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KMLZ VAT NEWSLETTER

Consignment stocks: intra-Community supply in case of binding orders

Tax court disagrees with fiscal authority

On 25 August 2015 (Ref. 1 K 2519/10), the Hessian tax court expressed its disagreement with the tax authority's opinion regarding supplies via German call-off stock. The tax court decided that supplies via call-off-stock can be intra-Community supplies if certain conditions are met. In particular, if the customer raised binding orders prior to the beginning of the transport to the consignment stock. According to the tax court, it is irrelevant that the right to dispose of the goods was transferred in Germany. The tax court has appealed the judgment (Az. V R 31/15). Therefore, a decision by the Federal Fiscal Court on the VAT treatment of supplies from the EU, via German consignment stock, is ultimately to be expected.

1. Facts

A Spanish production and trading company sold goods to a German company. The goods produced in Spain were supplied via a call-off stock located in Germany. For this purpose, the German customer concluded a service agreement with the operator of the warehouse. The warehouse services had been ordered on behalf and for the account of the supplier. The German customer had dictated these terms to the supplier. The operator of the warehouse was supposed to render several services with respect to the stored goods (e.g. unloading, storage, sampling). The German customer had been granted access to the stored goods, which access he could exercise at any time. Extensive agreements had been made between the parties. Central supply agreements provided for the goods to be supplied, the terms of payment, the terms of delivery/supply and the prices. The concrete quantity and dates of supply were determined by call-off schedules which were forwarded by the German recipient on a daily basis or at intervals of a few days. Only these had a legally binding effect. The call-offs scheduled supply dates for the next 12 weeks, in advance. The quantities shipped to the stock were required to cover the demands of the customer during the coming weeks and months.

2. Legal situation

According to the German tax authorities, the supply of goods from other EU member states, via a distribution warehouse or consignment stock located in Germany, is deemed to be an intra-Community transfer of own goods with subsequent domestic supply by the supplier (see sec 3.12 para 3 sentence 7 and sec 1a.2 para 6 of the Ger-

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man Administrative Circular, Guideline of the Upper tax authority in Frankfurt am Main dated 17 October 2010). Several tax courts and also the Federal Fiscal Court have raised doubts in this respect and have assumed an intra-Community supply of the respective supplier from another EU country.

3. Decision of the tax court

The tax court confirmed that a taxable supply was deemed to have been carried out at the time the transport started. The tax court assumed that intra-Community supplies were carried out if, as in the present case, the customer issued a binding order prior to the transport being commenced. According to the tax court, the transport to Germany was not deemed to be a transfer of own goods for the disposal of the supplier, but rather was carried out for the supplier to be in a position to meet his legally binding obligation of supply. In this case, as in any other supply with transport, the place of supply would have to be determined according to the place where the transport had started, although the right to dispose of the goods was actually transferred in Germany at a later date. For this reason, the tax court did not even consider where the right to dispose of the goods was transferred in the case at hand. This fact is irrelevant because binding orders had been in existence from the beginning.

In the tax court's view, an intra-Community transfer of own goods by the supplier cannot be assumed merely due to the fact that the goods to be supplied, to an already specified customer, are stored for a short period of time in a warehouse which was established at the customer's initiative.
As the parties involved agreed that binding orders had existed for the major part of the supplies prior to the beginning of the transport, the tax court did not have to comment on the existence of binding orders. In its judgment, the tax court expressly stated that it considered the fiscal authority's view, based on the Guideline of the Upper tax authority in Frankfurt am Main dated 17 October 2010, to be incorrect.

4. Conclusion

The Hessian court provides no new findings as to how storage contracts and other related supply agreements should be drawn up so as to ensure the assumption of a binding order prior to the commencement of transport. However, the tax court, once again, clearly objects to the fiscal authority's view that an intra-Community transfer of own goods always has to be assumed if goods are supplied via consignment stock.

The tax office has appealed the judgment. The appeal is currently pending at the Federal Fiscal Court under Ref. V R 31/15. Thus, a ruling by the highest court on consignment stocks is to be expected. It is to be hoped that, in its judgment, the Federal Fiscal Court will clearly comment on when a binding order, which existed before the beginning of the transport and subsequent intra-Community supply, must be assumed and, on the other hand, when no binding order and a subsequent intra-Community transfer of own goods is to be assumed. Based on this, future storage contracts and related supply agreements could be drawn up accordingly and with a high level of legal certainty, as regards VAT treatment.