



KMLZ VAT NEWSLETTER

ECJ: Subjective knowledge and protection of legitimate expectations in chain transactions

Once again, the ECJ was required to make a decision regarding a chain transaction. The tax office denied the deduction of input VAT by the final purchaser, due to the fact that the transport was wrongly ascribed and VAT was incorrectly invoiced to the final purchaser. Therefore, the question was referred to the ECJ of how the transport is to be ascribed, taking into account subjective knowledge and whether protection of legitimate expectations is to be applied to input VAT deduction in cases of incorrect allocation.

1. Facts

X1 sold mineral oil to X2. X2 agreed to arrange the transport of the products to Austria and employed its Austrian VAT-ID-No vis-à-vis X1. X1 provided X2 with the collection numbers and collection permits, which entitled X2 to collect the products at the German refinery plants. X2 forwarded these numbers and permits to X3, however X2 did not inform X1 of the sale. Although X1 assumed that X2, being a pure trading company, would sell the products on,

Supplier's subjective knowledge is relevant

To date, it has not been possible to ascribe the transport in a chain transaction in a legally watertight way. Hence, the ECJ's decision in the case *Kreuzmayr* (C-628/16) has been eagerly awaited. In its decision, the ECJ confirmed that the purchaser's subjective knowledge (provided that it is supported by objective evidence) must be taken into account but not only that of the supplier. Any stated intention made by an intermediary operator as regards a further sale is therefore irrelevant, even if it could have been assumed following the ECJ decision in the case *Toridas* (C-68/16). Further, the ECJ denies protection of legitimate expectations where a chain transaction was wrongly evaluated.

X1 was unaware of whether an onward sale had occurred. For X1, it was only clear that the products, which were ordered by X2, were collected.

2. Transport arrangements

The products were collected by X3 using its own tanker trucks or by haulage contractors. The question was, who arranged for the transport? X3 argued that it had carried out the transport on behalf of and for X2. The Independent Finance Senate (*Unabhängige Finanzsenat - UFS*) in the first instance (Independent Finance Senate in Linz 5.2.2013, RV/0281-L/12) had accepted this. However, X3 was unable to furnish any evidence in this regard. The Higher Administrative Court (*Verwaltungsgerichtshof - VwGH*) dealing with the appeal case, therefore assumed that X3 had arranged for the transport (VwGH 2013/15/0114 of 29.06.2016). Surprisingly, the VwGH did not refer to the ECJ jurisprudence and the overall circumstances to be considered.



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3. Procurement of the power to dispose of the goods

As a first question to the ECJ, the referring Federal Fiscal Court required clarification of whether the transport could be ascribed to the supply from X2 to X3. The ECJ only had limited scope in this regard due to the fact that the UFS held the following:

“The recipient of the recipient actually obtains the power to dispose of the goods at the place it collects the item, respectively has the item collected. As the supply of the supplier to the (first) recipient logically precedes the supply of the (first) recipient to its recipient, the first recipient obtains the power to dispose also at the place where the (second) recipient obtains the power to dispose.”

This legal opinion was not queried by either the VwGH or the Federal Fiscal Court (*Bundesfinanzgericht - BFG*) in its request for a preliminary ruling of 30.11.2016 (RE/5100001/2016). The BFG even limited its question to the ECJ indicating, that “... X3 was already entitled to dispose of the goods as owner in Member State A ...”. Against this background and following its previous case law the ECJ had to come to the conclusion that the movement of the goods had to be ascribed to the supply from X2 to X3.

4. Subjective knowledge

However, it was doubtful whether the subjective knowledge of both the suppliers and recipients could affect that conclusion. At first instance, the UFS e.g. stated as regards the transport arrangement: *“Who collects is not objective it rather has to be..... evaluated from the point of view of the first in the row. I.e. the case that the third in the row collects only exists where it (from the point of view of the third in the row) was visible for the first in the row.”*

In its request, the BFG addressed the issue that the supplier (X1), without being informed, could not evaluate whether there was a second recipient (X3). Even if the supplier had assumed that there was a second purchaser, the supplier would not have been able to evaluate where it obtained the power to dispose. Therefore, consideration must be taken of what information is provided by the intermediary operator to the supplier. According to the BFG, the supplier's subjective view is decisive.

The ECJ took an alternative view. It upheld its determinations in the case *Euro Tyre (C-430/09)*, according to which the intermediary operator's intention, at the time of the acquisition, must be taken into consideration, provided it is supported by objective evidence. The fact that the first supplier had not been informed that the goods were sold prior to an intra-Community transport from the intermediary operator to the final purchaser and that the intermediary operator acted, vis-à-vis the first supplier using a VAT-ID-No. of the Member State of destination, should be irrelevant. Any stated intentions by the purchaser, vis-à-vis the supplier, therefore cannot be regarded as a relevant criterion to be taken into account.

5. Protection of legitimate expectations

In a second question to the ECJ, the BFG asked whether X3 was entitled to deduct the VAT invoiced by X2 if the assessment of the chain transaction proved to be wrong. This was categorically denied by the ECJ. The right to rely on the principle of the protection of legitimate expectations only applies in a situation in which an administrative authority has caused a person to entertain expectations which are justified by precise assurances provided to him. This may also apply to an unjustified VAT exemption applied by the first supplier.