By PwC Deutschland | 17.05.2024

ECJ: Transactions between members of VAT group taxable?

In a case previously dealt with by the European Court of Justice the Supreme Tax Court saw the need for yet another preliminary ruling regarding the current German VAT situation of non-taxable intra-group transactions. In his Opinion the Advocate General takes the view that a VAT group’s internal transactions do not fall within the scope of value added tax.

Background

The plaintiff, a German foundation governed by public law,operatesa university and provided services subject to VAT on the one hand but also pursued sovereign responsibilities which were non-taxable. It was the parent (controlling company) of a limited liability company (GmbH) which, among other things, provided cleaning services for the plaintiff for consideration. These services covered areas used for business purposes (hospital operations) and space used for sovereign purposes (university operations).

The purpose the second reference V R 20/22 (V R 40/19) submitted by the Supreme Tax Court to the ECJ (following the ECJ decision in the case **C-269/20** *Finanzamt T*) is to clarify whether the present practice that internal transactions between members of the VAT group are not VATable should be continued. Secondly, the Supreme Tax Court asks whether those internal services are (at least) subject to VAT if the recipient is not or only partially entitled to input VAT deduction.

Opinion

The Advocate General (AG) proposes to the ECJ to decide that supplies of services for consideration between persons being part of a VAT group formed by legally independent persons, but closely bound to one another by financial, economic and organizational links do not fall within the scope of value added tax (VAT), even where the recipient of the supply of goods or services is not (or is only partly) entitled to deduct input VAT.

From the point of view of the AG, if there is no tax advantage for the members of the group which are not entitled to deduct VAT, the doubts of the referring Supreme Tax Court concerning the objective of the VAT group scheme consisting in preventing certain abuses are not justified.

The opposite approach, according to which services supplied by one member of the VAT group to another member of the same VAT group (or to the VAT group itself) would constitute transactions subject to VAT, would presuppose that the member was a taxable person, which is incompatible with the nature of the VAT group as a single taxable person, as established in the settled case-law of the ECJ (referred to in points 38 to 40 of the Opinion).

The GA did also mention that the concept of a VAT group was introduced into EU law by Second Council Directive 67/228/EEC and based on the German ‘Organschaft’ legislation, the core element of which was the non-taxable nature of internal transactions in order to avoid the cumulation of taxes. That concept has subsequently evolved through successive amendments made by the Sixth Directive and, most recently, by the VAT Directive.

Lastly and as a matter of fact, the objective of guaranteeing ***‘organizational’ fiscal neutrality*** (see Opinion, points 83 et seq) of the VAT group scheme nevertheless remains entirely valid for undertakings which do **not have the right to deduct input VAT**. For those undertakings, provided that a VAT group exists and the internal transactions are not taxable, it is immaterial whether those undertakings supply the goods or services themselves or through a controlled undertaking. In both cases, those supplies of goods or services

will not be burdened by VAT. It is therefore precisely for those undertakings that the rationale for guaranteeing ‘organizational’ fiscal neutrality remains valid. Accordingly, for those undertakings, VAT grouping not only has a procedural scope, as an administrative simplification, but also retains a material scope.

Reference:

ECJ case reference C?184/23 *Finanzamt T II* - **Opinion of 16 May 2024**.

Keywords

VAT group, intracompany transaction