



# KMLZ VAT NEWSLETTER

## Consignment stock: Direct supply despite temporary storage

### 1. Facts

A Spanish supplier sold goods to a German recipient. The supply of the goods, which were produced in Spain, was made via a call-off stock located in Germany. The recipient had been granted access to the stored goods, which access he could exercise at any time. The goods to be supplied, the terms of payment, the terms of supply and the prices were defined in supply contracts. The exact quantity to be supplied and the details of the supply were determined by call-off schedules, which were forwarded by the recipient to the supplier on a daily basis or at intervals of a few days. Only these schedules had a legally binding effect. The call-offs scheduled supply dates for the subsequent 12 weeks, in advance, and the dates of supply for this period of time.

### 2. Binding orders decisive

The Federal Fiscal Court confirmed the decisions taken by various tax courts during the previous two years. If the recipient is already known at the beginning of the transport, the supplies are deemed to be direct supplies to the customer and the storage in the consignment stock will remain unconsidered. The legal relationship, the supply is based

### Court disagrees with fiscal authorities

Supplies via consignment stocks are deemed to be direct supplies to the customer and any interim storage will remain unconsidered if the recipient is already known at the beginning of the transport. This is the decision of the Federal Fiscal Court (V R 31/15) published yesterday. The Court came to the same conclusion as that reached by the lower tax courts in their decisions of the past two years. The Federal Fiscal Court thereby opposes the current undifferentiated opinion of the fiscal authorities. This will be welcome news for some foreign suppliers who will therefore be able to avoid registration in Germany. However, practical difficulties might arise, e.g. the time difference between the beginning of the dispatch and the invoicing or the interaction with commercial law and income tax law. In any case, consignment stock agreements and their handling now need to be checked.

on, is decisive in this case. Thus, the recipient must be determined due to the binding legal transaction. A “probable justification of a recipient status” would result in difficulties of assessment and is therefore unacceptable. Insofar, the decision is quite strict and, to a certain extent, restrictive. However, this could also be due to the specific facts of the case in question.

### 3. Short interim storage irrelevant

Additionally, the court held that a short interim storage is irrelevant. It is, however, left open to question, whether this conclusion, which is based on the operative part of the judgment, applies without restriction. The Federal Fiscal Court mentions the specific circumstances of the case in its reasons: stocks, which were built on the initiative of the



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recipient, to which the recipient had contractually agreed unlimited right of access, were, from the outset, envisaged only to be subject to interim storage for a short period of time. These sorts of circumstances could be decisive and should therefore be considered when negotiating such contracts. On the other hand, it is not completely clear how the court defines storage “for a short period of time”. This issue already presented itself following the decision of 24.05.2011 of the Tax Court in Saxony, in the context of a broken supply with interim storage. It was unclear, up to what period of time a temporary, and therefore irrespective, stop/storage, (in the absence of any noteworthy interruptions), applies. In this case, the storage period was between 3 and 5 days. The facts of the Federal Fiscal Court’s case concern a significantly longer time period. The quantities shipped to the stock were required to cover the demands of the recipient during upcoming weeks and months. The call-offs scheduled supply dates for 12 week periods. Thus, a period of several weeks may be deemed to be short.

#### 4. Restrictions to call-off stocks

Direct supplies can only exist in the case of call-off stocks. These can be differentiated from other storage types by determining that only a specific recipient is permitted to remove goods from the stock. Where different recipients are entitled to take goods from the stock, the recipient is not known at the time the goods are dispatched to the stock. In these circumstances, an intra-Community transfer, with subsequent local storage, would apply.

#### 5. Point in time of reporting

From a practical point of view, difficulties might arise as regards the declaration. If the place of supply is deemed to be where the supply begins, this will also determine the date

of supply. The supplier reports his intra-Community supply directly upon the transfer to the stock. The withdrawal and therefore the invoicing, possibly takes place several months later. The recipient, however, has to report the acquisition VAT in the month following the purchase, at the latest.

#### 6. Authorities' view and legitimate expectation

The fiscal authority’s undifferentiated view in the German VAT Circular, as well as in the Frankfurt Regional Tax Office guideline of 15.02.2015, can no longer be maintained. It requires amendment. Despite the Federal Fiscal Court’s decision, no risk should arise for German recipients as regards input VAT deduction which was claimed in the past and which would now possibly appear questionable. The Federal Fiscal Court does not consider the German VAT Circular to be consistent with the law currently in force. In this respect, the Court explicitly mentioned sec 1a.2 para 6 sentence 1 regarding intra-Community transfer of goods. The same applies to sec 3.12 para 3 sentence 7 regarding the place of supply. Therefore, recipients should enjoy protection of legitimate expectations in accordance with sec. 176 para. 2 of the German Fiscal Code in this respect. The fiscal authorities may additionally implement a transitional period and not object to past treatment.

#### 7. Commercial law / income tax law

Usually, when concluding a consignment stock agreement, a recipient is focused on ensuring that he receives a constant supply of goods, just in time or just in sequence, whereby the economic risk remains with the supplier until the goods are removed from the stock. The supplier would then, correspondingly, have the stored goods recorded in its books. These aspects and their interaction with the VAT treatment have to be considered when drafting or amending contracts.