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News Flash

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Royalties according to law on copyright from the VAT point of view

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Recent decisions of the European Court of Justice (ECJ) concerned, among other things, to the application of VAT in cases of payment of some royalties under law of copyright. The discussed was a **VAT regime in relation to the royalty payable to an author of an original work of art on the basis of the resale right;** when making decision, the judges referred to the earlier judgment relating to fees on blank media and recording as well as reproduction devices paid by producers and importers.

Royalty payable to an author of an original Work of Art on the basis of the resale right

In the judgement, C 51/18 of December 19, 2018 the ECJ discussed if the royalty payable to an author of an original work of art on the basis of the resale right was subject to VAT.

In the year 2014, European Commission (EC) sent a letter of formal notice to the Republic of Austria expressing its reservations in respect of the administrative practice of imposing VAT on the royalty payable to an author of an original work of art on the basis of the resale right.

The EC had the opinion that royalty did not constitute consideration for the artistic service provided by the author of such a work of art, because the main aim of the **royalty is to give the author share in the economic success** of his work. In the absence of the supply of goods or services provided by the author in the exercise of the resale right, VAT is not imposed on any transaction.

Tolerating the act of resale and royalty of the representation of an original work

The Republic of Austria noted in its reply to the formal notice, that within the framework of the resale right, the author provides a service by tolerating the act of resale of the work.

Also argued, that this royalty is comparable to a service provided by other creators in the context of the representation of their works, and because **these services are subject to VAT,** so the royalty payable on the basis of the resale right should be according to the principle of fiscal neutrality also subject to VAT. The Republic of Austria also justified the taxation of that royalty by altering in the taxable amount of the service provided by the author when his work is first placed on the market.

The actual value given in return for goods or service

In the judgement, ECJ reminds, it is clear from settled case-law that a supply of goods or services is made for consideration, only if there is a legal relationship between the supplier, on the one hand, and the customer or recipient, on the other hand, in the context of which there is reciprocal performance, the remuneration received by the supplier constituting the value actually given in return for the goods or services supplied to the customer or the recipient.

Further, the ECJ states, that **the legal relationship, in the context of which arisen the resale of an original work of art is so only between the seller and the buyer and the fact, that the creator of the work has the right to remuneration for resale does not have any influence on that relationship.**

The seller and the buyer agree freely to the transfer of the work and the price, without having to solicit the author of the work on a permission and the author cannot intervene transaction or prevent in the resale in any way.

Right to royalty on resale

Right to royalty on resale is stated by law and to enable the author to profit from the economic advantages linked to the recognition of his artistic service.

The ECJ has inclined to the EC´s claim that graphic and plastic works of art are unique, therefore, royalty on resale is not comparable to the remuneration gained from exercising the rights of use and exploitation. **According to ECJ, the royalty payable to an author of an original work of art on the basis of the resale right is not the subject the VAT.** ECJ rejected all arguments of Republic of Austria.

Fees on blank media and recording and reproduction devices paid by producers and importers

In the judgment, which we described above, the ECJ also referred to the earlier judgment C-37/16 SAWP from the year 2017, where the ECJ has dealt with the question, if from the VAT point of view, the holders of reproduction rights make a supply of services to producers and importers of blank media and of recording and reproduction devices on whom organizations collectively managing copyright and related rights levy on behalf of those right holders, but in their own name, fees in respect of the sale of those devices and media.

The obligation to pay of these fees is followed from the special Law on copyright.

ECJ in this case came to the conclusion that ***supply of services are not provided and fees are not subject the VAT.***

Reciprocal performance

According to ECJ in this case there is no reciprocal performance by, on the one hand, holders of reproduction rights or, as the case may be, the organization collectively managing such rights and, on the other hand, producers and importers of blank media and of recording and reproduction devices.

Deduction of the input VAT

In general, input ***VAT can be deducted if VAT has been correctly applied.*** *Therefore, we recommend to taxable entities to pay more attention to the fees paid under the Law on copyright, to prevent unauthorized deduction of VAT.*

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