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By PwC Deutschland | 30 July 2024

VAT treatment of additional remuneration for copyrights granted in the past

According to a recently published decision of the Supreme Tax Court a so called “fairness compensation” which is paid by a TV station to the screenwriter based on the specific provisions in the German Copyright Act is subject to VAT as remuneration from a third party within the meaning of Section 10 (1) sentence 3 of the German VAT Act.

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Legal Background

German VAT Act: According to sec. 10 para. 1 sentence 3 of the German VAT Act (old version as applicable for the years in dispute 2014 and 2015), "*the consideration [also] includes considerations which are paid by a party other than the recipient of the service*."

The **Act on Copyright and Related Rights (Copyright Act)** also protects the author if his remuneration is noticeably disproportionate to the income that the owner of the rights of use derives from the marketing or exploitation of the work.

Section 32 (1) sentence 3 Copyright Act: „*If the agreed remuneration is not equitable, the author may require the other party to consent to a modification of the agreement so that the author is granted equitable remuneration*." - **Section 32a Abs. 2 sentence 1 Copyright Act** deals with the author's further participation: „*If the other party has transferred the right of use or granted further rights of use and if the author's disproportionately low remuneration results from proceeds or benefits enjoyed by a third party, the latter is directly liable to the author in accordance with subsection (1), taking into account the contractual relationships within the license chain*."

Case of dispute (pertaining to the years 2014 and 2015):

The plaintiff, a screenwriter, had concluded contracts with various production companies for the exploitation of his screenplays. The latter had transferred the exploitation rights to TV stations, which in turn had commissioned them to produce the corresponding films. As a result, the relevant income from the exploitation does not generally accrue to the production companies, but rather on the subsequent stage, i.e., primarily to the TV broadcasters.

In the case of dispute, the parties some years later agreed on additional joint remuneration guidelines for fictional productions, which should also apply to old cases from the period prior to the conclusion of the initial agreements. These provided for a participation model for screenwriters. After reaching a certain participation range and when reaching further ranges, the authors should each receive additional remuneration („fairness compensation"). Thus, the plaintiff received additional €50,000.

This was in line with the provisions of the Copyright Act which foresees claims both against the author's contractual partner and against the other companies in the licensing chain. The latter claim was the subject of the dispute before the tax courts, which led to the question whether the "fairness compensation" paid by a TV broadcaster to the plaintiff should be treated as remuneration from a third party within the meaning of Section 10 (1) sentence 3 VAT Act (as held by the tax office) or as a non-taxable transaction for VAT purposes (as claimed by the plaintiff).

The Düsseldorf Tax Court dismissed the claim, and the case went before the Supreme Tax Court.

Decision

The Supreme Tax Court concurred with the court of first instance and held the „fairness compensation" to

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be remuneration from a third party and thus subject to VAT. The court confirmed the necessary direct connection between the service provided and the consideration received: An analysis of the copyright claims shows that both the claims against the author's contractual partners and the claim against third parties are claims for an increased fee payable to the first purchaser for the granting of the right of use by the author. The performance-based fees granted later are thus part of the taxable amount (VAT basis) for the transaction.

After an in-depth review and analysis of the **various ECJ decisions** cited by the plaintiff to support his claim the Supreme Tax Court considered the VAT treatment of the subsequent payments not to be against EU law. A preliminary request to the ECJ was therefore not found to be necessary.

As mentioned above, the key point in any situation is whether there is a direct connection between the service and the consideration. This is the case here, the Supreme Tax Court says. The taxable amount for VAT in respect of supplies of goods and services encompasses every consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies. This also includes subsidies paid to taxable persons and where the subsidy is directly linked to the price of the transaction in question.

It is not a requirement under the Sixth Directive that, for a supply of goods or services to be effected ‘for consideration’, the consideration for that supply to be obtained directly from the person to whom those goods or services are supplied. Article 11.A(1)(a) of that directive provides that the consideration may be also obtained from a third party.

In several decisions the ECJ has held that the taxable amount includes in respect of supplies of goods and services everything which constitutes the consideration obtained by the supplier from the purchaser, the customer or a third party for such supplies. This includes subsidies directly linked to the price of such supplies.’ The purchasers of the goods or services must benefit from the subsidy granted to the beneficiary. The price payable by the purchaser must be fixed in such a way that it diminishes in proportion to the subsidy granted to the seller or supplier of the goods or services, which therefore constitutes an element in determining the price demanded by the latter. It must also be ascertained whether, objectively, the fact that a subsidy is paid to the seller or supplier allows the latter to sell the goods or supply the services at a price lower than he would have to demand in the absence of subsidy.

The granting of the right to additional payments in the case of dispute was – as defined more specifically in the ECJ judgment *Administration de l'enregistrement, des domaines et de la TVA* C-288/22 (see our **blog post of 29 December 2023**) - based on an activity effected on a continuing basis and a setting for which the procedures for fixing that amount are foreseeable. In addition, the granting of the additional claim was not subject to any uncertainties and already had a value by itself.

Source:

Supreme Tax Court, decision of 8 May 2024 (XI R 16/20) – published on 25 July 2024.

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