By PwC Deutschland | 03 March 2025

No liability for incorrect VAT disclosure in rental agreements upon acquisition of real estate

In a recent decision the Supreme Tax Court held that the person designated as the issuer of an invoice can only be held liable if he or she was involved in the creation of the invoice or if the issuance is otherwise attributable to him or her as representative or by proxy. An incorrect VAT statement in the invoice caused by the previous owner cannot be attributed to the purchaser of the property.

Legal parameters

Section 566 (1) of the German Civil Code (BGB): *If the rented residential premises is sold by the landlord to a third party after it has been made available to the tenant, the purchaser shall assume the rights and obligations arising from the tenancy in place of the landlord for the duration of his ownership.*

Section 14c (1) Sentence 1 VAT Act reads: *Where a taxable person has separately stated on an invoice for the supply of goods or services an amount of VAT that is higher than the amount for which he is liable under this Act on the transaction (incorrect statement of VAT), he shall also be liable for this additional amount.*

Background

In 2013 (the year of dispute), the plaintiff (a GmbH) acquired a plot of land with a multi-story office building during an enforced auction through knockdown order from a local court. Most of the building space was on lease. The previous owner had concluded a rental agreement with special clinic H for the operation of a day clinic in 2007, a rental agreement with A for the operation of a physiotherapy practice in 2012 and a rental agreement with a housing association. In each of these rental agreements the monthly net rent and the 19 % VAT due for these amounts were shown.

The plaintiff treated the revenues from the rental of the rooms to the specialist clinic H, to A and to the housing association as tax-exempt. The tax office took the view that the plaintiff owed the VAT shown in the rental agreements in accordance with Section 14c (1) of the German VAT Act and assessed the VAT for the year in dispute accordingly.

The tax court of first instance dismissed the claim. The plaintiff had provided VAT-exempt rental services for which a waiver pursuant to Section 9 (2) sentence 1 VAT Act was not possible. The rental agreements with the specialized clinics H, A and the housing association were to be considered as invoices within the meaning of Section 14c VAT Act and the GmbH (the plaintiff) was now responsible because these invoices had to be attributed to it because it had entered into the rights and obligations arising from the existing rental agreements in accordance with Section 566 (1), Section 578 (1) and (2) of the German Civil Code (BGB).

Decision

The Supreme Tax Court held in favor of the plaintiff. The tax court erred in attributing the VAT shown in the rental agreements that had been concluded by the previous owner to the plaintiff. The plaintiff is not liable to pay tax pursuant to Section 14c (1) sentence 1 VAT Act for the following reasons.

The recourse to the person named as the issuer in an invoice in accordance with Section 14c (1) sentence 1 VAT Act requires that this person has participated in the preparation of the invoice or that the invoice is in any other way attributable to him/her in accordance with the regulations applicable to legal transactions which also include the right of proxy. An incorrect VAT statement within the meaning of Section 14c (1) sentence 1 VAT Act caused by the previous owner cannot be attributed to the purchaser of the property in

accordance with Section 566 (1) Civil Code.

The European Court of Justice (ECJ) further assumed that an employer is to be regarded as an invoice issuer if invoices are issued in its name by an employee, even if the employee was not authorized to do so but was not adequately controlled by the employer (ECH judgment *Dyrektor Izby Administracji Skarbowej w Lublinie* of 30 January 2024 - **C-442/22**, para. 31 and para. 35). There, an employee used her employer's details, without its knowledge or consent, to issue fake invoices showing VAT and indicating the employer as the taxable person, so as unlawfully to sell those invoices so that their buyers may unduly benefit from the right to deduct VAT that was not payable.

In the case of dispute, however, the plaintiff did not itself - in its own name - state the disputed VAT amounts because the rental agreements were in fact concluded by the previous owner, and it was the latter who had incorrectly shown the VAT amounts whereby acting in his own name.

No obligations can be inferred from the rental agreement as regards the disclosure of VAT as having been transferred (and thus attributed) to the plaintiff. Although it is altogether possible that, due to an explicit contractual agreement regarding a remuneration including VAT, the supplier may be obliged to issue an invoice together with the VAT shown separately. This (civil law) obligation for issuing invoices can also be transferred to the purchaser in accordance with Section 566 (1) Civil Code.

In the present case, however, it is not in dispute whether an obligation to issue invoices has been transferred but rather whether the (partial) invoice documents (namely the rental agreements) already issued by the previous owner - and thus the abstract strict liability inherent in the incorrect statement of VAT - are attributable to the plaintiff. On the other hand, there is no obligation under civil law on the part of the supplier to disclose VAT that is not legally owed - in this case on an evidently tax-free rental service - which could result in a tax liability based on an incorrect VAT amount.

Source:

Supreme Tax Court judgment of 5 December 2024 (V R 16/22) – published on 27 February 2025.

Keywords

incorrect VAT