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By PwC Deutschland | 19 February 2024

Reduced VAT rate for supply of works of art by creator or his successor in title

According to a decision of the Supreme Tax Court the author of works of art for the purpose of the reduced VAT rate as provided in Section 12 (2) No. 13 VAT Act is the (intellectual) creator of the work and not his or her successor in title. The question of authorship for VAT purposes must be answered in accordance with the provisions of the Copyright Act.

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Background

Section 12 (2) No. 13 VAT Act provides that “The VAT rate is reduced to 7 percent for the supply and intra-Community acquisition of goods mentioned in number 53 of Annex 2 (i. e. works of art, including, original sculptures, made in all types of material), provided that the supplies are **carried out by (a) the creator of the goods or his successors** in title (…)”

In the case of dispute, the artist (A) and a gallery (operated in the legal form of a GmbH) set up a civil-law partnership (GbR) - the plaintiff - whose business purpose is the production of the sculptures as such and the marketing of those products of art. Management and representation of the plaintiff is handled by the gallery. Furthermore, A grants the plaintiff the exploitation rights to his projects. With respect to the sale of two sculpture installations, the plaintiff - in contrast to the opinion of the tax office - took the view that the supply was subject to the reduced VAT rate of 7%. The requirements of sec. 12 para. 2 no. 13 lit. a VAT Act were fulfilled, as the term " creator" used therein - in contrast to the Copyright Act - was to be interpreted broadly and also included jointly produced works of art.

The local tax court of first instance had rejected the claim; the Supreme Tax Court upheld this former decision and rejected the plaintiff's appeal.

Decision

The plaintiff is not entitled to the reduced VAT rate as only A is the author of the works within the meaning of the Copyright Act. Only the universal successor is eligible as legal successor within the meaning of Section 12 (2) No. 13 VAT Act, as distinguished from a succession to a particular object or property (singular successor, as in the case of dispute)

The legislator has intended to ensure that art supplies are privileged either by purchasing "first hand" from the artist **or** "second hand" from a "normal dealer" at a reduced tax rate **or** "second hand" from a dealer by applying the margin scheme of Section 25a VAT Act (in this context, a *dealer* is a person who deals with movable tangible property in the course of his business or sells such property in his own name).

The requirements for the reduced VAT rate pursuant to sec. 12 para. 2 no. 13 lit. a VAT Act are not met, as the plaintiff was neither the author or co-author nor the legal successor of the author of the sculpture installations (A). Legal succession in this context refers to universal succession only as opposed to a singular succession as in the case at hand, i. e. the succession to a particular object.According to the wording of Section 7 of the Act on Copyright and Related Rights (Copyright Act) “the author (here: A) is the one who creates the work”. Pursuant to Section 28 (1) Copyright Act, copyright is inheritable, but pursuant to Section 29 (1) it is in principle not transferable. Application of the reduced VAT rate also fails because the sculpture installations were not directly supplied to the plaintiff by the author.

Section 7 Copyright Act which defines the author as the creator of the work and the fact that the protected works within the meaning of Section 2 can only be personal intellectual creations of the author is in line with EU law, since a "work" in compliance with Directive 2001/29/EC can only be work which represents the

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author's own intellectual creation. In accordance with Directive 2001/84/EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art, the Member States provide for a resale right in favor of the author of the original of a work of art, which is conceived as an inalienable (non-negotiable) right and which cannot be waived by the creator (author) in advance. Copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation (ECJ decision of 16 July 2009 *Infopaq International* C-5/08, para. 37).

Nor can the plaintiff be regarded as the author on the basis of derived rights, because it not only had the sculpture installation produced according to the author's specifications, but also obtained these specifications free of charge and on the basis of a shareholder contribution from A (the creator of the sculptures).

Reference:

Supreme Tax Court, judgment of 18 October 2023 (XI R 15/20), published on 15 February 2024.

Keywords

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