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Abusive aircraft holding structures (Federal Court judgement 9C_775/2023)

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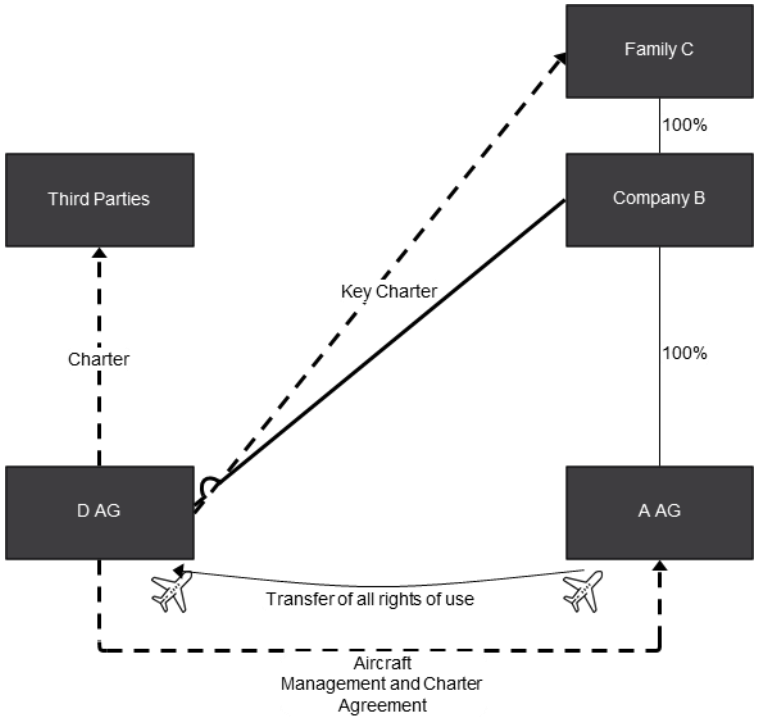
FACTS OF THE CASE



A AG is active in the procurement, holding, financing, operation, rental and leasing of aircraft. A AG is held by the company B. The owner of B is the C family.

In 2012, A AG acquired an aircraft and concluded an "Aircraft Management and Charter" agreement with D. In the agreement, A AG transferred the exclusive right to manage the aircraft and operate it vis-à-vis third parties to D.

All flights carried out with the aircraft were invoiced by the D. company. D retained a certain amount of the fees received as commission. D reimbursed the remaining amount to A AG as a rental payment. In detail, the agreement provided for the following:

- Flights by third parties ("charter"): A AG receives 85% less commission.
- Flights by related parties of A AG, executives of the C family, etc. ("key charter"): A AG receives 100% of the fees received by D less CHF 100 per flight hour.

The contract also stipulated that D had to obtain the prior consent of A AG for each charter flight. In addition, it would inform A AG of all flight enquiries from potential charter customers at A AG's

request. A AG reserved the right to approve or reject any charter flight offered by D at its own discretion.

In 2012, the FTA confirmed A AG's input tax deduction with regard to import tax on the aircraft and domestic tax invoiced by D. The decision was based on a ruling request, which was based on the following utilisation forecast:

- 52 % Utilisation by third parties
- 28 % Use for the private use of related parties of A AG and
- 20 % utilisation for members of the C family

It later transpired that more than 50% of the actual use was for the private needs of A AG and related parties. As a result, the FTA denied the input tax deduction to the extent of the use for non-commercial purposes and qualified the structure in relation to the aircraft as abusive.

QUESTION OR PROBLEM

The main issue in dispute is whether input tax deduction is excluded if the aircraft is used for the private use of the beneficial owners (A AG and related parties).

DECISION OF THE FEDERAL COURT

9C_775/2023

In its earlier judgement (BGE 149 II 53), the Federal Supreme Court was guided by the practice of the FTA when determining the threshold above which private use of an aircraft is no longer considered part of a business activity. Accordingly, private use of up to 20 % is not harmful. If this value is exceeded, the entire private use of the aircraft by the beneficial owner and related parties falls outside the scope of VAT and does not entitle the beneficial owner to deduct input tax.

Both the lower court and the appellant are correct in assuming that A AG forms an entrepreneurial unit (in accordance with the principle of the unity of the company in BGE 142 II 488), which is also confirmed by the Federal Supreme Court in the present case. However, even if a business unit exists, input tax deduction is only possible to the extent of the business activity.

The appellant's activity raises the question of whether an input tax adjustment is necessary, even though the structure provides for the aircraft to be used exclusively for business purposes. The Federal Supreme Court answered in the affirmative, as the private use accounts for more than 20% of the total use and therefore does not fall within the scope of VAT. In this respect, in the court's opinion, there was never a right to claim input tax.

CONCLUSION

Aircraft holding structures are regularly the focus of VAT auditors. The judgement essentially confirms the practice of the FTA and its restrictive approach. The judgement goes beyond aircraft holding structures and taxable persons should always keep an eye on the proportion of "de facto" private use of these items in relevant constellations (e.g. holiday homes, vehicles, boats).