



# KMLZ VAT NEWSLETTER

## ECJ ruling on supplies associated with letting and interpretation of *Auto Lease Holland* principles

The ECJ has taken a very interesting decision that has many implications for everyday practice. Prior to answering questions concerning the concept of a single supply, the ECJ had to first deal with the jurisprudence in the case of *Auto Lease Holland*.

### 1. **Auto Lease Holland**

Does the landlord provide a supply to the tenant or does the utility provider provide a direct supply to the tenant? This leads to the next question, namely whether the landlord is liable for VAT. If so, then the tenant would not be entitled to any input VAT deduction arising from the utility charges. Both, the utility provider and the landlord could be liable for VAT incorrectly charged according to sec. 14c para. 2 of the German VAT Act. This results from the fact that both have issued invoices showing German VAT even though they have not performed a supply or performed a supply to a different customer.

This would have a broad and significant impact for all utility providers and landlords. Leasing companies, mineral oil

### Criteria for ancillary supplies clarified

A number of different supplies can be regarded as constituting a single supply. However, in principle, every supply must normally be regarded as being distinct and independent. The differentiation proves difficult in practice. The criteria are ambiguous. Fortunately, the ECJ has made clear statements regarding supplies associated with the letting of immovable property. Utility providers, landlords and tenants should check whether the charging of utilities practiced to date meets the criteria provided by the ECJ. In addition, the ECJ has concretized the principles of its decision in the case of *Auto Lease Holland*. Companies confronted with problems arising from the *Auto Lease Holland* case will have more legal certainty. Nevertheless, they should check whether their current practice is in conformity with the new ECJ principles.

companies, fuel card companies and lessees were threatened by similar serious consequences after the ECJ's decision *Auto Lease Holland (C-185/01)* and the following German Federal Fiscal Court's decision of 10 April 2003.

Additionally, this case raised the question of between which parties the supplies of goods and services are deemed to be performed. Poland is one of the few countries in which the courts have been controversially and over a lengthy period, discussing the questions and consequences of the ECJ's *Auto Lease Holland* judgment. It is therefore not surprising that the Supreme Administrative Court in Poland has referred such a question to the ECJ.

However, the ECJ does not acknowledge any analogies between the current case and the *Auto Lease Holland* judgment. According to the ECJ, the decisive difference is the



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contract concerning the purchases of goods or services between the utility provider and the landlord. In *Auto Lease Holland* there was no separate supply agreement between the mineral oil company and the lessor, only a fuel management agreement between the lessor and the lessee existed.

The judgment therefore serves to provide significant clarification for companies who find themselves confronted with the *Auto Lease Holland* judgment. Separate supply agreements between the parties throughout the entire supply chain might be a further criterion to avoid falling within the scope of *Auto Lease Holland*. The regulations of the Federal Ministry of Finance of 15 June 2004 should also be taken into account concerning fuel supplies with regard to which the Federal Ministry of Finance has tried to limit the drastic consequences of the jurisprudence.

Both, utility providers and landlords should check whether the contractual agreements exist and if they are sufficient to justify the supply chain, which includes the landlord.

## 2. Distinction concerning ancillary supplies

Due to a lack of facts, the ECJ was not in a position to decide on the core question of whether services charges for rental services are deemed to be part of the remuneration for the uniform supply of rental of immovable property or are to be considered remuneration for supplies, which are independent of the letting. This, at first glance, seemingly negative circumstance, is actually an advantage. The ECJ was thereby given the opportunity to provide valuable indications as regards the criteria of distinction. The hitherto decisions (*RLRE Tellmer Property* and *Field Fisher Waterhouse*) were very specific cases leading to limited future application. The ECJ has now defined the following criteria:

### a) independent supplies

The tenant has the right to choose the supplier and/or the terms of use for the additional supplies. The ECJ even includes the widespread practice of individually determining the consumption of water, electricity or heating by means of the installation of individual meters and billing according to consumption. The tenant may therefore decide whether he wishes to consume the supplies or not. The separate invoicing would be a further indication of separate supplies.

### b) uniform single supply

Objectively, the letting is deemed to be one unit with accompanying services. In the ECJ's view this unit is a given only in specific cases, such as the letting of turnkey offices or of immovable property which is let for short periods where further supplies are included. The same applies if the landlord has to observe restrictions as regards choosing the supplier and/or the terms of use. This would be the case if, for example, the landlord owns part of a multi-dwelling building and is required to use suppliers designated by the coproprietors collectively and to pay his share of the costs related to such supplies, which he then passes on to the tenant.

Thereby, the treatment, as a uniform single supply, should only very rarely be possible. Merely a supplier's charges, which are allocated, based on the rental area, as a lump sum and which the tenant cannot freely select, might actually be ancillary supplies. Whenever the tenant might, theoretically, have the right to select the supplier or the actual consumption is billed, a separate supply has to be assumed. The Federal Ministry of Finance will have to amend sec. 4.12.1 of the German VAT Circular and include the specific ECJ guidelines.