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By PwC Deutschland | 03 June 2022

Update - ECJ: VAT on entire amount of brokerage commission payable immediately even if fee is paid in instalments

In the case of a one-time brokerage service, the entire fee is subject to VAT in the year in which the service is rendered. This also applies if payment of the fee is spread in equal annual installments over the subsequent years. With its decision the European Court of Justice (ECJ) answers the request for a preliminary ruling submitted by the Federal Tax Court and confirms its case law that VAT is due at the time services are supplied, even where payment relating to the transaction carried out was not yet received.

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Background

X-Beteiligungsgesellschaft mbH, a company incorporated under German law ('X') and registered for VAT in Germany acted as negotiator for T?GmbH ('T') as intermediary in the latter company's sale of real estate. It is evident from the fee agreement concluded between X and T in November 2012 that X was successful and thus had already complied with its contractual obligations in 2012. The fee for the arrangement of the sale of property was fixed at EUR 1 000 000 plus VAT, payable in five instalments of EUR 200 000 plus VAT each. The instalments were to be paid annually starting from 30 June 2013. On the due date of each instalment, X issued an invoice and paid the VAT due. The competent tax office held that the entire supply of services by X to T had taken place in 2012 and that it was then that X should have paid the VAT in full.

The Federal Tax Court referred the case to the ECJ for a preliminary ruling. By its **first question**, it sought to establish, in essence, whether Article 64(1) of Directive 2006/112 was to be interpreted as applying to a transaction consisting of a one-time supply of services for which the taxable person receives payment in instalments. As a matter of fact, the supply of services at issue was a one-time supply which was completed in its entirety in 2012.

The **second referral question**: Whether Article 90(1) of Directive 2006/112, which provides that a cancellation, a refusal or total or partial non-payment will lead to a corresponding reduction of the taxable amount, is applicable here, i. e. where a taxable person making a one-time supply has agreed with the customer to divide the payment of consideration into several instalments?

The **Advocate General** (GA) in his opinion of 1 July 2021 proposed to the ECJ that the following answer should be given:

The expression 'successive payments' as used in Article 64(1) of Directive 2006/112 is to be understood as referring to transactions which, on account of their recurring nature, require the payment of the consideration to be spread over time or made in instalments. That provision must therefore be interpreted as not applying to a transaction consisting of a one-time supply of service for which the taxable person receives payment in instalments. As to the second referral question, Article 90(1) of Directive 2006/112 – in the case where a taxable person making a one-time supply has agreed with the customer to divide the payment of consideration into several instalments – is not applicable in the case of X.

ECJ decision

The ECJ confirmed the line taken by the GA and held that VAT regarding the agency service rendered in 2012 was payable in full already in that same year.

According to Art. 63 of Directive 2006/112 VAT is due to be paid at the time of the supply of goods or services, i.e., after the relevant service has been completed or fulfilled. With respect to the wording 'supplies which give rise to successive payments' in Article 64(1) the ECJ concluded that this provision

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implicitly required that the supply be completed during those periods. The application of this provision thus implies a correlation between the nature of the services in question and the payment in installments. Hence, this provision could not affect a one-time service (here: the arrangement of the property-sale) even if the compensation was to be paid in instalments. It would be contrary to Article 63 of Directive 2006/112 to allow taxable persons, who have supplied a one-time service in conjunction with the conclusion of an agreement for payment in instalments, to opt for the application of Article 64(1) VAT Directive and thereby determine themselves the chargeable event and the time VAT is due.

Finally, the ECJ noted that, with regard to the provision of services, it was for the competent national authorities and courts to finally ascertain the precise time at which the supply of service took place.

Regarding the **second referral question** the ECJ - in line with the recommendations of the AG - held that in the event of an installment agreement, non-payment of a partial amount of the remuneration prior to its due date cannot be regarded as “non-payment of the price” within the meaning of Article 90(1) of Directive 2006/112 and, therefore, cannot lead to a reduction of the taxable VAT base.

UPDATE (3 June 2022)

The Supreme Tax Court – case V R 37/21 (V R 16/19) - has now published its final decision, applying the criteria laid down in the ECJ decision to the case in dispute. Consequently, the appeal of the tax office was granted.

As regards the question of non-recoverability (i. e. where payment of the fee is spread in equal annual installments over the subsequent years), the Supreme Tax Court agrees with the ECJ that, in the case of an agreement for payment in instalments, such partial non-payment will not lead to a corresponding reduction of the taxable amount.

The matter was now referred to the Regional Tax Court who had wrongly assumed that the tax was uncollectible. Further findings on the accrual of the tax in case of partial services are necessary and to be made in the second instance before the Regional Tax Court.

Source:

The ECJ case reference is **C?324/20** *X-Beteiligungsgesellschaft* judgment of 28 October 2021.

Keywords

brokerage commission, instalments