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KMLZ VAT NEWSLETTER

Sale of a co-ownership share can be a supply of goods

Co-ownership share is a supply of goods rather than a supply of service

New Federal Fiscal Court case law has ruled that the sale of a co-ownership share is now deemed to be a supply of goods rather than a supply of service. This new perspective will have a major impact on cross-border supplies due to the fact that the seller of a co-ownership share now bears the burden of proof. Although the judgment effectively changes the case law, the Federal Fiscal Court's conclusion is not transferrable to cases involving joint ownership. The national civil law will be of decisive importance.

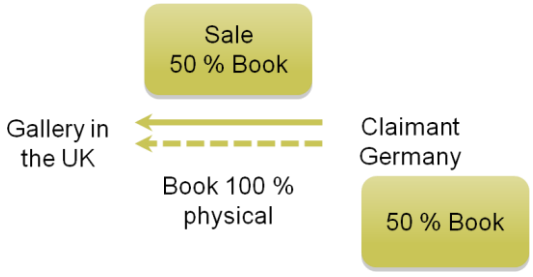
1. Background

According to the fiscal authorities, the transfer of a co-ownership share against remuneration under sec 3.5 para 2 of the German VAT Circular is considered to be a supply of services in accordance with sec 3 para 9 of the German VAT Act. The sale of investment gold is a different case which is, due to a legal regulation, a supply in accordance with sec 3 para 1 of the German VAT Act – see sec 25c.1 of the German VAT Circular.

The tax authorities' opinion is based on long-term established Federal Fiscal Court case law. However, the Federal Fiscal Court would now like to see its case law amended. In its key statement of the judgment of 18.02.2016 (V R 53/14), the Federal Fiscal Court held: The sale of a co-ownership share of an item may constitute a supply of goods.

2. Federal Fiscal Court decision

The facts of the case were as follows: In 2008, the claimant sold 50% of its co-ownership share of a book to a gallery in London. The same year the book was brought to the UK by the buyer and exhibited there. In 2010 the claimant sold the other half of its co-ownership share of the book to the gallery. The Federal Fiscal Court decided that the sale of the first 50% was deemed to be a zero-rated intra-Community supply.



The Federal Fiscal Court concluded that the sale of a co-ownership share could be a supply of goods. Consequently, the Federal Fiscal Court examined the question of whether such a supply is to be treated as a zero-rated intra-Community supply in accordance with sec 6a of the German

Contact: Prof. Dr. Thomas Küffner
Lawyer, Certified Tax Consultant,
Certified Public Accountant
Phone: +49 (0)89 / 217 50 12 - 30
thomas.kueffner@kmlz.de

VAT Act. To date, assuming a supply of services, this examination has been unnecessary as the place of the supply of services to a taxable person is deemed to be where the foreign customer is established in accordance with sec 3a para 2 of the German VAT Act. There is no need for the seller to meet any documentary requirements.

The Federal Fiscal Court justifies its case law with reference to the Union law. It would be incompatible with Union law to treat this transaction as a supply of services. The Federal Fiscal Court refers to the ECJ case law in the case *Centralan Property Ltd*.

Finally, the Federal Fiscal Court points to the fact that splitting the authority to dispose of a physical object with the effect that several persons are entitled to dispose of the object as owners is deemed to be the legal position of a co-owner who is entitled to freely dispose of his co-ownership share in accordance with sec 747 sentence 1 of the German Civil Code. In the Federal Fiscal Court's opinion, co-ownership according to a fractional share would be similar to commonly owned property so that the co-owner is entitled to the same legal position as an owner.

3. Consequences for the practice

Although, the Federal Fiscal Court's explanations are basically correct, they are too limited. In particular, the conclusion that the sale of a co-ownership share always has to be qualified as a supply of goods, cannot, in our view, be generalized. Co-owners are not always entitled to occupy a legal position which is comparable to an owner's legal position, for VAT purposes.

The legal position of an owner is only to be assumed where a supply involves the authorization to dispose of an object like an owner. The ECJ held this opinion in the case *Centralan Property Ltd.* According to German civil law, a co-owner is only entitled to dispose of his right to a share, but not the object itself. A co-ownership of an item or group of assets does not cause a real division of the item itself but rather an ideal division of the ownership, which refers to the whole item. According to sec 749 para 1 of the German Civil Code, each part owner is merely entitled to a legal claim for cancellation of the joint ownership vis-à-vis the rest of the owners. This, however, requires a separate agreement between the co-owners. As long as there is no agreement covering this issue, co-owners are not unconditionally entitled to demand the concrete object. One can certainly not speak of an entitlement to dispose of the object like an owner.

The fiscal authorities will now have to consider how to implement the judgment into the German VAT Circular. An overall approach is not possible in this case. There are different kinds of joint ownerships. Also practical questions of application will arise which need to be clarified: e.g. what would have happened if the book had not been brought directly to the UK. The seller would have had to invoice VAT. The English acquirer would have been able to benefit from an input VAT deduction only via the 8th Directive refund procedure or by registering for VAT purposes. This is unrealistic. The practice needs adequate solutions to this issue.