



KMLZ VAT NEWSLETTER

Installed operating equipment is not immovable property

The implementation of the reverse charge scheme for construction works in 2004 caused difficulties from the outset. Even today, it is not always clear whether a supply qualifies as construction work. It is not only uncertain as to whether a supply results in a construction, repair, maintenance, alteration or demolition of immovable property but also whether the supply relates to immovable property at all.

1. Decision of the Federal Fiscal Court

The Federal Fiscal Court decided, on 28 August 2014 (V R 7/14), that a smoke extractor installed to achieve clean room conditions is considered to be operating equipment but does not form part of a particular construction's immovable property. This finding results from the fact that the building concerned already contained an air conditioning system. The smoke extractor did not have a particular function in the building but rather served a separate purpose. Consequently, the services received in connection with the erection of the equipment did not qualify as construction work for immovable property according to sec. 13b para. 2 no. 4 of the German VAT Act.

Court defines “operating equipment” and “connection with immovable property”

The Federal Fiscal Court has ruled that installed operating equipment is not immovable property. This is the case irrespective of whether it is constantly affixed to the property or not. In the case at hand, the court was faced with making a decision concerning the reverse charge scheme in the construction sector. However, it also came to a number of general conclusions that may be relevant for the definition of services connected to immovable property. The German Administrative Circular will have to be amended accordingly. Companies performing and receiving supplies related to machines and equipment will have to review the VAT treatment and amend said treatment, if need be.

2. Definition of “building”

The Federal Fiscal Court confirmed the definition of a building in sec. 13b.2 para. 1 of the German Administrative Circular. Buildings are defined to be immovable goods constructed with a fixed connection to the ground. This includes bridges and streets.

3. Definition of „operating equipment“

According to the Federal Fiscal Court, however, equipment installed in buildings is considered to be part of the building only if it is of relevant importance to the construction, maintenance or use of the building, as a whole. The equipment needs to have a function for the building itself. If the equip-



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ment serves a separate purpose and is only accommodated in the building, it is not considered to be part of the building.

In the Federal Fiscal Court's opinion, this is also confirmed by the VAT Directive. According to article 199 para. 1(a) of the VAT Directive, the liability to pay VAT can only be shifted to the customer for supplies "related to immovable property". Thereby, article 135 para. 2(c) of the VAT Directive would have to be taken into consideration for the interpretation of the concept of "immovable property". Permanently installed equipment and machinery are therefore excluded from the VAT exemption set out for rented property.

4. Federal Fiscal Court objects to German Administrative Circular

The court has explicitly objected to the Fiscal authorities' opinion. Contrary to sec. 13b.2 para. 2 of the German Administrative Circular the term "building" cannot be interpreted for VAT purposes, based on the Baubetriebsverordnung – a *regulation for construction companies*. The installation of shop fittings, window displays and restaurant equipment mentioned in sec. 13b.2 para. 5 would therefore not be covered by construction work. Afterall, this is always considered to be operating equipment. For this reason, the Federal Ministry of Finance cannot avoid amending the German Administrative Circular to this effect.

It therefore follows that the installation of photovoltaic systems on buildings, as mentioned in sec. 13b.2 para. 5 no. 11 of the German Administrative Circular, will no longer be considered to be construction work. Further, the equipment serves a separate purpose, i.e. the generation of electricity as a source of revenue.

In addition, sec. 13b.2 para. 5 no. 3 of the German Administrative Circular surely cannot be maintained. Large machinery which has to be erected in order to operate can generally not be considered to be a building. The Federal Fiscal Court is of the opinion that, in accordance with article 135 para. 2(c) of the VAT Directive, machinery equipment is excluded from the definition of buildings.

5. Property related supplies

The Federal Fiscal Court's decision may also have an effect on what is considered to be a supply of services relating to immovable property in terms of sec. 3a para. 3 no. 1 of the German VAT Act. If the Federal Fiscal Court considers the operating equipment not to be part of the immovable property for VAT purposes, even if it is constantly affixed, supplies connected to this equipment cannot be considered property related supplies.

Various parts of sec. 3a.3 of the German Administrative Circular would then have to be amended. Although the German Administrative Circular was, insofar, derived from the guidelines of the 93rd meeting of the VAT committee of 1 July 2011, these guidelines do not have a binding effect.

6. Recommendation

Companies performing and receiving supplies related to machinery and equipment will have to review and possibly revise their VAT treatment. While the German Administrative Circular remains unamended, companies can continue to comply with it. In the case of adverse results, however, they may refer to the Federal Fiscal Court's decision.