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Vat Case Law on services related to website and internet

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Topic preview

- Introduction (legal background)
- VAT Case Law
 - Taxable person
 - Place of taxation
 - Electronically supplied services
 - General or reduced tax rate on the supply of electronic publications and E-books
- Summary and outlook

Introduction

- New VAT-Rules on level of the EU and OECD
- History and general background
- Prior to 1 January 2015 (2003 – 2014):
„Scheme of VAT on E-Services“
- A supplier, established outside of the EU and who supplied E-Services to private persons living in the EU could choose a MS in the EU where to register and pay VAT

Introduction

- Reasons for a change of the rules
- Relevant legal acts:
 - Council Directive 12. 02. 2008/8/EC changing the VAT-Directive
 - Council Implementing Regulation EU Nr. 282/2011 March 2011
 - Council Implementing Regulation EU Nr. 1042/2013 October 2013
- Proposals EU-Commission 1.12.2016 to simplify the VAT-rules for supplies on E-commerce and to apply the reduced tax rate for the supply of E-Books

Introduction

Place of taxation

- Supply of services Business to Business (B2B)

Place of taxation is the place where the recipient of the supply is established (reverse-charge-mechanism)

- Supply of services Business to Consumer (B2C)

Place of taxation is the MS where the consumer is established, has his permanent address or usually resides

- Supply of services B2C outside the EU

No EU VAT charged

Introduction

Definitions to apply the rules

- „Electronically supplied services“
- These services include services which are delivered via Internet or an Electronic network and the nature of which renders the respective supply essentially automatic and involving minimal human intervention and impossible to ensure in the absence of information technology (examples)

Introduction

Definitions to apply the rules

Services of telecommunication are defined as services relating to the transmission, emission or reception of signals, writing, images and sounds or information of any kind by wire, radio, optical or other electromagnetic systems, including the related transfer or assignment of the right to use capacity for such transmissions, emission or reception and the provision or access to global information networks (examples)

Introduction

Definitions to apply the rules

Broadcasting services include services consisting in audio and audio-visual content, such as radio and television programmes which are provided to the general public via communications networks by and under the editorial responsibility of a media service provider, for simultaneous listening or viewing, on the basis of a programme schedule (examples)

Introduction

Rules on level of the OECD

- BEPS-OECD Action Plan 10/2015 including tax challenges of the digital economy (GST/ VAT)
- Risk of non intended double non taxation or double taxation in the absence of international VAT-Coordination
- OECD-VAT/GST-Guidelines (14.04.2017) :

Aim: Neutrality of VAT in cross border trade – especially the increasing electronic commerce

But: No detailed description of legislation for national legislations – Guidelines establish an international dialogue among OECD-Members and partners

OECD-VAT/GST Guidelines

The destination principle – general rules

- 3.2.: Business to Business (B2B) supplies:

Jurisdiction in which the customer is located has the taxing rights over internationally traded services...(tax shift or reverse charge mechanism)

- 3.1.: Business to Consumer (B2C) supplies:

Rules of the jurisdiction of consumption are applicable – this implies generally the registration of the supplier in the state of destination of the supply

Advantage of destination principle: Applicance of tax-rate of the state of destination which is the state of the final consumption of the supply...

Comparison GST/VAT-Rules on level of the EU/OECD

- OECD-Rules with regard to GST/VAT legally are „recommandations“ only - they serve as a reference point
- Rules of the EU layed down in EU-Directives etc. have a binding character with regard to the EU-Member States
- The EU-Member States also have to apply the jurisdiction of the European Court of Justice (ECJ):
e.g. Place of taxation C-605/12 „Wellmory“; taxation of electronic publications C-219/13 „K Oy“; general or reduced rate on the supply of E-books C-390/15 „RPO“...

VAT Case Law

Is the supplier a taxable person?

- XI R 43/13 - 12. 08. 2015 Federal Tax Court Germany
- The facts:
 - A seller offers 140 fur-coats via internet (e-bay) to possible customers in the years 2004 and 2005 and in the end gathers about 90.000 € with regard to these activities
 - The tax office investigated the case and decided that the seller did not act as a private person but as a taxable person; the supplies were taxable in Germany
 - The seller launched an appeal against the VAT- assessments and declared that she – being a private person only – had inherited all the fur-coats she sold from her mother in law

VAT Case Law

Is the supplier a taxable person?

- XI R 43/13 - 12. 08. 2015 Federal Tax Court Germany
- The judgment of the Court:
 - With regard to all circumstances the seller had to be regarded as a taxable person (Art. 9 VAT-Directive) because she had acted like a real trader (reference to the judgment V R 2/11 – 26.04.2012 Federal Tax Court)
 - The seller had sold a big amount of fur-coats over a longer period via internet (E-Bay)
 - The Court did not believe that all of the fur-coats (140) were inherited from the mother in law because of the different sizes and arms-lengthes of the coats....

VAT Case Law

Is the supplier a taxable person?

- Practical solution for many „e-bay“-cases in Germany: Applicance of § 19 Par. 1 UStG which allows the taxable person to choose „non-taxation“ with the loss of the right to deduct input-VAT if the taxable transactions are below a certain threshold (in accordance with Art. 281 VAT-Directive) – socalled „Regulation for small-traders“
- No conflict with OECD - VAT/GST-Guidelines
- Discussion

VAT Case Law

Place of taxation

- 1 FSK 1884/14 – 20. 03. 2017 Supreme Administrative Court Poland
- National decision after the judgment of the ECJ C-605/12 – 16. 10. 2014 – *Wellmory*
- Issue : B2B-supply of electronical services
- Art. 44 VAT-Directive - Art. 11 of the Regulation 282/2011

In general: Place of taxation is the place where the recipient of the supply is established (reverse-charge-mechanism)

Exception: If the recipient has a fixed establishment in another MS the place of taxation is there...

Place of taxation

Facts of the case „Wellmory“

- *Wellmory* is a Polish company supplying electronical services to a company which had its place of business in another MS of the EU (Cyprus)
- Both companies entered into a cooperation agreement under which the Cypriot company was to provide a Polish-language auction site
- 2 turnovers: (1) *Wellmory* was supposed to offer and sell products by auction for its own account on that website and (2) the customers were obliged to acquire before special rights from the Cypriot company (socalled bids)
- To operate the website the Cypriot company furthermore used the technical resources of *Wellmory* for that purpose

Place of taxation

Facts of the case *Wellmory*

- In April 2010 *Wellmory* became a wholly-owned subsidiary of the Cypriot Company
- On the basis of the agreement *Wellmory* received remuneration from the Cypriot company for the service of selling the product and associated services (advertising etc.)
- *Wellmory* did not pay VAT being of the opinion that the recipient of the services was liable for the tax at its place of business in Cyprus (according to the principle of destination)

Place of taxation

Facts of the case *Wellmory*

- The tax authorities considered that the Polish company's services should be taxed in Poland, because the Cypriot company maintained a fixed establishment in Poland to which the services had been provided
- *Wellmory* appealed against the negative judgment of the Administrative Court
- Supreme Administrative Court stayed the proceedings to refer a preliminary ruling to the ECJ

Place of taxation

Court decisions in the case *Wellmory*

1. ECJ Judgment 16.10.2014 C-605/12:

The Cypriot Company only has a fixed establishment in Poland for the purpose of determining the place of taxation of those services „if that establishment is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive the services supplied to it and use them for its business, which is for the (national) court to ascertain.“

Place of taxation

Court decisions in the case *Wellmory*

2. 1 FSK 1884/14 – 20. 03. 2017 Supreme Administrative Court Poland

- The Court cancelled the judgment of the Administrative Court of first instance and the decision of the tax authorities
- The Court ordered a reevaluation of the case with regard to the indications given by the ECJ and the Advocates General's opinion concerning the basis of the assessment of the products

Place of taxation

Discussion of the Case „Wellmory“

- EU-VAT-Law: Art. 44 VAT-Directive and Art. 11 of the EU-Regulation 282/2011 are applicable

The solution of the case depends on the individual circumstances with regard to the „fixed establishment“

- No conflict with OECD - VAT/GST Guidelines

3.4: For the application of Guideline 2 (B2B – destination principle) when the customer has establishments in more than one jurisdiction, the taxing rights accrue to the jurisdiction(s) where the establishment (s) using the service or intangible is (are) located.

Place of taxation /electronically supplied services

FedTaxCourt Germany XI R 29/14 - 1.06.2016

Introduction

- The question is whether a taxable person being established in the US without having a place of business in the EU carried out electronically supplied services in the year 2003 in Germany
- If the answer to this question is affirmative the place of taxation is Germany being the country where the recipient of these services was established, regardless whether the recipient was a taxable person or a private consumer according to the former national VAT-provisions – see also Art. 44 and Art. 58 VAT-Directive (destination-principle)

Place of taxation/electronically supplied services

FedTaxCourt Germany XI R 29/14 - 1.06.2016

The facts of the case

- The plaintiff was a US-Company established in the US
- The US-Company was running an agency for online-dating (match-making agency)
- The users paying for it had access to personal data of other users (user-profiles); hereby they were enabled to establish a contact
- The users could find on the websites written information and videos about the other users
- On the website the users could look for partners according to certain criteria
- The users had access to special chat-rooms and a special news-magazine

Place of taxation/electronically supplied services

FedTaxCourt Germany XI R 29/14 - 1.06.2016

The facts of the case

- The US-Company thought that the supplies were taxable in the US and therefore did not submit any tax return in Germany
- The tax-office in Germany decided that the US-Company was a taxable person being obliged to pay VAT in Germany according to the provisions in the German VAT-Law
- The US-Company lodged an objection against the tax-assessment at the tax office – but in vain
- The tax-court of first instance dismissed the action

Place of taxation/electronically supplied services
FedTaxCourt Germany XI R 29/14 - 1.06.2016 - Judgment

- The FedTaxCourt decided that the US-Company was obliged to tax the supplies in Germany because she carried out „electronically supplied services“
- „Electronically supplied services shall include services which are delivered over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and in the absence of information technology is impossible to ensure.“

Place of taxation/electronically supplied services FedTaxCourt Germany XI R 29/14 - 1.06.2016 - Judgment

- Most of the services supplied in the case have to be considered electronic and were carried out automatically without any considerable human intervention
- The principal supply was the supply of access to the databases (Art. 58 VAT-Directive Annex II point 3)
- This also includes the collection of user-profiles and the supply of access to these data, although they have not been gained through automatic research (e.g. by „webcrawler“)
- The access to the chat-room and the news-magazine are only ancillary supplies to the principal electronic supplied services from the point of view of the consumer

Place of taxation/electronically supplied services
FedTaxCourt Germany XI R 29/14 - 1.06.2016 - Judgment

- Against the opinion of the plaintiff it was impossible to supply these services „in the absence of information technology“ although there exist other match-making agencies who would not supply their services via internet
- In this context it is only decisive how the plaintiff herself offered her services
- Discussion: No conflict with the destination-principle in 3.1 of the OECD-VAT/GST-Guidelines for Business to Consumer (B2C)-supplies

Taxrate on the supply of books published on physical supports other than paper

Legal background

- VAT-Directive allows MS's to apply one or two reduced VAT-tax-rates
- Reduced tax-rates shall apply only to supplies of goods or services set down in the Annex III of the directive
- Annex III Nr. 6: „supply, including on loan by libraries of books (including brochures etc.), newspapers and periodicals, other than material wholly or predominantly devoted to advertising“
- The reduced rates shall not apply to electronically supplied services...

Taxrate on the supply of books published on physical supports other than paper

- Judgment of the Supreme Administrative Court of Finland 31. 12. 2014– SAC 2014:199 following the judgment of the ECJ C-219/13, *K Oy*, 11.09.2014
- Facts of the case:
 - *K Oy* is a publishing company whose activities include the publication of general literature. It publishes textbooks, audiobooks and books on other physical supports
 - These books are available in the form of electronic files on physical supports such as CD's, CD-Roms, USB-keys or other equivalents
 - Answering a question of *K Oy* the Central Tax Board ruled that only publications printed in paperform or produced by comparable means could constitute „books“ in the sense of the reduced VAT-tax-rate

Taxrate on the supply of books published on physical supports other than paper

- Based on the appeal of *K Oy* against this decision the Court SAC referred the case to the ECJ
- The ECJ recalled the principle of neutrality which precludes that similar supplies of goods or services which compete with each other are under a different regime for the purpose of VAT
- To determine whether supplies of goods or services are „similar“ in this sense the point of view of an „average consumer“ is decisive
- This has to be decided by the referring national court

Taxrate on the supply of books published on physical supports other than paper

- The ECJ decided that the provisions of the EU did not preclude, provided that the principle of neutrality is complied with, which is for the national Court to ascertain, national legislation, under which books published in paper form are subject to a reduced rate of VAT and books published on other physical supports such as CD's, CD-ROM's or USB keys are subject to the standard rate of VAT
- Judgment of the SAC: Principle of neutrality does not require similar taxation of printed books and books published on other physical supports...

Taxrate on the supply of E-books

- Judgment Constitutional Court Poland 17. 05. 2017
Act K 61/13 following a judgment from the ECJ 7. 03.
2017 C-390/15 *RPO*
- Legal background in Poland:

Under the Polish VAT-Law supplies of publications which are printed or delivered on a physical support are subject to a reduced VAT-tax-rate; on the other hand this reduced VAT-tax-rate is not applicable to electronic transmissions of publications

Taxrate on the supply of E-books

- The facts of the case:

By application lodged on 6.12.2013 the Commissioner for Civic rights (Ombudsman) requested the Constitutional Court to rule that the national provisions of VAT-law do not comply with the Polish constitution in that those provisions lay down that the reduced rates of VAT are to apply only to publications made available on a physical support to the exclusion of publications transmitted electronically...

Taxrate on the supply of E-books

The Constitutional Court decided to stay the proceedings and to refer the following questions to the ECJ for a preliminary ruling:

1....

2. Is Article 98 (2) of the VAT-Directive..in conjunction with point 6 of Annex III to that directive, invalid on the ground that it infringes the principle of fiscal neutrality to the extent to which it excludes the application of reduced tax rates to electronic books and other electronic publications?

Taxrate on the supply of E-books

- Judgment of the ECJ in the case *RPO* 7.3.2017:

Examination of the questions referred for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of point 6 of Annex III of the VAT-Directive....

- Decision of the Constitutional Court 17. 5. 2017:

- Proceedings discontinued due to the withdrawal of the application by the Ombudsman
- The provision in question should be amended – but the initiative is a task of the European Commission

Taxrate on the supply of E-books

- Final remarks

- Decision in the case *RPO* was no surprise with regard to earlier judgments (ECJ 5. 3. 2015 C-479/13 and C-502/13)
- Proposal EU-Commission 1.12.2016: Reduced tax-rate also possible for the supply of E-Books
- European parliament agreed but the directive did not pass the ECOFIN-Council in June 2017 (unanimity for the consent could not be achieved due to the resistance of one EU-Memberstate) – this was a disappointing surprise...

Taxrate on the supply of E-books

- Common Discussion (Finnish and Polish Case)
- No conflict with OECD-VAT/GST – Guidelines –:
There exist no regulations with regard to the applicance of national VAT/GST-tax-rates
- General danger of distortion of competition with regard to different tax-rates (e.g.: General tax rate 15 % in Luxembourg and 27 % in Hungary)
- But: This does not matter in the case of supplies of electronical services due to the regime of the destination principle layed down in the VAT-Directive and the GST/VAT-Guidelines

Summary and outlook.....

Thank you for your attention!