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Hurdles to input VAT deduction (not only) in the transaction context

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In a recent ruling (BGer 9C_154/2023 of 3 January 2024), the Federal Supreme Court dealt with the admissibility of input tax deduction for acquisition tax (VAT on services purchased from abroad) for consultancy services in connection with the sale of shareholdings. Accordingly, a person liable for VAT in Switzerland is only entitled to claim the declared purchase tax as input tax if the corresponding services were provided in a period in which the taxable person was already liable for VAT (registered). The taxable person is responsible for providing proof of this.

FACTS OF THE CASE

A AG, which was only entered in the VAT register as a taxable person on 1 April 2019, planned the sale of shares in two companies. To this end, it commissioned several foreign service providers to prepare, plan and implement the sale, who were to provide advice in the areas of investment, auditing, tax and law, depending on their expertise. The consultancy agreements between A AG and the consultants were concluded in 2014 and 2018 respectively, i.e. before A AG was registered as a company subject to VAT. The project was then completed in May 2019 with the successful sale of the shares. All consultants invoiced their services after 1 April 2019, whereby A AG, which was now liable for VAT, duly declared the purchase tax and reclaimed the resulting VAT amount as input tax. None of these purchased services were capitalised during the duration of the project from 2014 to May 2019.

Following an examination, the FTA largely refused the input tax deduction, arguing that the taxpayer could only deduct the input tax on services that (regardless of the invoice date) had actually been provided after it was entered in the VAT register on 1 April 2019 (cut-off date). Due to a lack of detailed information on which consultant provided which services at exactly what time, the FTA methodically assumed an even, linear purchase of services according to the duration of the contracts (pro rata temporis). The input tax deduction was therefore only permitted to the extent that the services were provided after the reference date according to this proportional distribution of fees.

CONSIDERATIONS OF THE FEDERAL SUPREME COURT

Requirement of an existing tax liability while receiving services

The position of the FTA, according to which the right to deduct input tax can only cover supplies that were received during the period of existing tax liability, was not (or no longer) disputed in the proceedings before the Federal Supreme Court.

Proof of the date on which the service was received

The court therefore focussed on the question of proving when the advisory services were actually provided. In accordance with the principle that facts justifying and increasing the tax must be proven by the tax authority, and facts reducing and excluding the tax must be proven by the person liable to pay the tax, the court held that A AG had the burden of proof that the services from the consultancy agreements concluded long before the VAT registration were only provided after entry in the register of taxable persons. A AG had failed to provide this evidence. In the absence of any other evidence, the approach of the FTA, which assumed a continuous provision of services over the period since the conclusion of the contract and accordingly divided the fees "pro rata temporis", was not objectionable in the present case.

Subsequent input tax deduction

In the sense of a contingent application, A AG had argued that it was entitled to a claim for subsequent input tax deduction. This is the possibility of correcting the input tax deduction (pro rata) at a later point in time than the purchase of the service if the conditions for the input tax deduction subsequently materialise, Art. 32 VAT Act.

The input tax deduction on goods and services put to use can be corrected if they are still available and have a current value at the time when the conditions for input tax deduction have materialised, Art. 72 para. 2 sentence 1 VATO.

However, there is a legal presumption that services in the areas of consulting, accounting, recruitment, management and advertising are already consumed and no longer available at the time they are purchased, Art. 72 para. 2 sentence 2 VATO. In the opinion of the court, the standard codifies, to a certain extent, an obligation for immediate depreciation, solely in relation to the VAT treatment. The accounting treatment (which Art. 70 para. 1 sentence 1 of the VAT Ordinance generally prescribes) is cancelled out by this special standard.

CONCLUSION

The generally generous regulations on input tax deduction in Switzerland can sometimes lead to a certain carelessness in the area of VAT. The judgement makes it clear that early VAT registration of the parties involved in connection with potential transactions should always be carefully checked and is usually advisable.

The judgement is not only relevant in the context of transactions, but also, for example, in the case of business start-ups, especially if a mandatory tax liability is not necessarily assumed at the beginning of the entrepreneurial activity.

In addition, the judgement shows that particular attention should be paid to documenting the timing of the provision of services - for example, through detailed invoicing or the documentation of certain "project milestones".