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By PwC Deutschland | 08 November 2024

Heat supplies free of charge for business purposes subject to VAT

In a most recent decision, the Supreme Tax Court held that the heat which is supplied free of charge to other entrepreneurs for their business is a supply of goods for consideration for which VAT must be accounted. This also applies in situations where the heat supplied is used by the recipient for transactions that entitle to an input VAT deduction.

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Background

The plaintiff operates a heat and power plant producing biogas. The biogas was used for the decentralized production of electricity and heat. Although the case concerns agriculture and forestry, the Supreme Tax Court's earlier referral to the ECJ raised some substantial VAT questions that went beyond the original matter in dispute, namely the determination of the taxable amount in case of heat applied free of charge for the benefit of the respective recipient and for which no invoice was issued.

The earlier referral of the Supreme Tax Court to the ECJ specifically concerned the question of whether free-of-charge supplies of heat to other taxable persons are subject to taxation even if it is reasonable to expect that this does not lead to an untaxed final consumption (which needs to be prevented in any case). Here, though, the free transfer of heat was an economic activity that did not result in an untaxed final consumption because the heat was used by the recipients to grow asparagus or dry wood which for them resulted in further taxable output transactions.

More details on the ECJ decision to be found **here** (blog post of 1 May 2024).

Decision

In its final judgment the Supreme Tax Court followed the view taken by the ECJ and held that a taxation is inevitable and necessary in this case. The transfer free of charge of heat produced by a taxable person to other taxable persons is treated as a VATable supply of goods for consideration. It is irrelevant whether the recipients use the heat for purposes entitling to an input VAT deduction.

The overriding question, though, was on how to determine the assessment basis for VAT as regards the free benefit in kind, specifically which costs must be included as part of the basis for VAT. Here, too, the Supreme Tax Court followed the opinion of the ECJ and decided that „the cost price (i. e. the cost to the business) within the meaning of Section 10 (4) No. 1 VAT Act includes not only direct manufacturing or production costs but also indirectly attributable costs, such as financing costs, irrespective whether those costs were subject to input tax or not.

Source:

Supreme Tax Court, decision of 4 September 2024 XI R 15/24 (XI R 17/20) - published on 7 November 2024.

Keywords

consideration in kind, heat supplies