



ECJ on invoice correction in case of “unsuccessful” triangulations

1 Background

Triangulation is a simplification rule for certain chain transactions. If the transport is ascribed to the first supply in a chain transaction, the intermediary is obliged to VAT register in the country of destination. If the intermediary uses the VAT-ID of his country of domicile, the safety-net acquisition tax of art. 41 VAT Directive will also apply.

The triangulation rule, within the meaning of sec. 25b German VAT Act (Art. 42, 197 VAT Directive) results in the intermediary not having to register in the country of destination in the case of a chain transaction involving three traders from different Member States. This follows from the fact that the VAT liability is transferred to the acquirer in the country of destination and the intra-Community acquisition is deemed to be taxed there. The application of the rule is dependent on the intermediary submitting a proper recapitulative statement and indicating in his invoice both the application of the triangular transaction rule and the transfer of VAT liability. Whether “unsuccessful” triangular transactions can be remedied with retroactive effect has recently been assessed inconsistently by German courts (denied: Tax Court Cologne, 8 K 250/17; granted: Tax Court Münster, 15 K 1219/17 U, Tax Court Rheinland-Pfalz, 6 K 1767/17 - both pending).

2 Facts of the case and questions referred to the ECJ

The Austrian company *Luxury Trust Automobil* acquired vehicles in the United Kingdom in 2014 (the year in dispute) and sold them to a company based in the Czech Republic. The three entrepreneurs involved each appeared with the VAT-ID of their home state. The vehicles were delivered directly from the British supplier, who also arranged the transport, to the recipient in the Czech Republic. *Luxury Trust Automobil* treated the sales as triangular transactions and reported this



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accordingly in the recapitulative statement. The invoices contained the reference "VAT-exempt triangulation" but did not refer to the transfer of the VAT liability to the Czech purchaser. Later, the reference was added to corrected invoices. These invoices, were ,however, not verifiably received by the customer.

The tax office denied the triangulation, due to the lack of reference to the transfer of VAT liability, and assessed the safety-net acquisition tax. The Austrian Federal Fiscal Court confirmed the opinion of the tax office. The subsequent application of the simplification was not to be adjudicated due to the lack of proof of the delivery of the corrected invoices. The Austrian Administrative Court finally referred the following questions - stated here in a simplified form - to the ECJ:

1. Is the reference to a triangulation in the invoice sufficient to effectively designate the final purchaser as the person liable to pay the VAT?
2. Can the statement in the invoice that the recipient is liable for the VAT be retroactively effective?
3. Are the invoice requirements of the Member State of the intermediate or final purchaser applicable?

3 Decision of the ECJ

The ECJ does not allow the mere reference to a VAT-exempt triangulation, in the absence of a simultaneous reference to the transfer of the tax liability, to be sufficient for the assumption of a triangulation, and refers to the findings in the case of *Firma Hans Bühler* (C-580/16, KMLZ VAT Newsletter 18 | 2018). Accordingly, Art. 42 lit. a VAT Directive constitutes a material requirement for a triangulation. In conjunction with Art 197 VAT Directive, this requires an invoice that corresponds to Sec. 3 to 5 of Chapter 3, which also includes Art. 226 VAT Directive. In Art. 226 No. 11a VAT Directive, the legislator explicitly stipulated the mandatory invoice reference "Reverse charge" in cases where the recipient of the supply was liable for the VAT. An interpretation contrary to the explicit wording was therefore not possible. This was also in line with the purpose of the regulation to inform the invoice addressee about the legal assessment of the transaction.

The ECJ rejects an invoice adjustment in such a way that the consequences of the triangulation have a retroactive effect on the original invoice. The subsequent, first-time fulfilment of a material requirement does not constitute a correction. In this respect, the court refers to the opinion of AG *Kokott*. In the corresponding case, she affirmed the occurrence of the legal consequences of the triangulation at a later date, but without retroactive effect (*ex nunc*). The third question remained unanswered, as the court denied the application of the simplification rule.

4 Conclusions

The ECJ makes it unmistakably clear: Without a proper invoice, the triangulation simplification does not apply! The court thus abandons the chosen path of attaching only formal importance to invoice requirements. In practice, the question of invoices for triangulations thus remains very important. Those who wish to make use of the simplification should pay close attention to the fulfilment of the requirements in view of the legal consequences that will otherwise occur.

Those who do not fulfil the material requirements of a triangular transaction, due to a lack of invoice requirements, can remain hopeful. There is no deadline under EU law within which the triangulation must be claimed. The requirements can probably still be fulfilled, even after an insufficient initial invoice has been issued, but without retroactive effect. Unfortunately, this finding was not explicitly included in the tenor of the judgement. The question also arises as to what procedural consequences appear with regard to the VAT liability in the Member State of the last purchaser. Further legal proceedings are therefore pre-programmed. Corresponding cases should consequently be kept open.