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By PwC Deutschland | 15 February 2022

ECJ: Time of input Vat deduction in case option to charge VAT upon receipts is chosen

In a most recent ruling, the European Court of Justice (ECJ) held that, for situations where the output VAT is calculated at the time the remuneration is received rather when the service was completed, the German VAT provision that the right to deduct input VAT must be exercised upon completion of the supply or service is not in line with current EU law, in particular Articles 167 and 66 (1) of Council Directive 2006/112/EC.

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Background

The request for a preliminary ruling from the Regional Tax Court of Hamburg deals with the question at which point in time a taxpayer is entitled to deduct input VAT where the lessor and the plaintiff are taxpayers subject to VAT on the basis of remuneration received rather than on the basis of the remuneration agreed (i.e. where the VAT is to be charged when the service has been provided).

The plaintiff, a civil-law company (GbR), leased a plot of land for industrial and commercial purposes of which it was itself the lessee. GbR and its lessor had effectively waived the tax exemption for the rentals and thus the lease payments were subject to VAT. However, and distinct to the normal course of events, from 2004 GbR's rental payments were partly deferred. Thus, part of its rent due in the years 2009 to 2012 was effectively paid only in the years 2013 through 2016. The local tax office was of the opinion that the input tax deduction claim had already arisen with the performance of the transaction – in this case the monthly rental of the property. The Regional Tax Court of Cologne had doubts as to the compatibility of German law with EU law in the light of Article 167 of the VAT Directive, under which the right of deduction arises only at the time when the deductible tax becomes chargeable, and referred the case to the ECJ for a preliminary ruling.

In his opinion of 9 September 2021, the Advocate General (GA) suggested the ECJ rule that the application of the respective German VAT regulation, according to which the right to deduct input VAT must be exercised once the service has been carried out, to be in breach of EU law.

Decision of the ECJ

The ECJ confirmed the Opinion as proposed by the GA and held that *Article 167 of Council Directive 2006/112/EC (VAT Directive) precludes a national legislation which provides that the right of input tax deduction arises at the time the transaction takes place if - pursuant to a national derogation under point (b) of the first paragraph of Article 66 of Directive 2006/112 - the VAT becomes chargeable to the supplier of services only when remuneration is received and under the condition that the fee has not yet been paid.*

Point (b) of the first paragraph of Article 66 of the VAT Directive states that Member States may provide, by way of derogation from the general provision of Article 63 (according to which VAT shall become chargeable at the time the services are supplied), that VAT becomes chargeable at the time of receipt of payment at the latest. In the present case, Germany has made use of that option by virtue of Sec. 13(1)(b) of the VAT Act, which provides that, as it is in the case at hand where the tax was to be calculated based on the remuneration received, that the VAT also becomes chargeable at this point in time.

Furthermore, the plaintiff and the lessor have been authorized by the local tax office to charge VAT based on the remuneration received. They were, subject to confirmation by the referring Regional Tax Court, taxable persons for whom VAT becomes chargeable no later than at the time payment is received, within the meaning of point (b) of the first paragraph of Article 66 of the VAT Directive.

The ECJ also reiterated the reasons and intention for implementation of Art. 167a VAT Directive

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2006/112/EC: It was primarily introduced to support small and medium-sized enterprises that have difficulty paying the VAT to the competent authority prior to receipt of payment from their customers, and in addition to allow Member States to introduce an optional cash accounting scheme that does not have a negative effect on cash flow relating to their VAT receipts.

Subject to the review and confirmation yet to be carried out by the referring Regional Tax Court of Cologne with regard to the material conditions as to the German derogation under Article 167 in conjunction with Article 66(1)(b) VAT Directive (which provides that 'the tax becomes chargeable at the latest when the fee or the price is received'), it appears to the ECJ very likely that the right of the plaintiff to deduct input tax arose at the same time the rental fee was received by the lessor.

Source:

The ECJ case reference **C-9/20** *Grundstücksgemeinschaft Kollaustraße 136* judgment of 10 February 2022.

Keywords

input VAT deduction, remittance basis, remuneration agreed