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German Tax and Legal News

## BFH rules on place of supply for low value consignments

The place of supply for VAT purposes might be in Germany in the case of imports of small consignments, even if the supplier acts on behalf of the final customer

In a decision dated 16 June 2015, the Federal Tax Court (BFH) ruled on the application of import VAT relief for low value consignment sales where the supplier acts on behalf of private customers.

Under the EU regulations, consignments of low value dispatched by letter or parcel-post directly from a third country to a natural or legal person in the Community shall be exempt from import VAT. In Germany, low value for these purposes means a package whose value does not exceed EUR 22.

Although the general place of supply rules deem the place of supply to be the country of dispatch, the German VAT Act provides that where there is a shipment made from a non-EU country to Germany, the place of supply will be Germany, provided the supplier or its representative are liable for import VAT.

Previous BFH decisions, as well as administrative guidance, have clarified that the place of supply rule for import supplies applies even if the supply is actually exempt from import VAT, as in the case of low value consignments.

The BFH also has concluded in several cases that the place of supply is in Germany where a supplier acted on behalf of a private customer. For example, the court held in 2013 that a seller remains liable for import duties even if the seller's terms and conditions included a clause that the shipment and import will be made in the name of, and on behalf of, the final customer who is a private individual. The BFH concluded that such a clause was invalid based on consumer protection regulations, and thus the place of supply shifted to Germany. Earlier in 2015, the BFH ruled that a supplier that bears all costs related to import must be considered the importer, even if the supplier was acting on behalf of the customer. Thus, the place of supply was within Germany so that German VAT would remain payable on the supply to the customer.

### Case before the BFH

The case before the BFH involved a supplier that was engaged in the retail sale of books, DVDs and CDs to German customers. The seller's terms and conditions of its sale included the following statement: *"for logistical purposes, the goods will be delivered from a warehouse located in Switzerland. For this purpose, the customer authorizes the seller to file the customs declaration and all necessary documents on its behalf. The seller will bear all potential debts, taxes, customs duties and other fees arising therefrom."*

For consignments made to German customers with a value exceeding EUR 22, the seller acted as the importer of record for customs purposes, while the seller acted on behalf of the final customer and applied for the import VAT exemption in the name of the customer with respect to low value consignments. The seller treated the latter supplies as supplies not subject to German VAT; however, the German tax authorities disagreed and imposed a 19% VAT on the supplies.

The BFH held that the treatment of the low value consignments were subject to German VAT based on the German special place of supply rule for import supplies because the seller should be considered liable for import duties. In line with its decision issued earlier in the year, the BFH denied the seller's proxy for customs purposes and concluded that as the seller remained liable for all potential debts, taxes, customs duties and other fees arising from the consignment, he cannot be considered as acting for the account of its customer.

The BFH also noted that, even if the customer would have been considered as debtor of import duties and although the supplier had provided nontax reasons, such as wage costs, for the supply structure, this did not change the fact that the structure was abusive, and thus, the place of supply would be within Germany so that German VAT would remain payable.

## Comments

The BFH confirmed its approach to systematically disallow the use of the low value consignment relief provisions in commercial supply structures. Although the provision on abusive tax planning is rarely used in VAT cases, the court explicitly stated that this provision should apply to import structures such as the present case.

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