Real Estate Tax Services News

Keeping you informed

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ECJ "Titanium" case: VAT changes expected for certain non-resident landlords

In brief

The European Court of Justice (ECJ) has recently ruled that the mere letting of real estate does not constitute a presence of the landlord in the country in which the real estate is situated. As a consequence, certain non-resident landlords[1] would no longer be entitled to register for value-added tax (VAT) purposes in that country. Under the current national VAT laws of Germany and Austria, this could have an impact on the invoicing to the tenant (reversed charge mechanism) as well as on the correct procedure to reclaim input VAT.

In detail

In the "Titanium" case (C-931/19), a company which registered office and management were situated in Jersey, leased out a property in Vienna (Austria) to two Austrian taxable persons with rental services being subject to VAT, and utilised the services of an Austrian property manager.

The ECJ ruled that as the non-established landlord itself did not have any staff in Austria to perform services relating to the letting, the property did not satisfy the criteria established in the case law to be characterised as a fixed establishment within the meaning of Directive 2006/112/EC and its amendments.

Consequently, the ECJ issued its judgement in relation to the question referred to it that a property which is let in a Member State by a non-resident landlord without staff to perform services relating to the letting in that Member State does not constitute a fixed establishment within the meaning of Article 43 of Directive 2006/112/EC and of Articles 44 and 45, as amended.

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[1] non-resident landlords who, in particular, have not established a permanent establishment or place of management

Impact of the ECJ decision on non-resident landlords of Austrian or German real estate

German real estate is frequently owned by non-resident landlords that operate a rental business of German real estate without having personnel in Germany. The current view of the German tax administration, as set out in the German VAT Application Decree (*Umsatzsteuer-Anwendungserlass*, or UStAE), is comparable to the Austrian tax administration's treatment of non-resident landlords without staff in Austria. Non-resident landlords are currently therefore deemed to operate from a fixed establishment in Germany for VAT purposes despite a lack of staff in Germany, which similarly to the Austrian regime could be in breach of the VAT Directive as interpreted by the ECJ.

As a result of the latest ECJ decision, German VAT arising on rental income generated by a non-resident landlord may have to be declared and paid by the tenants via the reverse charge mechanism. The non-resident landlord would no longer be obliged (or permitted) to register for VAT in Germany. Additionally, any German input VAT correctly charged to the non-resident landlord would have to be declared and a refund applied for via the time-consuming input VAT refund procedure within the strict exclusion period of six months for non-EU landlords or nine months for EU landlords following the end of the fiscal year in question.

Similar consequences are expected for Austrian property lettings.

Our view

From PwC Germany

Non-resident investors leasing German real estate assets should monitor how the German fiscal authorities as well as the legislator react to the ECJ decision. The VAT compliance procedure and the resulting time period to reclaim input VAT of the investors may change substantially (as the input VAT refund procedure is, even under the current process, at least time-consuming and often requires long discussions with the responsible German Federal VAT Office (*Bundeszentralamt für Steuern*, or BZSt).

With the upcoming federal election in September 2021, the German tax authorities are not expected to adopt the position of the ECJ within the coming months (while noting that retroactive changes to the regulations cannot be fully excluded in Germany, even though experience shows that such changes are typically implemented prospectively). For the time being, non-resident landlords should therefore focus on keeping any needed tax proceedings open and highlighting the approach taken to the relevant tax office to be in a position to react to any change to the VAT filing procedure in Germany.

From PwC Austria

The rule in the Austrian VAT Guidelines was meant as a simplification for non-established landlords who anyway had to register with the Austrian tax authorities for income tax purposes. In addition, the rule simplified the recovery of Austrian VAT incurred by the non-established landlord as the input VAT could be offset against the output VAT due on the rental services via the monthly VAT returns and ensured that the option to treat the rental services as subject to VAT was clearly executed.

We expect that the Austrian Ministry of Finance will wait for the decision of the Austrian Supreme Court before either changing their current practice and abolishing the rule in the Austrian VAT Guidelines or changing the law by excluding the rental services from the reverse charge mechanism. Non-established landlords can refer to the judgement of the CJEU if they do not want to continue their VAT registration in Austria. As the current practice of the Austrian tax authorities clearly is not covered by the Austrian VAT Act, this leaves the landlords and the tenants with uncertainty on how to proceed from now.

If the reverse charge mechanism shall be applied in the future, we recommend to clearly state on the invoice to the tenant that the landlord opted to treat his rental services as subject to VAT and that the reverse charge mechanism must be applied by the tenant.

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