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By PwC Deutschland | 24 September 2024

No retroactive correction of invoices for want of reference to intra-Community triangular transaction

According to the Supreme Tax Court, the subsequent correction of invoices does not have retroactive effect considering the requirements laid down in Section 14a (7) VAT Act regarding the additional obligations on the issue of invoices for intra-Community triangular transactions. This decision is a follow-up on an earlier judgment of the European Court of Justice from 2022 in the case C-247/21 Luxury Trust Automobil.

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Background

A wholesale trader (the plaintiff) sold agricultural machines from manufacturers in Germany, Belgium, New Zealand, and the Czech Republic, primarily to Poland. The machines were ordered by the plaintiff from the manufacturers and delivered from there directly to the customers in Poland. The VAT identification number (VAT ID-No.) of the respective country of residence was used. For the supplies from other EU Member States to Poland, the plaintiff declared intra-Community transactions subject to VAT in Germany in his German VAT returns and at the same time claimed the input VAT deduction in accordance with Section 15 (1) sentence 1 no. 3 VAT Act.

The subsequent deliveries in Poland were declared by the plaintiff as VAT-exempt intra-Community supplies from Germany to Poland within the meaning of Section 4 sentence 1 no. 1 letter b VAT Act in conjunction with Section 6a VAT Act. Neither the plaintiff's European Sales List (ESL - Summary VAT Report – „*Zusammenfassende Meldung*“) nor the invoices to his customers initially gave any indication of an intra-Community triangular transaction.

Tax office: No retroactive correction and no input VAT deduction

As regards the supplies between the manufacturers based in the other EU countries and the plaintiff and the customers based in the other EU countries, the tax office took the view that intra-Community chain transactions existed. The place of supply for deliveries made by the plaintiff to its customers was, in accordance with sec. 3 para. 7 sentence 2 no. 2 VAT Act, in each case in the country of the customer (usually Poland), i. e., where the transport or dispatch ended.

The plaintiff would have had to register there for VAT purposes and declare its sales from deliveries to the customers. The plaintiff would also have had to pay VAT there for an intra-Community acquisition to be allowed an input VAT deduction. At the same time, the plaintiff had made intra-community acquisitions in Germany in accordance with Section 3d sentence 2 half-sentence 1 VAT Act which states that „*if the purchaser uses a VAT identification number issued to him by another Member State, the purchase shall be deemed as having been executed in the territory of this Member State*“.

Furthermore, the plaintiff had not made use of the simplification under Section 25b VAT Act (for intra-Community triangular transactions). To apply this rule, the plaintiff would have had to refer to the triangular transaction and to the recipient as the taxable person (**transfer of VAT liability)** in the invoice to the last customer. However, the plaintiff had not done so. He had noted the tax exemption of an intra-community supply in the invoices and correspondingly completed and submitted theEuropean Sales List (summary VAT report – „*Zusammenfassende M*eldung“), which refers to a tax notification format that businesses need to fill out in case of intra-community supplies within the EU to ensure taxation in the country of the customer under the reverse charge method.

The plaintiff then issued corrected invoices in 2015 and submitted amended ESLs to the Federal Central Tax Office. The tax office did not accept the corrected invoices and refused the VAT refund claim of the plaintiff.

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Decision

The Supreme Tax Court **confirmed the opinion of the tax office** and summarized its findings as follows.

The place of the plaintiff's intra-Community acquisitions is in the country of destination (generally Poland) in accordance with Section 3d sentence 1 VAT Act. However, the plaintiff has also (in each case) made an intra-Community acquisition in Germany in accordance with Section 3d sentence 2 half-sentence 1 VAT Act (by using his German VAT-ID number as the purchaser vis-à-vis the manufacturers from other Member States), and the acquisitions in the years in dispute were evidently not taxed in the country of destination.

With respect to **the question of a retroactive correction of invoices** the Supreme Tax Court had suspended the proceedings until the decision of the European Court of Justice (ECJ) of 8 December 2022 in the case **C-247/21** *Luxury Trust Automobil*>.

In its judgment of 8 December 2022 i. a. held that, *in a triangular transaction, the final customer has not been validly designated as being liable for value added tax (VAT) if the invoice issued by the intermediary acquiring the goods does not contain the reference to a „tax liability of the recipient of the services“ (the reverse charge method). The ECJ went on to say that the omission, on an invoice, of such reference may not subsequently be corrected by adding a statement that that invoice relates to an intra-Community triangular transaction and that the tax liability is transferred to the person to whom the supply is made*.

The ECJ has recognized that the fundamental principle of VAT neutrality requires that the deduction or refund of input VAT be allowed even if the taxable person has failed to comply with some of the formal requirements, but subject to the condition that **the substantive (material) requirements** have otherwise been satisfied. The transactions in question should be taxed considering their objective characteristics, the ECJ said.

The ECJ concluded that there can be no question of correcting the invoice where a condition for the application of the exception rule for triangular transactions is not met, namely the reference in the invoice for „reverse charge“ (if the customer is liable for the payment of the VAT) as required by Article 226(11a) of the VAT Directive. The retrospective fulfilment of a mandatory condition for transfer of the VAT liability to the recipient of a supply does not constitute a correction. It is rather the first issuance of the required invoice, which for this reason cannot have retroactive effect.

The Supreme Tax Court agrees by adding that this applies not only - as the plaintiff suggests - in cases of VAT fraud, but generally for triangular transactions. Proof that the recipient of the supply has been designated as the person liable to pay VAT in accordance with Art. 197 of the VAT Directive is a material requirement that must be met in every case.

Source:

Supreme Tax Court, decision of 17 July 2024 XI R 35/22 (XI R 14/20)) – published on 19 September 2024.

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Keywords

alteration of VAT invoices, incorrect invoice