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By PwC Deutschland | 10 May 2024

Assessment basis for VAT upon transfer of immovable property in exchange of shares

The ECJ decided in a polish case that the taxable amount of a contribution of property by one company to the capital of a second company in exchange for shares in the latter must be determined based on the issue price of those shares if the parties mutually agreed to that effect.

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Background

P. is a company registered for VAT; its authorized capital is by shares. P. sought to increase that capital through contributions in kind from two other companies (W. and B). More specifically, those two companies concluded several contracts with P. concerning the transfer of properties they owned and a cash contribution in exchange for shares in P. Under the relevant contracts to that effect, it was agreed that the consideration for the contributions in kind to P.'s capital should be the issuing of shares in the latter, valued at their issue price. The share price was based on the value of the properties contributed, which had been assessed in in adherence to third party (market) prices.

The local tax office disagreed with the company's approach, arguing that the taxable amount should be based on the nominal value of the shares in B rather than on the higher issue value. As a result, they refused P.'s right to deduct the VAT regarding the amount exceeding the nominal value of the shares.

ECJ decision

The ECJ held that the taxable amount of a contribution of property by one company to the capital of a second company in exchange for shares in the latter must be determined in relation to the issuing value of those shares when those companies mutually agreed that the consideration was to be the issuing price of the shares.

In the opinion of the ECJ it is already apparent from the wording of Article 73 of the VAT Directive that the taxable amount includes everything which constitutes consideration obtained or to be obtained by the supplier in respect of the supply of goods or services.

Furthermore, it follows from established ECJ case?law that the taxable amount for a supply of goods is the consideration received by the taxable person. In any case it is not a value estimated according to objective criteria (see, to that effect, judgment of 19 December 2012, *Orfey Balgaria*, **C?549/11**, paragraph 44 and the case-law cited).

In the present case, the subjective value of the consideration for the property corresponds to the monetary value that W. and B. attributed to the shares in P. when accepting those shares in exchange for the contributions in kind. Subject to verification by the referring court, it is appears apparent from the contracts concluded between the parties that the subjective value of each of those shares acquired by W. and B. in connection with the capital increase should correspond to the issue price of those shares.

That assessment is not called into question by the fact that the issue value of the shares was determined through an assessment by a third party of the market value of the properties contributed. To the ECJ, that assessment demonstrates only the fact that those parties agreed on terms and conditions analogous to those which other parties would have been able to agree on for the sale of such properties on the market.

Reference:

ECJ, judgment of 8 May 2024 (**C?241/23**), *Dyrektor Izby Administracji Skarbowej w Warszawie*.

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Keywords

Share exchange, contribution in kind