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By PwC Deutschland | 02 November 2023

ECJ: Subscription bonus to new subscribers – gifts of small value or supply of goods?

In a referral from Portugal the ECJ was asked on the VAT situation in case of the supply of a subscription gift of small value in the form of tablets or smartphones to new subscribers of consumer protection magazines. In its opinion, the ECJ saw the circumstances of the case to suggest that the provision of a subscription bonus is an ancillary service connected with a main service because the bonus was only granted to increase the number of subscribers to the magazines and thus contributed to improve the profit situation of the plaintiff.

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Background

Deco Proteste – the applicant, a company established in Portugal - publishes and markets magazines and other documents providing information on consumer protection. Those goods are sold only on subscription. In the context of promotional campaigns aimed at attracting new customers, it gives new subscribers a bonus by means of a gift which can be a tablet or smartphone, each with a unit value of less than 50 euros.

The subscription gift is sent by courier to those subscribers with their magazine after the first monthly subscription payment, the amount of which is identical to that of subsequent monthly payments. As there is **no minimum subscription period**, customers may keep the subscription gift without incurring any penalty after the first monthly payment, even if the subscription is cancelled.

The gifts are bought from companies established in the EU and are subject to VAT through the reverse charge procedure.

In 2019, following a VAT review concerning the years 2015 to 2018, the tax and customs authority noted that the invoices issued by the applicant stated the amount of the subscription to which a reduced VAT rate of 6% was applied. However, those invoices made no reference to the subscription gifts. The tax and customs authority therefore subjected the supply of those gifts to VAT at the standard rate of 23%.

The referring court asked the ECJ whether the bonus gift, i. e. the tablet or smartphone, is given in exchange for value (“supply of goods for consideration”) and subject to VAT, even if that value is not identified or individualized.

Decision of the ECJ

The ECJ held that the provision of the bonus in kind in return for taking out a subscription to periodicals constitutes a supply that is ancillary to the principal service of supplying periodicals and must not be regarded as a disposal of goods free of charge.

It is apparent to the ECJ from the information provided that the provision of subscription gifts for all new subscriptions is an integral part of the commercial strategy of the applicant. Furthermore, subscription costs are considerably higher when accompanied by subscription incentives such as a gift. The ECJ sees a clear connection between the provision of the gift and the subscription to the magazines.

Hence, the circumstances of the case appear to illustrate a main supply accompanied by an ancillary supply. The sole purpose of the gift to new subscribers is to increase the number of subscribers to the magazines published by the applicant and, consequently, to increase its profits.

Moreover, the subscription gift offered for the years in dispute (2015 to 2018) enabled new subscribers to benefit, under the best possible conditions, from the service provider’s main service, namely the reading of the magazines for which the subscription was taken out, in so far as a tablet and a smartphone make it possible, for example, to consult a digital version of those magazines.

Takeaway from a German point of view

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(this is a free translation from excerpts of an article in the October edition of the German VAT News - *Umsatzsteuer-News, Ausgabe 10 - Oktober 2023*)

It is not quite clear from the ECJ decision whether the main service consisted of print editions or digital editions of the magazine (or both). From a purely German perspective, it appears that in the case of non-cash bonuses (bonus in kind) from newspaper and magazine publishers to new subscribers who signed up for a long-term subscription, there is commonly a supply of goods for consideration or one single supply". In the case submitted to the ECJ subscribers could cancel the subscription already after payment of the first installment: Thus, contrary to the wording of the view held by the German tax administration, it might apparently be possible that a long-term subscription is not preconditional.

There are apparently no judgments from the Supreme Tax Court in this respect. Thus, it is not clear at present whether future Supreme Tax Court decisions would come to different conclusions. The Hamburg Tax Court in a similar case (decision of 19 January 2022; case ref. 6 K 16/20) held that the grant of premiums in kind upon subscription to a magazine including DVDs with a feature and a program guide is not a single service together with the delivery of the magazine. Since no further appeal was launched the judgment of the Hamburg Tax Court is final.

Source:

ECJ, judgment of 5 October 2023 (**C?505/22**), *Deco Proteste – Editores*

Keywords

ancillary service, free gift