

Case alert

Kreuzmayr GmbH

January 2018

Summary

This was a referral to the Court of Justice by the Austrian Courts. In essence, the case concerns the application of the place of supply rules for VAT purposes and highlights the importance of applying those rules correctly.

Kreuzmayr GmbH is an Austrian company. It purchased supplies of fuel from another Austrian company (Bidi) and was charged Austrian VAT which it reclaimed through its Austrian VAT return.

Unfortunately, it subsequently transpired that the fuel was physically located in Germany at the time that the supply of the fuel was deemed to take place and, accordingly, the place of supply was deemed to be Germany and not Austria.

As a German supply, VAT was due in Germany and not in Austria and so, on the basis that Austrian VAT should not have been charged by Bidi to Kreuzmayr GmbH in the first place, the Austrian Tax Authority decided to disallow Kreuzmayr GmbH's claim for input VAT.

The Court of Justice agrees with the Austrian Tax Authority. Even though Kreuzmayr GmbH had paid VAT to its supplier, that VAT was not chargeable in the first place and could not be reclaimed even though it had acted in good faith throughout the transaction.

Court of Justice of the European Union – Case C-628/16

The Court of Justice has issued its judgment in this Austrian referral relating to the correct application of the place of supply rules and the recovery of VAT incorrectly charged.

BP GmbH (a company established in Germany) sold fuel to a customer (Bidi – a company established in Austria) and arranged for the fuel to be collected and transported to Austria by Bidi. Based on those facts, BP GmbH treated the supply of fuel as an intra-community transaction under Article 138 of the VAT Directive and charged no German VAT to its customer on the basis that Bidi was an Austrian VAT registered entity and the fuel was to be transported there.

Unbeknown to BP GmbH, Bidi had entered into a contract with Kreuzmayr GmbH (a company also established in Austria) to immediately sell on the fuel it had purchased. It did not inform BP GmbH of this sub-sale or that it had given Kreuzmayr the collection security codes to enable Kreuzmayr to access the fuel and remove it from the fuel compound. BP GmbH simply assumed that it was Bidi that had collected the fuel. As both Bidi and Kreuzmayr were Austrian businesses, Bidi treated its supply of the fuel to Kreuzmayr as a domestic supply in Austria and, accordingly, charged Austrian VAT which Kreuzmayr reclaimed through its Austrian VAT return. Bidi did not account for that VAT to the Austrian Tax Authority and it subsequently became insolvent.

On discovery of the sub-sale by Bidi to Kreuzmayr, BP GmbH notified the German Tax Authority that its original sale to Bidi was not an intra-community transaction. The German Tax Authority thus requested payment of the German VAT that should have been charged and accounted for by BP GmbH. Similarly, the Austrian Tax Authority considered that the sub-sale of the fuel by Bidi to Kreuzmayr GmbH was a supply that took place in Germany. It considered that title to the fuel had passed from Bidi to Kreuzmayr whilst the goods were physically located in Germany. As such, this precluded recovery by Kreuzmayr of the Austrian VAT that had been erroneously charged by Bidi. The CJEU agreed with the Austrian Tax Authority. The place of supply of the sub-sale was Germany and, even though Kreuzmayr had acted in good faith throughout the transaction the fact remained that Austrian VAT was never chargeable in relation to the sub-sale and, as a result, it could not be reclaimed.

Comment – The court has, once again, reiterated that where there are two separate supplies of goods but there is only one transportation, the intra-community transaction is the transaction to which the transport can be ascribed. Here, this was the second transaction between Bidi and Kreuzmayr. It was not a domestic Austrian transaction and Kreuzmayr was not entitled to reclaim Austrian VAT that had been incorrectly charged to it by its supplier. This case emphasises the need for businesses to be aware of where goods are physically located within a supply chain when they are supplied and to question whether VAT is correctly chargeable. Acting in good faith and relying on suppliers and customers to get it right offers little protection as Kreuzmayr GmbH found out to its cost in this case.

Contact

Stuart Brodie

Scotland

T +44 (0)14 1223 0683
E stuart.brodie@uk.gt.com

Karen Robb

London & South East

T +44 (0)20 772 82556
E karen.robbs@uk.gt.com

Vinny McCullagh

London & South East

T +44 (0)20 7383 5100
E vinny.mccullagh@uk.gt.com