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The applicability of the 0% rate despite no registration of the contractor as an active EU-VAT taxpayer

Tax Alert

Dear Readers,

The Court of Justice of the European Union (hereinafter "ECJ") passed a judgement in the case of a Portuguese entity in which it referred to the possibility of applying the 0% rate of VAT where a foreign contractor does not have the EU VAT number. The ECJ decision also applies to Polish taxpayers.

In its judgement of 9 February 2017, file ref. C-21/16, the ECJ decided in a dispute between the Portuguese branch of the Dutch company Euro Tire BV and the Portuguese tax authority. The tax authority refused the exemption from VAT (i.e. an operation analogous to the application of the 0% rate in Poland) of a number of sales transactions to a Spanish company, because at the time of the transactions the contractor (i.e. the Spanish company) was neither registered for the purposes of intra-Community transactions in Spain, nor entered in the VIES database. The European Court of Justice held, however, that the formal requirements (registering the entity as an active EU-VAT taxpayer and entering it in the VIES database) cannot undermine the right of the seller to use the settlement provided for intra-Community transactions (i.e. exemption with the right to deduction, or application of the 0% rate) subject to meeting the material conditions for its application.

According to the court, the substantive conditions of the existence of intra-Community supply, which determine the application the 0% rate, provided for in the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, hereinafter "the VAT Directive") and the ECJ case law do not include the obligation for the buyer to have a VAT number, and the more the obligation to register the purchaser for the purposes of intra-Community transactions. The substantive conditions for VAT exemption of intra-Community supply, according to settled case-law of the ECJ, are met when the right to dispose of goods as an owner has been transferred to the buyer and the seller determines that the goods have been dispatched or transported to another member state and that as a result of shipping or transport the goods physically left the territory of the member state of supply.

Obtaining a valid VAT identification number for the purposes of intra-Community transactions and registration in the VIES database by the purchaser do not constitute substantive conditions for VAT exemption of intra-Community supply. These are only formal requirements that cannot undermine the right of the seller to VAT exemption if the material conditions concerning intra-Community supply have been met.

The ECJ judgement is also relevant to the interpretation of Polish tax regulations. Article 42(1) sub-paragraph 1 of the VAT Act of 11 March 2004 (consolidated text, Journal of Laws of 2016, item 710, as amended) makes the application of the 0% rate conditional on delivery to the buyer having a proper and valid identification

number for intra-Community transactions, given by the member state of the purchaser. Given the court's decision, which clearly underlines the importance of the VAT neutrality principle, the Polish taxpayer should have the right to apply the 0% rate, provided that the substantive conditions have been met, regardless of whether the purchaser has been registered as an active VAT-EU taxpayer or not. Of course, compliance with formal obligations may be required in the future, but this never prejudices the execution or non-execution of intra-Community supply.

In the analysed judgement, the court once again stresses the need to respect the principle of neutrality of VAT by national tax authorities. In so far as the fight against VAT extortion is essential and necessary, the ruling of the ECJ clearly shows that regardless of the policies of the member states, European law still upholds the fundamental principles of value added tax.

Regardless of the decision issued by the ECJ, it should be borne in mind that some European countries as well as the European Commission are in favour of the necessity of inclusion in the VAT Directive the requirement to register the buyer for the purposes of intra-Community transactions as one of the conditions to benefit from the exemption from taxation of such transactions. The introduction of this regulation in European law implies indeed a need to harmonise the rules of registration and deregistration of taxpayers as active EU-VAT payers in individual member states, nevertheless, it is important to be aware that changes in EU legislation may be introduced in this regard. For this reason, we still recommend obtaining information on registration for intra-Community transactions from foreign buyers, the more that this is one of the elements of verifying the reliability of contractors.

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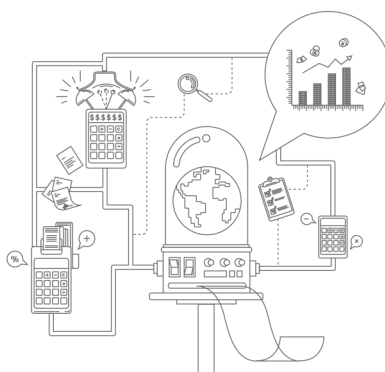
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