



KMLZ VAT NEWSLETTER

Consignment stock: Direct delivery only with binding purchase agreement

1. Facts

A Dutch B.V. delivered screens to a German customer. The screens were brought to a call-off stock on the customer's site. The B.V. remained the owner of the consignment stock until such time as the B.V.'s customer transmitted its weekly list of the consignment stock sold in the previous week. The purchase price charged by the B.V. was only set on the day on which the customer resold the consignment stock. The B.V. was obliged to leave the consignment stock in the warehouse for at least three weeks. After this period, the customer was entitled to return the whole stock or part thereof to the B.V.

Federal Fiscal Court denied direct delivery

The German Federal Fiscal Court has now published another decision regarding a consignment stock case (V R 1/16). In this case, the German Federal Fiscal Court denied a direct delivery because there was no binding purchase contract in place at the beginning of the transport to the stock. The German Fiscal Court remained true to its principles, which is hardly surprising (see KMLZ Newsletter 03/2017). Another finding of the German Federal Fiscal Court is also interesting: A remuneration which was agreed on by mistake, without VAT, represents a gross amount, from which VAT needs to be subtracted. This is not only relevant for consignment stock cases, but for all cases in which VAT is required to be subsequently paid.

2. Fixed Customer

Since there are no special regulations for consignment stocks, the German Federal Fiscal Court decided the case in the same way as its previous decision: using general VAT principles. Therefore, the German Federal Fiscal Court considered whether section 3 paragraph 6 German VAT Act could be applied and if the place of delivery was consequently in the Netherlands, from where the goods were transported to the warehouse. Since section 3 paragraph 6 German VAT Act requires shipment to the customer, it must be clear who the customer is at the beginning of the shipment. The German Federal Fiscal Court decided that, at the beginning of the shipment, a binding purchase contract is therefore crucial.

However, according to the agreement between the parties in the case, the customer was not obliged to buy the goods



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brought to the warehouse. Moreover, the customer was not obliged to make a payment until the goods were taken out of stock. According to the German Federal Fiscal Court, a binding purchase contract was not concluded until after the storage period (or, to be more precise, when the goods were removed from the warehouse). The place of delivery was therefore in Germany and not in the Netherlands, as it would have been in the case of a direct delivery. Apparently, the German Federal Fiscal Court's decision was influenced by the fact that the goods were in the books of the supplier and not the customer, until their removal from the stock.

This is surprising because entering the goods in the balance sheet is only a result of the person being the beneficial owner. It is not an indication of the VAT treatment, even if the right to dispose of the goods and the economic ownership have certain similarities.

All in all, the questions of how binding a purchase contract needs to be and which conditions need to be fulfilled remain open. German civil law cannot be relevant because cross-border transactions are to be assessed, which means that eventually, the civil law of the ship-from country also needs to be considered. This might differ from German civil law. The facts of both of the aforementioned German Federal Fiscal Court judgements are only examples. Therefore, general criteria only arise from the jurisprudence regarding the right to dispose of the goods.

3. Circular of the upper tax authority Frankfurt/M.

The upper tax authority Frankfurt/M. published an updated version of its circular regarding consignment stocks on 23rd

February 2017. Compared to the last version of 15th December 2015, there have been no significant changes. It was only mentioned that the German Federal Fiscal Court had handed down a first decision (V R 31/15) and that the tax authorities would deal with this topic in general after the second judgment had been published (V R 1/16 – published on 5th April 2017).

4. Net pay or gross pay

The German Federal Fiscal Court was also required to deal with a second question: Does the VAT need to be calculated by subtracting it from or adding it to the agreed purchase price? The parties had mistakenly assumed that these were direct intra-Community supplies and had therefore agreed that VAT did not need to be paid.

The German Federal Fiscal Court came to the conclusion that VAT needed to be calculated by subtracting it from the paid amounts, even if a remuneration without VAT was explicitly agreed. In this respect, the German Federal Fiscal Court follows its previous jurisprudence. If the customer subsequently pays the VAT to the supplier, however, the assessment basis for the VAT then changes, VAT from this additional payment is only due when payment is made. Hence, possible interest on subsequent VAT payments turn out to be lower by 19/119. Of course, this not only applies to consignment stock cases, but to all cases in which VAT needs to eventually be paid.