

Germany: "VAT-Carousels" and latest decrees of ECJ and German Bundesfinanzhof (BFH)

An article by the CMS VAT Group

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The ECJ, the German Federal Fiscal Court (BFH) and the German Constitutional Court (BVerfG) recently decided about criminal and fiscal liability in cases of involvement in a "VAT-Carousel". In particular the decision by the ECJ gives the tax and custom authorities great leverage to go after suspicious business activity.

ECJ, 07.12.2010 - C- 285/09 ("R")

- Mr. R. intentionally submitted manipulated bills to the responsible financial authority in order to conceal the true acquirer of an intra-Community transaction. Purpose was to allow the acquirer to evade his VAT-obligations in Portugal.
- The ECJ confirmed for this specific case, in which the obligation to inform tax authorities about the acquirer of the intra-Community transaction was intentionally not observed, that the prevention of tax abuse enjoys overall priority and therefore any tax exemption for the intra-Community transaction should be denied.
- The ECJ moreover held, that "if there are genuine reasons to assume that the intra-Community acquisition corresponding to the supply at issue might escape payment of the VAT in the destination Member State, notwithstanding the mutual assistance of and administrative cooperation between the tax authorities of the Member States concerned, the Member State of departure is, in principle, required to refuse to grant the exemption to the supplier of the goods and to require that supplier to pay the tax subsequently in order to ensure that the transaction in question does not escape taxation altogether."
- The principles of proportionality, neutrality and territoriality of VAT do not cause any obstacle to this view, if, as in the particular case, the participant of an "VAT-Carousel" is obliged to repay the VAT for an intra-Community transaction subsequently.

BFH, 07.12.2010 – V R 30/10

- It was the first time that the BFH commented on the application of the ECJ judgement in "R".
- The BFH suspended the judgement of a lower finance court, because it had denied the tax exemption of an intra-Community transaction and a pre-tax deduction by reason only of the transaction being part of a "VAT-Carousel."
- The BFH further held, that the ECJ in the "R"-case, notwithstanding of the explicit reference question of the German Federal Court of Justice (BGH), has not decided upon the question on whether an intra-Community transaction is taxable, if the supplier - without intentionally deceiving about the acquirer - just had knowledge, that the acquirer intends not to discharge his tax liability (just neutral abetment).
- If pure neutral abetment without any further infringement of fiscal documentation duties is sufficient to constitute a liability for tax abuse under the jurisdiction of the ECJ in the "R"-case is not clear at present.

BFH, 17.02.2011 – V R 28/10

- The BFH had to decide upon the documentation requirements for an intra-Community transaction in connection with a "VAT-Carousel".

- The BFH specified in his judgement the obligation to produce proof regarding freight documents and bills. Complete CMR- freight documents are permitted, sufficient and recommendable as proof.
- The BFH further held that if reasonable commercial diligence is observed, there can be no liability for the purpose of EJC "R". Because a supplier who acts reasonable in the sense of a commercial businessman, does not conceal the identity of the acquirer. This, however, is a requirement to establish any liability.

BVerfG, 16.06.2011- BvR 542/09

- On the 16th July 2011 the German Federal Constitutional Court (BVerfG) refused to accept (for judgement) the constitutional complaint of a participant to a "VAT-Carousel."
- In his decision the court stated, that the interpretation of sec. 6a UStG (VAT-code) through the BGH in connection to a criminal case does not infringe Art. 103 para. 2 GG (German Constitution, which states the principle of "nulla poena sine lege stricta").
- The court especially referred to the fact that the interpretation of the BGH is conform with the meanwhile issued and binding interpretation of the ECJ.
- The BVerfG thus has accepted and declared his agreement with the BGH's construction:
Where a supplier helps foreign acquirers to commit tax evasion and the exemption from taxation on this basis has to be withdrawn according to the principles of ECJ "R", then the supplier is indictable in Germany because of direct tax evasion.

In conclusion we can state, that problems regarding "VAT-Carousels" are as virulent as ever. Presumably legal certainty will only be achieved with a further ruling by the ECJ if anti-abuse-rules apply in regard to neutral abetment.

For further information on this tax analysis and thought, please contact:

Dr. Björn Demuth

Partner – CMS Hasche Sigle

T +49 711 9764 488

E Bjoern.Demuth@cms-hs.com

Jakob Billau

Associate - CMS Hasche Sigle

T +49 711 9764 486

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