KMLZ

VAT'S UP

VAT NEWSLETTER

ECJ: Transportation arrangement is not only based on contractual agreements

29 I 2020

1 Background

KrakVet sold animal products online, including through a Hungarian domain. The goods were always shipped from Poland to the private customers in Hungary. Customers were free to pick up the purchased goods directly at KrakVet's warehouse in Poland or to choose their own carrier. At the same time, KrakVet's website offered customers the opportunity to conclude a forwarding contract with the freight forwarder KBGT. KrakVet did not become a contracting party in this respect. If customers chose the recommended freight forwarder, KrakVet offered a discount on the price of the goods, so that the transport effectively cost only about EUR 0.25. The Polish tax authority confirmed to KrakVet that VAT was due in Poland on the basis of Art. 32 VAT Directive and assessed a Polish VAT rate of 8% for these supplies. However, following an audit by the Hungarian tax authority, the latter found that the supplies threshold provided for in Art. 34 VAT Directive was exceeded and taxed the supplies (additionally) with 27% Hungarian VAT.

2 Double Taxation

The ECJ first confirmed that the tax authorities of one Member State can tax a transaction, knowing full well that another Member State's tax authority has already taxed it. The tax authorities are not obliged to clarify legal questions with one another or to reach an agreement in this regard, even if this results in double taxation.

3 Infringement of the law

The ECJ also confirmed that an abusive practice can only be assumed if in circumstances where a purely artificial arrangement is ultimately found to exist. However, if a taxpayer organises his economic activities in such a way that he benefits from a Member State's low tax rate, this must be recognised and accepted.

Dr. Atanas Mateev
Certified Tax Consultant

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

4 Transport arrangement

The most exciting question in this case, however, was who was responsible for the transport from a VAT perspective? The ECJ carried out a two-stage examination. The first step was to examine the contractual situation. However, according to the ECJ, contractual provisions do not always correspond to the economic and business reality. In this case, a comprehensive assessment of all special circumstances was required. Items were considered to be dispatched or transported "by or on behalf of the supplier" if it was the supplier and not the customer who actually decided how the items were to be dispatched or transported. In this case, the customer only agreed to the choice already made by the supplier. This situation also applies if the supplier does not become a party to the contract of carriage. These conditions are still to be examined by the referring court, but it is obvious that the latter will probably find that KrakVet was responsible for the transport.

5 Consequences for the practice

Following this decision, one must now ask oneself what effect it may have on cross-border chain transactions. The allocation of the supply to which the transport has to be assigned, is also dependent on which party has arranged the transport. From a German perspective, the assignment must be based on the order placement (Section 3.14 para. 7 sentence 4 of the German Administrative VAT Circular). Can Germany now adhere to this absolute rule? Other Member States hold differing views. The uncertainty surrounding this criterion has also become apparent since the introduction of the quick fixes. Initially, the EU Commission wanted to focus primarily on the bearing of risk arrangements. After some discussion, it then turned its focus to the identity of the party who holds the contract with the freight forwarder as provided for in the Explanatory Notes.

The ECJ does not in principle reject the previous legal understanding of the question as to which of the parties was now responsible for the transport. This is because the court first of all states that the contractual agreements continue to be the decisive criterion in the assessment. At the same time, however, it restricts this generally valid statement and introduces a second level of examination.

The ECJ now says that a purely civil law consideration does not always correspond to reality. If the contractual provisions do not correspond to the economic and commercial reality, they are no longer to be taken into account. Of course, the ECJ's remarks are provided on a case-by-case basis. However, its statements may compel some companies to rethink their position. There are companies, which, as the last customer in a chain transaction, "recommend" certain forwarding companies to their suppliers in order to perfect their logistics processes. Or one might think of chain transactions within a group, in which a production company carries out supplies to the customer via a central sales company, both established in the same country. The logistics are often organized by the production company, but the transport is ordered from the forwarding agent under the customer number of the sales company. The transport is then ascribed to the second leg and avoids registration of the sales company abroad. Now, the question arises if it is still possible to adhere to such arrangements.

KMLZ Rechtsanwaltsgesellschaft mbH | www.kmlz.de | office@kmlz.de
D-80331 München | Unterer Anger 3 | Tel.: +49 89 217501220 | Fax: +49 89 217501299
D-40221 Düsseldorf | Speditionstraße 21 | Tel.: +49 211 54095320 | Fax: +49 211 54095399