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VAT'S UP

VAT NEWSLETTER

Federal Fiscal Court views chain transactions differently to tax authorities, even in the case of fractional transport

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1 Background

In the case of supplies involving several parties, the question always arises as to whether a chain transaction has been carried out and, if so, to which supply the transport of the goods is to be allocated. A chain transaction is characterised by the direct delivery of the goods from the first supplier to the last acquirer. In the opinion of the German tax authorities, there is no direct delivery if the transport or dispatch is carried out by several parties (in a so-called "broken" transport, sec. 3.14 para. 4 of the German Administrative VAT Guidelines (UStAE), Federal Ministry circular of 23 April 2023).

2 Federal Fiscal Court decision of 22 November 2023 (XI R 1/20)

With the decision published on 25 April 2024, the German Federal Fiscal Court (BFH) ruled on a chain transaction with three parties regarding the ("old") law applicable until 31 December 2019:

- As regards the allocation of the transport of the goods, it needs to be determined, by an assessment of the overall circumstances of the individual case, whether the first acquirer has transferred the right to dispose of the goods to the second acquirer in Germany.
- A duly issued and signed bill of lading does not provide evidence as to whether the first acquirer has transferred the right to dispose of the goods, domestically, to the second acquirer.
- Whether a "broken" transport has taken place is irrelevant to the question of whether a domestic transfer of the right to dispose of the goods has taken place between the first and second acquirer.

With regard to the allocation of the transport of the goods, the decision is not surprising. It follows the ECJ case law and the corresponding case law of the BFH under the "old" law. Of particular interest and perhaps also of relevance for the ("new") law, applicable since 1 January 2020, however, are the statements on 'broken' transports.

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3 Chain transaction despite “broken” transport – until 2019

In the case in dispute, the goods were first transported from Germany to a freight forwarder's warehouse in the Netherlands and from there to Kazakhstan. It was not clear who had organised which part of the transport. According to the BFH, however, this did not matter. Even in the case of a “broken” transport, a chain transaction would be deemed to have taken place. Irrespective of any fractional transport responsibility, the BFH was convinced that the first acquirer had already transferred the right to dispose of the goods to the second acquirer in Germany. Therefore, the transport had to be allocated to the supply of the first acquirer to the second acquirer. The temporary storage in the forwarder's warehouse, prior to onward transport, was also irrelevant because this only resulted in a short and negligible interruption to the transport.

4 “Broken” transport still not relevant after 2019?

Direct delivery from the first supplier to the last acquirer is a condition for a chain transaction under both the “old” and the “new” law. The wording of the definition in sec. 3 para. 6a sentence 1 of the German VAT Act (UStG), which came into force on 1 January 2020, has in fact remained unchanged compared to sec. 3 para. 6 sentence 5 UStG, which was in force until 2019. If, according to the BFH, a chain transaction is deemed to have taken place under the “old” law, contrary to the opinion of the tax authorities, even if individual parts of the transport are commissioned or carried out by different parties, this should actually also be the case under the “new” law. There only need be a uniform and not detrimentally interrupted transport or dispatch (see BFH judgements of 16 November 2016 - V R 1/16 and 11 March 2020 - XI R 7/18).

5 Follow-up question: allocation of the transport

If, according to the BFH, a chain transaction is possible in the case of “broken” transport, the next question is how to allocate the transport of the goods in such a case. The German VAT Act considers whether the first supplier, the intermediary or the last acquirer was responsible for the transport. However, the VAT Act does not provide any regulation in the case of fractional transport responsibility, nor does the VAT Directive. As the BFH has now confirmed, according to ECJ case law, it only matters for the “old” law where the right to dispose of the goods is transferred from the first to the second acquirer and not which party bears the transport responsibility. The question still to be clarified is whether the transfer of the right to dispose of the goods is also the only relevant criterion for the “new” law in force since 2020, in the case where there are several transport orders within a chain transaction. The ECJ case law cited by the BFH could continue to apply because the introduction of Art. 36a EU VAT Directive on 1 January 2020 only governs the special case of a chain transaction in which the intermediary transports or dispatches the goods. However, the EU VAT Directive, (contrary to the German VAT Act), still does not stipulate how the transport of the goods is to be allocated if the first supplier or the last acquirer is responsible for the transport. An interpretation by the ECJ is probably first required before this situation becomes any clearer.

6 Effect on practice

It is unlikely that the UStAE or even the UStG will be amended as a result of this BFH decision. Everything will therefore remain the same for day-to-day business. Businesses should orientate themselves on the UStG and the UStAE. This will provide a degree of legal certainty. The only thing to bear in mind is that, for chain transactions within the EU, the possibly differing views of other Member States involved must always be taken into account.

However, businesses that are in dispute with the tax authorities about the treatment of chain transactions may find it helpful to argue their cases using the findings of the BFH, which contradict the UStG and the UStAE. And this would be conceivable for both the “old” and the “new” legal situation, at least as long as the ECJ has not yet ruled. There may only be restrictions for the cases regulated in Art. 36a EU VAT Directive.

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