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VAT NEWSLETTER

Property acquirer not liable for unduly charged VAT in rental agreements

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1 Background

Contracts can be (possibly together with a bank transfer receipt) regarded as invoices if they contain the invoice details required by VAT law. In practice, this is a considerable simplification. In the case of continuing obligations, such as long-term leases, this possibility is often utilised. However, if the contract fulfils the requirements of an invoice, a too high stated VAT amount in the contract can result in unduly charged VAT. In accordance with sec. 14c para. 1 of the German VAT Act (UStG) the person invoicing also owes the surplus to the tax authorities. But what happens if the purchaser of a rented building enters such a 'rental agreement as an invoice' with unduly charged VAT? Is he then liable for the VAT in accordance with sec. 14c UStG? The German Federal Fiscal Court dealt with these questions in its decision of 5 December 2024 - V R 16/22.

2 Facts of the case

The plaintiff acquired a property, including a multi-storey, rented office building, as part of a forced sale. The tenants included so-called VAT pests (clinic, physiotherapy practice, housing association). An option for taxation was excluded for these tenants in accordance with sec. 9 para. 2 UStG. However, the previous owner had stated the monthly net cold rent, the other cost advances and the VAT due on these amounts with the addition '+ 19 % VAT' in each of the rental agreements. The plaintiff entered into these rental agreements in accordance with sec. 57 of the German Enforcement Law Code (ZVG), in conjunction with sec. 566 para. 1 of the German Civil Code (BGB). In the VAT return, the plaintiff treated these rental transactions as VAT exempt. The tax office was of the opinion that the plaintiff owed the VAT openly stated in the rental agreements, in accordance with sec. 14c para. 1 UStG and assessed the VAT accordingly.

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3 German Federal Fiscal Court decision

The Federal Fiscal Court ruled that the purchaser of a property is not liable for VAT amounts unduly charged in rental agreements he has taken over. Claims against a person designated as the issuer of an invoice, in accordance with sec. 14c para. 1 sentence 1 UStG, presuppose that this person was involved in the creation of the invoice or that the issuance of the invoice is attributable to him. In the case at hand, it was undisputed that VAT was unduly charged. However, the invoice (rental agreement) was not issued by the purchaser himself – on his own behalf – or with his participation.

Therefore, only the invoice documents already issued by the previous owner in the form of rental contracts – and thus the abstract strict liability inherent in the incorrect tax statement – can be considered. However, the attribution of the incorrect tax statement is ruled out. Such attribution does not result from sec. 566 para. 1 BGB. After all, the entry of the purchaser into an existing tenancy, as regulated in sec. 566 para. 1 BGB, serves to protect the tenant by the purchaser assuming the rights and obligations of the previous owner. As an exceptional provision, sec. 566 para. 1 BGB is to be interpreted narrowly and only applied insofar as the tenant protection it aims to provide requires this. However, the incurrence of a tax liability, pursuant to sec. 14c para. 1 sentence 1 UStG, does not serve to protect the tenant. Nor does an incorrect tax statement form part of the landlord's rights and obligations that this provision is intended to transfer. In any case – regardless of the transfer of the obligation to issue an invoice to the customer – there is no obligation to VAT that is not legally owed in an invoice. An attribution also does not result from a transfer of a going concern (TOGC) pursuant to sec. 1 para. 1a UStG. It is true that the assumption of a TOGC means that the acquirer takes the place of the seller in the sense of an individual succession for VAT purposes. However, this consequence only relates to the transferred asset, which does not include the incorrect tax statement pursuant to sec. 14c para. 1 sentence 1 UStG. Finally, there is no attribution through the assumption of a monitoring fault (see ECJ, judgement of 30 January 2024 – C442/22). This is because a breach of the monitoring obligation only leads to attribution if the plaintiff was named as the issuer of the invoice.

4 Consequences for the practice

From a VAT perspective, property transactions are always fraught with risk for the seller and the purchaser. The decision of the Federal Fiscal Court is from the perspective of a purchaser welcome, as it does not create any further risk for them in the form of liability for unduly charged VAT in any rental agreements that he may have taken over. In view of the prospective e-invoicing obligation, the significance of this decision will decrease. However, the requirements of the Federal Ministry of Finance letter of 15 October 2024 on the e-invoicing obligation in B2B transactions – in particular the comments on contracts as invoices (points 44 - 46) – must be considered.

Still, the decision also raises follow-up questions. For example, it remains unclear whether the previous owner is liable for the VAT stated in the lease agreement in accordance with sec. 14c para. 2 UStG, because he is no longer the service provider, and the VAT statement is possibly attributable to him. To counter this risk, the previous owner should take measures to avoid it (e.g. declaration of cancellation of the VAT statement) before the transfer of the contract. From the tenant's point of view, it is questionable whether the tenant can only claim the input VAT deduction from the rental agreement as an invoice if the property purchaser has issued a proper invoice in the form of a contract (invoice) attributable to him in accordance with the principles of the decision. This is supported by the fact that, at least from the point at which e-invoicing became mandatory, the transfer of the contract results in a change that could result in the obligation to issue an e-invoice.

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