



KMLZ VAT NEWSLETTER

ECJ: Tax authorities bound to examination decisions

1. Facts

In its decision of 14.06.2017 – C-26/16 – *Santogal*, the Plaintiff, a Portuguese company, sold a high-priced new motor vehicle to an Angolan recipient in Spain. Prior to the supply, the recipient provided the Plaintiff with some documents. Thus, the Plaintiff treated the supply as a VAT exempt intra-Community supply. These documents included the recipient's Foreigner's Identity Number, a confirmation issued by the Spanish authorities as regards the entry in the Foreigners' Registry and a passport copy. After the vehicle was transported to Spain, the recipient additionally forwarded a confirmation concerning the technical inspection as well as the temporary registration in Spain. The Portuguese authorities reviewed the documents and acknowledged the supply to be VAT exempt.

ECJ emphasizes principle of legal certainty

In the past, the ECJ has often had to decide cases on VAT exempt intra-Community supplies. The most recent decision (decision of 14.06.2017 – legal case C-26/16), demonstrates an important procedural aspect: Where the tax authority has already examined the affected transactions and the existing documentation and did not object, it may not retroactively deny tax exemption due to the principle of legal certainty. This also applies beyond intra-Community supplies.

However, based on the recipient's inconsistent address details and on the vehicle's temporary registration, the Portuguese authorities later denied the exemption. The recipient possibly did not pay VAT on the intra-Community acquisition in Spain.

2. ECJ decision

First, the ECJ commented on the requirements for VAT exempt intra-Community supplies. In its opinion, it is irrelevant, that the recipient is not resident in the country of destination. Further it is, according to the ECJ, also irrelevant, that the recipient had only temporarily registered the vehicle in the Member State of destination. Mere registration is not a requirement for a VAT exemption. Where a tax evasion had been committed in the country of destination and the tax authorities consequently deny a VAT exemption based on this, it must be established, in the light of objective evidence, that that vendor knew or ought to have known that the transaction was part of a fraud committed by the purchaser and that he did not take all reasonable steps within



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his power to avoid participating in that fraud. It is for the referring court to verify whether this is the case. The question as to whether the supplier displayed the diligence required to satisfy itself that the transaction carried out had not resulted in its participation in tax evasion, depends not only on the vendor's behavior but also on the authorities' behavior. On the assumption that the vendor had presented documents, in order to benefit from the exemption of the transaction in issue, and those documents had been examined and accepted by the competent authority, it is precluded by the principle of legal certainty that a Member State holds the vendor liable for the payment of the VAT because of a tax fraud committed by the recipient, of which the vendor had and could have had no knowledge.

3. Consequences for the practice

The refusal to grant VAT exemptions on intra-Community supplies remains a much discussed subject. Either the tax authorities are of the opinion, that the required documentation was not provided or they consider a transaction to be part of a fraud, which often results in the refusal to grant exemption during the preceding or the subsequent stages, together with the notice that the vendor knew or ought to have known that the transaction was part of a fraud.

VAT exemption is also often denied in cases where the tax office changes its mind. Where, for example, the tax office has carried out a special VAT audit at the supplier's, at which time the transactions and the evidence are examined

and not objected to, it can still subsequently change its opinion. This can result in a taxable person being required to make an additional VAT and interest payment with respect to periods in excess of ten years.

If the ECJ standard was applied, the respective audit procedures would justify legal certainty for the taxable person. Where the tax office treated, checked and accepted the transactions and the documents to be VAT exempt, it would no longer be in a position to subsequently deny the VAT exemption.

However, there is a restriction imposed by the ECJ: Whoever acts in an abusive manner cannot refer to the principle of legal certainty. This means, where the taxable person knew or ought to have known that the recipient committed a tax fraud, the tax authorities' audit procedures will not offer any legal certainty to him. It is, however, for the tax authority to prove this.

If the tax authorities raise justified expectations as a result of corresponding actions, entrepreneurs can now refer to the ECJ's judgment. In individual cases, entrepreneurs could consider initiating an audit procedure, to be carried out by the tax office.