

Is colocation a real estate service?

On July 2, the European Court of Justice ruled that a colocation service does not qualify as a real estate service. As a result, these services are not VAT exempt, and taxable for VAT where the customer has established its business.

Facts

The Finnish company A Oy provides colocation services which include the provision of a server cabinet with a lockable door, power supply and services to ensure the best possible operating environment for the use of the servers, such as temperature and humidity control, cooling, power supply interruptions, smoke detectors for fire detection in the server cabinets and electronic access control.

The server cabinets are bolted to the floor in a building rented by A Oy. The users then place their equipment in the server cabinets; that equipment is screwed into the server cabinets and can be removed in minutes.

Customers do not receive their own key from the server cabinet in which they have placed their server, but they can receive a key from the 24-hour concierge service on presentation of an identity document. A Oy is not entitled to access the client's server cabinets.

Issue

The issue is if the rental of the technical space necessary for the hosting of customers' servers should be considered as the transfer of a right of use on real estate. So, in essence, the question is (1) are the services provided by A Oy VAT exempt and (2) are these services taxable in the countries where the building is located or where A Oy's customers are established?

Evaluation

The rental of immovable property in the VAT Directive has been defined as the right to use a property for remuneration and for an agreed period of time and exclude its owner and any other person from the enjoyment of that right. And the letting of immovable property is an economic but, as a rule, relatively passive activity, without significant added value.

In this case, there is no (VAT exempt) letting of immovable property as the customers cannot control or restrict access to the part of the building in which the server cabinets are located, and A Oy does not grant exclusive rights to an area passively. Also, the server cabinets themselves are not leased real estate as they do not form an integral part of a building or construction without which the building or construction is incomplete (like doors, windows, roofs, stairs, and lifts), nor as an element or tool or machine that is permanently installed and cannot be moved without destruction or alteration of the building or construction.

The second question is if the service(s) provided by A Oy must be regarded as a service relating to immovable property, in which case the place of supply of that service is where this property is located?

However, services relating to immovable property only concern services that are sufficiently directly related to immovable property, which is the case;

- i. where these services are derived from immovable property and this good is part of the service, central to and essential to the services rendered, and
- ii. when those services are provided for, or are directed to, real estate for the purpose of legal or physical alteration of that good.

The rental of immovable property for the storage of goods is not a service relating to immovable property if no specific part of that property is intended for the exclusive use of the tenant.

As the customers do not have an exclusive right to use the part of the building in which the server cabinets are installed, and the server cabinets themselves are not immovable property, the services provided by A Oy do not constitute real estate services.

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