



KMLZ VAT NEWSLETTER

Protection of legitimate expectations regarding intra-Community supplies

1. Facts of the judgment XI R 37/12

The plaintiff (K), a German resident, supplied high-quality vehicles – Ferraris and Mercedes ML - to the Austrian companies A and C as well as to the Spanish company B. K treated the supplies as zero-rated intra-Community supplies and invoiced the purchase price as “net export price” including the reference “*Bestätigung innergemeinschaftlicher Lieferung* – Confirmation of intra-Community supply”.

2. Tax authorities cite typical circumstances for the denial of zero-rating

The case concerned three different deliveries of vehicles. It was proven, in the criminal proceedings brought against A in Austria, that A had not had the vehicles delivered to Austria, contrary to his assurances. The vehicle, which was destined for B was transported to Spain via a shipping company; however, the vehicle was not registered for B but rather, to another Spanish company. K himself brought the vehicle which was bought by C to Austria. An information request made at the Federal Central Tax Office showed that the company C, was classified by the Austrian authorities

Federal Fiscal Court rejects existence of a dummy company

Fiscal authorities often refuse the tax exemption for intra-community supplies of goods arguing that the taxable persons would have been acting in bad faith due to their involvement in perpetrating a tax fraud. In the present proceedings before the Federal Fiscal Court, the fiscal authorities presented, in their view, extensive incriminating evidence, including evidence of the particular company being run as a dummy company, demonstrating a neglected duty of care.

as a company which was “not economically active”. Furthermore, C did not have the usual infrastructure required for a trader of high-quality vehicles. He only had a small storage building for interim storage as well as an office in an apartment.

3. Appeal before the Federal Fiscal Court generally successful

The tax authorities denied the zero-rating with respect to all three supplies. However, the tax court confirmed K’s treatment of the supplies as zero-rated intra-Community supplies to be correct. The tax authorities appealed the court’s ruling. It was only successful regarding the supply to B. The Federal Fiscal Court confirmed the remaining decision of the tax court.

4. Invoice and enclosures classified as uniform invoice

The Federal Fiscal Court granted K the zero-rating regarding the intra-Community supply to A based on the legitimate expectation regulation of sec. 6a para. 4 of the German VAT



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Act. At first, the Federal Fiscal Court affirmed the existence of necessary proof of intra-Community supplies. Only in this case, a legitimate expectation is applicable. The invoices met the requirements of sections 14 and 14a of the German VAT Act. This was due to the fact that the invoices, as well as the attachments to the invoices, had to be classified, in their entirety, as an invoice, due to their close connection.

5. Legitimate expectation only applies in the case of diligence exhibited by a reasonable businessman

According to the Federal Fiscal Court, the assumption of the tax court that K exhibited the "diligence of a reasonable businessman" necessary for the legitimate expectation in accordance with sec. 6a para. 4 of the German VAT Act regarding the supply to A, was unobjectionable. The tax court's assessment that K was not able to recognize that A possibly made incorrect statements as regards the place of destination was based on the fact that K had asked A for a qualified confirmation, in accordance with sec. 18e of the German VAT Act, concerning the validity of his VAT number.

6. Intermediaries with limited operational infrastructure are not to be considered dummy companies

The Federal Fiscal Court classified the supply to C to be zero-rated in accordance with sec 6a para. 1 of the German VAT Act. The Court argued that the business activity of the recipient could be assumed if he, as an intermediate taxable person, merely had temporary storage or an office in an apartment. The non-declared intra-Community acquisitions of C in Austria would also not justify the assumption of the existence of a dummy company. The Federal Fiscal Court reconfirmed, in this connection, that the actual taxation of intra-Community acquisitions in the member state of destination is no precondition for zero-rating.

7. No tax fraud in the case of non-disclosure

At the same time, the Federal Fiscal Court denied "non-disclosure" with respect to case R, in accordance with the ECJ's case law. In the legal case R, the ECJ ruled, upon submission of the Federal Supreme Court (BGH), that the deception, as regards the recipient's identity, would be considered an exceptional case, where the entitlement to objectively prove an intra-Community supply does not apply. The Federal Supreme Court affirmed the existence of tax fraud as regards to non-disclosure in terms of case R.

8. Identification of the recipient required

The Federal Fiscal Court classified the supply to B as being subject to VAT. For a zero-rated supply it is required to ensure the recipient's identification. This could not be replaced by the fact that the supply is subject to VAT for intra-Community acquisitions in the member state of destination. This means that the registration of the vehicle in Spain for another, unknown person, rather than B, was insufficient. The Federal Fiscal Court's provisions as to how to ensure the recipient's identity go too far and are not in compliance with the recent ECJ judgment (9 October 2014 – C-492/13).

9. In Practice

According to the judgment of the Federal Fiscal Court (XI R 37/12), detailed determinations are required to prove the existence of a dummy company. Blanket assertions of the investigating authorities are insufficient. Companies and taxable persons should make use of the judgment and proceed against possible accusations under criminal tax law. Only by carefully examining contractual partners, as well as their documentation, can a company's duty of care be proven and the danger of proceedings for tax fraud, avoided.