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KMLZ VAT NEWSLETTER

BMF does (not) clarify essential questions of doubt regarding fractional transport

1. Tax exemption in case of fractional transport

By judgement dated 24/05/2011 (6 K 2176/09), the Saxony Finance Court furnished convincing arguments and held that the tax exemption for intra-Community deliveries may also be applied to cases of fractional transport. Nothing else can apply to exports. Neither the wording of the tax exemption nor their intent and rationale require, in fact, that the goods be transported abroad by only one party involved. The option to have the item processed prior to its export or intra-Community delivery likewise suggests that split transport will not hinder the exemption. Otherwise, Section 6a Para. 1 Sentence 2, Section 6 Para. 1 Sentence 2 German Value Added Tax Act (*Umsatzsteuergesetz, UStG*) would never be applicable. From that point of view, the BMF only puts into practice what the case-law had been requiring for quite some time now. For this purpose, however, the BMF imposes additional requirements in this respect:

- The customer must definitive be known.
- There has to be a temporal and material link between the delivery of the item and its shipment.
- Moreover, there has to be a continuous process of the movement of goods.

Essential questions of doubt regarding fractional transport

By letter dated 07/12/2015, the German Federal Ministry of Finance (*Bundesfinanzministerium, BMF*) gave its view on the so-called 'fractional transports' or 'fractional shipments'. The letter has three regulatory requirements. First, the applicability of the tax exemption for export deliveries or intra-Community deliveries in case of fractional transport. Second, the (incorrect) clarification that there are no chain transactions in case of fractional transports or shipments.

In addition, all of this needs to be proves. While the first requirement appears to be clear, the further requirements are undefined legal terms. It is not clear when a temporal and material link is supposed to be given. It is likewise unclear in what way this criterion would differ from a “continuous process of the movement of goods”. The BMF gives an example where the goods are stored at the port for one week. Unfortunately, however, the BMF does not provide any solution for this example. This is why one can now puzzle over whether or not this is a fractional transport, for which the tax exemption still applies. In the particular context of the case, this question should indeed be answered in the positive. It would have been desirable for the BMF not to draw back to empty phrases, but to formulate concrete application examples and to also provide solutions for them. The question as to the extent to which this part of the BMF letter will have any impact on consignment warehouses has been left completely open.

2. Chain transactions in case of fractional transport

The BMF holds on to the existing regulation of Point 3.14 Para. 4 German Value Added Tax Application Decree (*Umsatzsteuer-Anwendungserlass, UStAE*). According to this regulation, a chain

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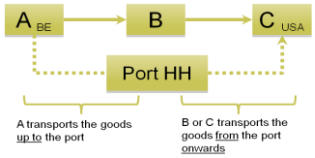
transaction is excluded if several parties are involved in the transport. This is regrettable. In the ECJ proceedings of VSTR (C-587/10), the goods were also stored at the port and had been transported by several parties involved. Nevertheless, both the ECJ and the German Federal Fiscal Court concluded that the chain transaction principles had to be applied. It is reasonable to assume that both Chambers had recognised the shared transport. From that point of view, the BMF falls far short of what is possible based on the provisions laid down by the case-law. It remains to be noted that according to the BMF letter, too, chain transactions may still exist in case of a fractional transport before or after the transport interruption. This has to be assessed separately in the respective case. The clarification of the BMF that, in case of uniform transports, the interruptions owing to the transport process (for ex. switch to another means of transport) do not have any significance, should be of a purely declarative nature. This had previously also hardly been questioned by anybody.

3. Conflict of law rule "light"

The German Value Added Tax Application Decree has always been providing for a very welcome conflict of law rule. In accordance with Point 3.14 Para. 11 German Value Added Tax Application Decree (old version), the entrepreneur involved in a chain transaction is provided with important assistance. To the extent that any Member State assigns the transport or shipment in any manner other than this would be the case according to the principles of German law, no objection will be raised if the German entrepreneur (and the fiscal authorities) follows this principle. This conflict of law rule is not only unique within the European Union, but it is also extremely reasonable. It is preserved by the new BMF letter. It is only transferred into another paragraph (see also Point 3.14 Para. 19 German Value Added Tax Application Decree, new version) and complemented. Nevertheless, this only applies to a narrow scope of application: fractional transports from another EU Member State via Germany into the third-country territory. The conflict of law rule expressly refers to "shipments" into the third country. According to its wording, it only applies to exports via German seaports.

Example:



In the example case specified above, B had to declare an intra-Community acquisition and an export without the simplification rule in Germany. Under the prerequisites of the extended conflict of law rule, the stopover at the port and the different arrangement of the transport will be ignored. As a consequence, the intermediary entrepreneur does not have to declare any taxable transaction in Germany. However, this is subject to the following requirements:

- transport by ship to third country;
- evidence that the existence of a chain transaction in the Member State of departure can be assumed despite the different arrangement of the transport.

The intermediary entrepreneur saves themselves having to declare any (tax-exempt, in accordance with Section 4b German Value Added Tax Act, where applicable) intra-Community acquisition as well as any tax-exempt export delivery in Germany. Instead of the export certificates, the intermediary entrepreneur now has to demonstrate that the good had been transported to the third country by ship and that the existence of a chain transaction is assumed in the Member State of departure (in the example at hand: Belgium). The question as to whether this is really easier than to obtain export certificates (following successful registration, where applicable) remains to be seen.