Deloitte.

URL: http://mobile.deloitte-tax-news.de/german-tax-legal-news/bfh-rules-on-vat-treatment-of-supplies-via-consignment-stock-neu.html

21.06.2017

German Tax and Legal News

BFH rules again on VAT treatment of supplies via consignment stock

Supplies made by a Dutch BV to its German customer from consignment stock located in Germany do not qualify as intra-Community supplies and, therefore, are subject to VAT.

Germany's Federal Tax Court (BFH) issued a decision on November 16, 2016 (V R 1/16), concluding that supplies made by a Dutch BV to its German customer from consignment stock do not qualify as intra-Community supplies and, therefore, are subject to VAT in Germany.

Facts of the case

The case before the BFH involved a Dutch BV entrepreneur that sold goods to a German company, which the German company resold to its customers. The goods were supplied by the BV to the German company from consignment stock located in Germany, where the German customer was granted free access to the goods. The BV retained ownership of the consignment stock until the German customer had provided to the BV, on a weekly basis, a list of the goods it had sold during the previous week. The German company then removed the listed goods from the consignment warehouse, and the BV issued an invoice for the goods to the German company.

The invoice price paid by the German customer to the BV for the goods was determined on the day the German customer resold the stock. The BV was obliged to leave the consignment stock in the warehouse in Germany for at least three weeks, after which the German company was entitled to return all or part of the inventory it had not resold to the BV.

BFH decision

The BFH concluded that the supplies made by the Dutch BV to the German customer from the call-off stock (i.e. where only one specific customer (here, the German company) may withdraw goods from the warehouse) located in Germany are subject to German VAT. Further, these shipments do not qualify as intra-community supplies (which would be VAT-exempt), as this would require the customer to be known, through the existence of a binding purchase contract, at the time the goods were originally dispatched by the BV into Germany.

The BFH found that the customer could not be known at the time of the original dispatch, since it was not certain whether the German customer would keep the items, or was willing to pay for the items, until the goods were removed by the German company from the consignment stock. As such, a binding purchase contract was concluded only after the goods had been taken out of the storage for its own benefit by the German customer, because the customer was not obliged from the outset to purchase the goods sent to the warehouse by the Dutch entrepreneur. The German customer was obliged to pay for the goods only after it had removed the goods from the consignment warehouse.

Under German law, if the parties involved in a sale of goods agree - even based on a misunderstanding of the law - on consideration that does not include VAT, the agreed amount will be deemed to be inclusive of VAT. Since the BV had declared the sales in the Netherlands as tax-exempt intra-community supplies and the German customer had declared corresponding intra-community acquisitions in Germany, no VAT had been paid on the sale consideration. Accordingly, the BFH held that the basis for assessing VAT to the BV should be calculated by subtracting the VAT deemed to be included from the agreed price. With regard to the determination of the additional interest for late payment of the VAT actually incurred, the BFH stated that the same principles of law that govern the principal tax claim apply to the interest as well, as this is an auxiliary tax claim.

Comments

In a decision dated October 20, 2016 (see Deloitte Tax-News), the BFH also ruled on the VAT treatment of supplies made via consignment stock in which the BFH disagreed with the

German tax authorities' position regarding supplies via German consignment stock. According to the tax authorities, the supply of goods from other EU member states via consignment stock located in Germany should be deemed to be an intra-community supply of goods followed by a domestic supply by the supplier. The BFH concluded that a supply via a call-off stock should be considered a direct intra-community supply only if the final customer is identified at the beginning of the transfer from the EU member state of dispatch, and if a binding order existed on that date. It is irrelevant that the right to dispose of the goods was transferred in Germany.

The BFH now has confirmed the 2016 decision by holding that the customer cannot be determined if there is no binding purchase contract between the supplier and the customer at the time of the original dispatch. However, the BFH has left open the question which conditions must be fulfilled to establish the existence of a binding purchase contract that identifies the customer at the beginning of the shipment. The tax authorities will have to apply the BFH decisions.