



KMLZ VAT NEWSLETTER

Allocation of transport in chain transactions – new jurisprudence continues

1. Federal Fiscal Court's decision XI R 30/13

According to the operative provisions of the Federal Fiscal Court's decision XI R 30/13, the transport has to be ascribed to the first supply (A to B) in a chain transaction, even though the last purchaser (C) ordered or carried out the shipment. The Court held this to be the case unless the first purchaser (B) transferred the right to dispose of the goods to the last purchaser (C) in the country of dispatch. However, the Federal Fiscal Court referred the case back to the Fiscal Court since the latter had not considered all relevant circumstances. Hence, the Fiscal Court had to determine as to when B was regarded as having effectively transferred the right to dispose of the goods to C.

2. Decision of the Fiscal Court Rheinland-Pfalz

The Fiscal Court Rheinland-Pfalz was ultimately unable to find any new facts or indications substantiating the assumption that the right to dispose of the goods was transferred from B to C in the country of dispatch. Hence, the Fiscal Court followed the guidelines of the Federal Fiscal Court and ascribed the transport to the first supply (A to B).

Fiscal Court Rheinland-Pfalz follows Federal Fiscal Court and finds surprising arguments

On 25 February 2015, the Federal Fiscal Court published two pathbreaking decisions regarding the allocation of the transport in chain transactions: XI R 30/13 and XI R 15/14 (see Newsletter 12/2015). In particular, the Court decided that sec. 3.14. para. 8 sentence 2 of the Administrative VAT Guidelines is not fully compatible with the jurisprudence of the ECJ. The allocation of the transport and the place where the right to dispose of the goods is transferred cannot be determined based on who has ordered or carried out the shipment. In its judgement XI R 30/13, the Federal Fiscal Court referred the case back to the Fiscal Court Rheinland-Pfalz because of missing factual determinations. The Fiscal Court redetermined the case and delivered its decision on 31 May 2016 (3 K 1364/15). The result is not surprising. The Fiscal Court followed the guidelines of the Federal Fiscal Court. However, the Court's reasons for its decision are partly astonishing.

This result is not surprising. However, the four arguments provided in the reasons for judgment are interesting, in some respects rather astonishing. The Fiscal Court did not consider it necessary to mention the principle established by the Federal Fiscal Court, according to which the transport, in the case of any doubt, is to be ascribed to the first supply. Rather, the Fiscal Court made its determination based on indications that the first purchaser (B) did not transfer the right to dispose of the goods to the last purchaser (C) within the country of dispatch. Hence, the transport had to be ascribed to the supply from A to B. The Fiscal Court found this to be the case based on the following indications:



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a) B charged UK VAT to C (whereas A raised an invoice for a zero-rated intra-Community supply to B). In fact, the Fiscal Court acknowledged that the determination cannot be made based on the subjective notification of an intention. However, the interests of the parties involved as well as the concrete contractual agreements and actual execution do not allow for the taxation of the supply from A to B in the country of dispatch.

b) A was unaware of the onward supply of B to C. Hence, it cannot be assumed that B instructed A to transfer the right to dispose of the goods to C or that A wanted to transfer this right to C. It is particularly interesting that the Fiscal Court did not even consider it to be necessary that A got a confirmation that B does not intend to transfer the right to dispose of the goods to a third party within the country of dispatch. This is based on the statement of the Director of A according to which he was informed by B that the freight forwarder of B would pick up the goods. Again, it is surprising that the Fiscal Court initially repeats the principle according to which the determination cannot be made based on the subjective knowledge of A but only on the objective circumstances and then subsequently considers the subjective knowledge relevant to the issue.

c) C did not pick up the goods personally. Only a personal pick-up by C could have led to the indication that the right to dispose of the goods was transferred to C within the country of dispatch.

d) It is decisive that B mentioned in its invoices to C that B remained the owner of the goods until fully paid. Hence,

the right to dispose of the goods could only be transferred once C fully paid the purchase price to B. This indication is astonishing due to the fact that such civil law particularities should not, in principle, have any impact on the right to dispose of goods.

The Fiscal Court once again granted the tax authorities to lodge an appeal against its decision and, unsurprisingly, the tax authorities proceeded to do so (XI R 17/16). It will be interesting to see if the Federal Fiscal Court confirms the findings of the Fiscal Court.

3. Outlook

Apparently, the Federal Ministry of Finance intends to implement the recent regulation in the Administrative VAT Guidelines into the VAT law, with a few amendments. The fact as to who ordered or carried out the shipment shall remain the determining, categorical criterion. The proposal, made by the business sector, that the VAT-ID employed by the middle party should determine the matter seems not to have been accepted. The tax authorities only intend to consider the VAT-ID in a scenario where the middle party ordered the shipment.

However, in the short to medium term, amendment of the VAT law would seem unlikely. Thus, the tax authorities are considering publishing a circular to clarify the transition period allowing for adherence to the previous handling with a few amendments because of the new jurisprudence. We can expect the circular to be published by the end of 2016. It is unlikely that the Federal Ministry of Finance will want to wait until the new appeal procedure with the Federal Fiscal Court is concluded before publishing.