



ECJ creates further uncertainty about the definition of “immovable property”

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1 Background

A Oy leased a building and offered computing services in a computer centre to domestic and foreign telecommunications network operators. A Oy provided its customers with lockable equipment cabinets where they could store their own servers. The scope of services also included a power supply, air conditioning and monitoring to ensure the efficient use of the servers under optimal conditions. The equipment cabinets were bolted to the floor. The servers were also screwed to the cabinets but could be removed within minutes. The customers were not initially given keys to their respective equipment cabinets, but these keys were provided immediately after an identity check.

It was questionable whether the services offered by A Oy were to be understood as the leasing or letting of immovable property within the meaning of the VAT Directive. The ECJ was asked to consider this issue and where it found no leasing or letting of immovable property to exist, to clarify whether the services offered should be considered as services connected with immovable property.

2 Hosting services do not represent leasing or letting of immovable property

The ECJ maintains its previous view. It rejected the idea that the provision of the premises, in which the equipment cabinets were installed, constituted leasing or letting of immovable property. It found that such leasing or letting of immovable property would only be given if the landlord of a property passively granted a tenant the right of exclusive use for a certain period of time against remuneration. However, this circumstance was not given in the present case. On the



Dr. Atanas Mattev
Certified Tax Consultant

+49 (0) 89 217 50 12-53
atanas.mateev@kmlz.de

one hand, it was not possible for the customer to exclude others from using the server rooms. On the other hand, A Oy offered a bundle of additional services.

3 Server cabinets shall not be regarded as immovable property

The lease of the server cabinets could also have constituted a service connected with immovable property, provided that the cabinets were to be valued as a part of the building.

However, the ECJ also denied this. It found that the server cabinets were neither an integral nor a permanently installed part of the building. According to the ECJ, integrity failed because the building, without the server cabinets, could not be regarded as structurally "incomplete". The cabinets did also not constitute a permanently installed part of the building since they were only screwed into the floor and could be quickly removed without destroying or altering the building.

It is not surprising that the equipment cabinets were found not to constitute a permanently installed part of the building because they were only lightly affixed to the floor. The exciting question, however, was whether the server cabinets were "integral" to the building in terms of its use as a hosting centre. Movable items are integral to a building if they serve a common purpose together with the building. Hence, the justifiable question as to whether the building and the server cabinets served a common purpose. Unfortunately, the ECJ's answer in this regard was very brief. The ECJ merely explained that, without the server cabinets, the building could not be considered structurally "incomplete".

4 Consequences for the practice

What is to be understood as immovable property for VAT purposes is governed by Art. 13b of Council Implementing Regulation 282/2011, according to which even initially movable objects may later constitute an integral part of immovable property or be permanently installed therein and thus fall under the term "immovable property".

In the present case, the ECJ focused on the "structural" materiality of a movable item. However, this cannot be inferred at all from the text of the Regulation. In practice, questions, which actually seemed to have been previously clarified, now arise again. Is the concept of immovable property to be understood more narrowly than previously assumed? Is it still justifiable that machines or equipment installed in a building are considered to be parts of the land? This question arises, above all, in the case of installations, which occupy an entire building and form part of a further construction (e.g. supply installations in production, waste disposal plants, fully automated logistics plants). This equipment is often not firmly affixed to the floor of the building. It is not uncommon for a building to be constructed as an outer skin specifically to meet the needs of these large plants, so that the building and the plant complement each other.

The bottom line is that the hoped-for enlightenment by the ECJ has failed to materialise. Whether a movable item is integral to a property or constitutes a permanently installed part of it must always continue to be examined in practice on a case-by-case basis. Above all, taxable persons operating in the plant and mechanical engineering sector should check whether services directly attributable to an on-site project are to be assessed as being connected with immovable property. This applies to both input and output transactions. If it transpires that a transaction is not taxable at the place where it is located, taxable amounts:

- ... from incoming invoices with local VAT may have been incorrectly claimed as input VAT and/or
- ... from supplies to customers may not yet have been correctly reported.