KÜFFNER MAUNZ LANGER ZUGMAIER

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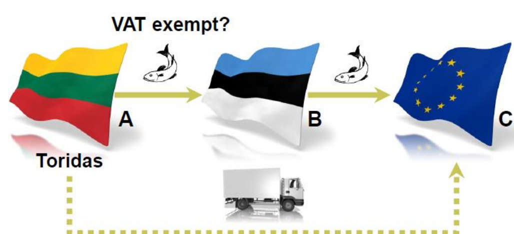
Chain transactions: ECJ defines new (old) criterion for transport assignment

Notification of resale essential?

Once again, the ECJ has had to decide on how to ascribe the transport of goods in a chain transaction. The ECJ maintains the principles of its case law in its judgment of 26 July 2017 (case *Toridas*, C-386/16). However, it also sees a decisive criterion in the notification of the resale of the goods, before they leave the country, in order for the transport not to be allocated to the first supply. This will need to be considered in the future.

1. Facts

Toridas (A), a Lithuanian-based company, sold fish to an Estonian customer (B). The customer (B) resold the goods in issue to taxable persons in Denmark, Germany, The Netherlands and Poland. The transportation from Lithuania to the other Member States was carried out by the customer (B). *Toridas* (A) knew this and to whom the customer (B) resold the fish. The question of where the transport was to be ascribed to was the issue brought before the ECJ.



2. Decision by the ECJ

The ECJ concluded that the transport was to be assigned to the supply from B to C. This is consistent and unsurprising.

However, what is interesting is that in this ruling, the ECJ appears to be foregrounding the intention of resale expressed by the first acquirer for the assignment of the transport. If one were to look only at the concrete answer to the question submitted by the Lithuanian court, one might even get the impression that the ECJ has adopted its existing case law and only considers the notification of resale to be relevant for the allocation of the transport. According to the tenor of the judgment, the transport is to be ascribed to the second supply in the chain if the first acquirer (B) informs the first supplier (A), before the supply takes place, that he will resell the goods immediately to a taxable person in a third Member State.

However, a small restriction in the ECJ's judgment should be noted: "…in circumstances such as those of the main proceedings…". According to the ECJ, it is apparent from the information contained in the order for reference by the Lithuanian court that the supply by the first acquirer (B) to the final acquirer (C) took place before the intra-Community transport. In this context, the ECJ also confirmed the principles set out in its preliminary ruling *Euro Tyre Holding* (C-430/09) and *VSTR* (C-587/10). According to these deci-

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sions, in order to answer the question of which supply is to be assigned to the intra-Community transport, it is vital

- to make a full assessment of all specific circumstances of the individual case; and
- in the context of this assessment, it is necessary to clarify, in particular, whether the first acquirer (B) has given the final acquirer (C) the right to dispose of the goods prior to the intra-Community transport taking place.

Hence, as a first step, it would be necessary to examine whether the first acquirer (B) gave the final acquirer (C) the right to dispose of the goods before the intra-Community transport took place and thus in the country of departure. If so, the transport and thus the VAT exempt intra-Community supply, could be assigned to the supply from the first acquirer (B) to the last acquirer (C). For this purpose, however, a further precondition would be that the first acquirer (B) informs the first supplier (A), in advance, of his intention to resell the goods to another taxable person in another Member State. The ECJ apparently regards this further precondition to be decisive. Otherwise, the ECJ would only have responded to the question submitted that the notification of resale is not relevant. Then it would have been sufficient for the ECJ to merely refer to the transfer of the right of disposal to the final acquirer (C) in the country of departure.

In its decision of 11 August 2011 (V R 3/10), the German Federal Fiscal Court already classified the intention of resale expressed by the first acquirer to be decisive. The court referred to paragraph 36 of the ECJ ruling *Euro Tyre Holding* where this criterion was mentioned. Later, the Federal Fiscal Court relativised this in its decision of 25 February 2015 (XI R 15/14) by arguing that only objective circumstances have to be considered and that it is not sufficient if the first acquirer merely expresses his intention to resell the goods to another Member State.

3. Practical tips

The decision contributes somewhat to reducing uncertainties in the handling of chain transactions. At the very least, the ECJ provides the taxpayer with a criterion, which can be taken into account in the assessment of the overall circumstances. However, the outcome of further proceedings pending before the ECJ in the legal case *Kreuzmayr* (C-628/16) must first be observed. In this case, the ECJ is also required to decide on the assignment of the transport of goods in chain transactions. In this case, the first acquirer (B) did not inform the first supplier (A) that he would resell the goods before leaving the country of departure.

In the case of chain transactions with regard to Germany, it will still be necessary to continue to follow the regulations of the German VAT Circular. Although the Federal Fiscal Court has categorized it as not compliant with EU-law, the fiscal authorities still continue to follow it. The legislative procedure regarding the reorganization of chain transactions is known to be stagnating due to the forthcoming federal elections. At the same time, companies should try to achieve a balance between the rules in the German VAT Circular and the principles developed by the ECJ and Federal Fiscal Court. Depending on the desired result, this will involve a decision being made by the first acquirer as to whether he informs the first supplier of any intention he may have to resell the goods.

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