

Deduction of input VAT by shareholders

From a VAT perspective, the relationship between shareholders and companies is often prone to problems. This also applies with respect to the question of VAT deduction. If a shareholder brings assets into a company or if he allows the company to use them, it is questionable whether the shareholder can deduct VAT from the asset's acquisition costs. Recently, certain pre-existing difficulties have become particularly threatening. Even the Supreme Tax Court's two "VAT Senates" are divided over the application of the law.

The different applications of the law by the Supreme Tax Court's V and XI Senate become apparent in the following case:

1. Case before the XI Senate

At the moment, the XI Senate is required to make a decision on a case in which a shareholder left his client base, free of charge, for usage by a new partnership. The new company used the client base for taxable supplies. The shareholder had received the client base from another company and received an invoice including VAT. The shareholder claimed VAT deduction thereof.

2. Request by the XI Senate to the V Senate

The Supreme Tax Court's XI Senate intended to grant the shareholder the VAT deduction. However, such a decision

Existing divergence between Supreme Tax Court's V and XI Senate

The Supreme Tax Court's V and XI Senate currently hold diverging views on VAT deduction by shareholders. While the XI Senate construes the European Court of Justice's statements in the case of *Polski Trawertyn* quite widely, thereby making VAT deduction easier, the V Senate adheres to its restrictive interpretation. The European Court of Justice will have to clarify these interpretation issues.

derogates from the V Senate's jurisdiction. The V Senate has previously denied VAT deduction in circumstances where a shareholder purchased assets outside of his usual economic activity in order to bring them into the company. For this reason, the XI Senate asked the V Senate by order of 14 November 2012 (file no. XI R 26/10) using what is also called a "divergence request", if the V Senate intended to alter its former legal opinion.

3. Reasons of the XI Senate for the intended derogation

The reason for the intended derogation by the XI Senate is the European Court of Justice's decision of 1 March 2012 in the case of *Polski Trawertyn* (case C-280/10). The European Court of Justice decided on a case in which the shareholders bought land together in order to then bring it into a new company by means of investment contribution in kind. In principle, the shareholders would have had no right to deduct VAT as they had used the land for a VAT exempt contribution. However, as the company used the land to carry out taxable supplies and the company itself did not deduct VAT from the acquisition costs of the land, the European Court of Justice granted the shareholder a VAT deduction for reasons of economic neutrality. The Supreme Tax Court's XI Senate planned to transfer the European Court of Justice's jurisdiction to this case.



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4. Reaction of the V Senate

By order of 14 November 2012 (file no. ER-S 2/2012) the V Senate rejected derogation from its jurisdiction by the XI Senate. The V Senate has adhered to its former jurisdiction. According to the V Senate, the European Court of Justice's judgment in the case of *Polski Trawertyn* could not be transferred to the case at hand as it did not contain statements regarding the following issues:

- the surrender of use of an asset to the company instead of a contribution of assets
- free-of-charge surrender of use to the company
- contribution or surrender of use if there is no VAT exemption
- direct acquisition only by individual shareholders
- priority of VAT deduction by the shareholders over the priority of VAT deduction by the company

The V Senate indicated that it is the European Court of Justice's duty to clarify existing interpretation doubts.

5. Practical tip

As the different opinions of the V and XI Senate indicate, some questions regarding VAT deduction by shareholders remain unanswered. In contentious cases, tax assessments should be kept "open" and the development in this area should be observed.

The "shaping of law" should focus, in particular, on VAT-related consequences if the shareholder brings an asset into the company or allows the company to use it. If a shareholder purchases an asset, he could possibly use it for own taxable supplies for a short period of time and then permit the company to use it in return of payment.

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