

# Global Tax Update

## Germany

Deloitte Tohmatsu Tax Co.

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### BFH rules on VAT treatment of supplies via consignment stock

**(1) Supplies via call-off-stock can be zero rated intra-community supplies if certain conditions are fulfilled.**

Germany's Federal Tax Court (BFH) issued a decision on 20.10.2016, V R 31/15, on the VAT treatment of supplies made via consignment stock. The BFH confirmed the 2015 decision of the lower Hessian tax court (FG Hessen 25.8.2015, 1 K 251910 1 K 2519/10), in which that court disagreed with the German tax authorities' position regarding supplies via German call-off stock. According to the tax authorities, the supply of goods from other EU member states via consignment stock located in Germany should be deemed to be an intra-community supply of goods followed by a domestic supply by the supplier. This in general results in VAT reporting obligations for the supplier in Germany.

The case before the BFH involved a Spanish trading company that sold goods to a German company. The goods produced in Spain were supplied via call-off-stock located in Germany. The German customer had a service agreement with the warehouse operator, under which the warehouse services were contracted on behalf of, and for the account of, the supplier. The customer had dictated these terms to the supplier. The warehouse operator was required to provide services, such as storage, unloading, etc., relating to the stored goods, and the German customer had been granted free access to the goods. The central supply agreements contained terms relating to the goods to be supplied, the terms of delivery, price and payment. The quantity and dates of supply were determined by call-off schedules forwarded by the German customer on a daily basis. Only these schedules had a legally binding effect. The quantities shipped to the warehouse were required to cover the demands of the customer during the coming weeks and months.

The BFH ruled that a supply via a call-off-stock where the final customer was identified at the beginning of the transfer from the EU member state of dispatch and where a binding order existed on that date should be considered a direct intra-community supply. It is irrelevant that the right to dispose of the goods was transferred in Germany.

The BFH stated that its decision is in line with the 2009 decision of the Court of Justice of the European Union (X, 18.11.2010, C-84/09). Based on this decision, the classification of a transaction as an intra-community supply or acquisition cannot be made contingent upon the observance of a specific time period during which the transport of the goods supplied or acquired must begin or end. However, to make such a classification and to determine the place of acquisition, there must be a temporal and material link between the supply of the relevant goods and the transport of the goods, as well as continuity in the transaction.

The BFH pointed out that the temporal and material link requirement is not affected by a short temporary interim storage of the goods, as in the current case. The BFH also held that the German tax authorities' view, which is based on the guidance issued by the OFD (higher local tax authority) of Frankfurt dated December 15, 2015, that the transfer of goods from another member state to a German consignment stock will trigger a deemed intra-community acquisition of the goods by the seller in Germany, followed by a domestic taxable supply, is incorrect.

**(2) Deloitte's Comments**

The BFH decision does not include any new guidance as to how storage contracts should be drafted to ensure the assumption of a binding order before transport commences. Although the BFH does not follow the position taken by the German tax authorities for nonresident taxpayers, potentially affected parties should continue to register for VAT in

Germany in the case of supplies via call-off-stock since it is unclear if and when the tax authorities will implement the BFH decision in practice. Hopefully, the tax authorities will take steps soon to implement a change in practice, which will lead to fewer registration duties for nonresident taxpayers.

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