAT regulation in question (i.e. Section 4 No. 13 of the German VAT Act) does not comply with EU law. The ECJ therefore held that *"The relevant provision in Article 135(1)(l) of Directive 2006/112/EC on the common system of Value Added Tax precludes a national legislation which exempts from VAT the supply of heat provided by the homeowners' association to the owners who are also members of that association."*

The ECJ points out that the supply of heat by the WEG is an economic activity. The property owners (homeowners) who are also members of the association pay a proportionate fee corresponding to the actual consumption in return for the heat supplied. It is irrelevant whether this activity is pursued with the intention to generate profits.

The ECJ went on to say that leasing or letting of immovable property provided for in Article 135(1)(l) of the VAT Directive is exempt from VAT because the letting of immovable property, whilst being an economic activity, is normally a fairly passive activity, not generating any significant value added. Such an activity is thus to be distinguished from other types of activities which are either industrial or commercial in nature.

The supply of heat generated by WEG through the operation of the power unit is distinct from the (tax-exempt) provision of immovable property (i.e. land). With the supply of heat, the association sells a tangible

asset, which is the result of the exploitation of another tangible property (the land). However, it does not grant the purchasers of heat title to the land in such a way as to take possession of the "property of the power plant" and exclude any other person from this right.

Note: The Lower Tax Court - in a second step - will now review the case again and likely decide input VAT to be deductible insofar as it relates to costs of purchasing and operating the combined heat and power unit.

Source:

The ECJ case reference is **C-449/19** *WEG Tevesstraße*, judgment of 17 December 2020.

Keywords

VAT Exemption, heat generating power plant, heat supplies, power plant