KÜFFNER MAUNZ LANGER ZUGMAIER

05 | 2014

KMLZ VAT NEWSLETTER

Separating intra-Community self-supplies from temporary transfers of goods

Processing abroad

Many German companies ship products for processing to other EU Member States. After processing and transformation, some finished products are returned to their EU Member State of origin and some are shipped to another EU Member State for further processing. In practice, there is great uncertainty - also due to differing national regulations. The ECJ has now decided that a (non taxable) temporary transfer of goods is only given if the goods will be returned to the country of departure after processing. However, this is only half of the story.

1. General situation

The separation of a (taxable) intra-Community self-supply from a (non taxable) temporary transfer of goods is of high practical importance. Often this decides if there is an obligation to VAT register in another EU Member State. The ECJ (judgment of 06 March 2014 – C-606/12 and C-607/12 – *Dresser-Rand SA*) has now decided on the conditions according to Art. 17 para 2 letter f of the VAT Directive.

2. Background of the proceedings before the ECJ

A French company shipped goods to Italy for processing and transformation. Subsequently, the company supplied the processed goods to its customers outside the EU from Italy. The goods were not returned to France. For this reason, the French company assumed that a deemed intra-Community acquisition had to be taxed. Correspondingly, the Italian subcontractor could zero-rate its supplies to the French company based on a national provision.

The Italian tax authorities took a contrary view. They considered that the transfer of goods was not taxable and the supplies by the Italian subcontractor cannot be zero-rated. The tax authorities referred to appropriate national provisions.

The ECJ refers, however, to the wording of Art. 17 para 2 letter f of the VAT Directive. According to the wording, a (non taxable) temporary transfer of goods is given only if, after processing, the goods are returned to the taxable person in the Member State of dispatch.

3. Effects on the German legal situation

The decision of the ECJ is significant, particularly because German VAT law does not contain such a limitation, at least explicitly. Sec. 1a.2 para 9 of the German VAT Circular refers to Art. 17 of the VAT Directive only for the interpreta-

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tion of the provisions. It does not specify that a (non taxable) temporary transfer of goods is given if the goods are returned to the Member State of dispatch. However, the German Fiscal authorities have, to date, accepted the temporary transfer of goods only if the goods were returned to the contracting entity in Germany after processing.

4. Practical significance

In practice, the decision of the ECJ provides legal certainty. This applies, at least, with respect to cases of intra-Community self-supplies, where the goods are not directly returned to the Member State of dispatch after processing.

To date, several Member States have considered transactions to be a temporary transfer of goods even if the goods were not returned to the country of dispatch after processing. VAT registration abroad was not necessary in these cases. It can be expected that these Member States will now change their practices, based on the decision of the ECJ and registration of foreign taxable persons will be necessary in the future. Correspondingly, where appropriate, an intra-Community self-supply has to be declared in Germany. Companies shipping goods for processing to another EU Member State should therefore strictly monitor the corresponding business models and follow up on legal adjustments abroad. VAT registration might be required in some cases.

5. Type of processing in foreign countries decisive?

The ECJ was not required to decide whether the type of processing of the item might be relevant for the separation of intra-Community self-supplies from temporary transfers of goods. The German tax authorities consider that a temporary transfer of goods cannot be assumed where the goods which have been processed obtain a different marketability. This would be the case, for example, if the German customer provided plastic granulates to a subcontractor abroad and ultimately received finished plastic casings back.

The fiscal authorities of several other Member States do not have a clear view of this issue or, alternatively, disagree. Therefore, in practice, it usually comes down to different VAT treatment between individual Member States. In the future, taxable persons should examine the legal situation in the particular Member State if they are planning to set up such processes. If need be, solutions must be worked out as to how to deal with contradictions of evaluation in certain Member States.

6. Steps to be taken

Companies with these kinds of processes should check, whether the goods return to the Member State of dispatch after processing. If this is not the case, they must check whether an intra-Community self-supply must be declared. Eventually, retroactive reporting must also be attended to.