

Groundbreaking Supreme Court ruling for the BES construction sector

On December 1, 2023, the Supreme Court issued an important ruling regarding, among others, the right to deduct the Algemene Bestedingsbelasting ('ABB') in the construction sector on the BES islands. The Supreme Court's ruling in this regard and the implications for the construction sector on the BES islands are briefly discussed in this newsflash. Where in this newsflash reference is made to the ABB rates applicable to Bonaire, for Saba and St. Eustatius the applicable ABB rates are 6% for supply of goods and 4% for supply of services.

The Case

The interested party is a construction company established exclusively for the construction of one resort in Bonaire. For this construction, the interested party used several subcontractors for various construction activities. On their invoices to the interested party, these subcontractors erroneously charged 6%, the ABB rate for services, instead of 8%, being the ABB rate for supply of goods.

In dispute is whether the interested party is entitled to deduct the ABB paid to these subcontractors for the construction services rendered considering that the service rate of 6% was charged instead of the supply of goods rate of 8%.

Deduction of ABB

The ABB grants the producer the right to deduct, among others, the ABB which he pays on goods supplied to him by other producers. This is subject to the condition that the ABB is charged on an invoice issued in the prescribed manner. The ABB paid for services rendered is in principle not deductible.

Special regulations apply to the construction sector to prevent the accumulation of ABB. The ABB on services or combined supplies/services are deductible in the construction sector if they are 'actual construction activities'. Subcontractors are in that case regarded as producers pursuant to a decree of the State Secretary of Finance (Decree of September 23, 2011, no. DV2011/430M). The State Secretary has thereby set the condition that an invoice prepared in the prescribed manner must be issued by the subcontractor, with the supply of goods rate of 8%.

For invoices (for actual construction activities) with an ABB rate of 6%, the tax authorities did not allow ABB deduction. The interested party was of the opinion that he was nevertheless entitled to deduct ABB and therefore took the matter to the Supreme Court.



Supreme Court ruling

The Supreme Court has ruled that an 'invoice issued in a prescribed manner' should be understood to mean an invoice which clearly shows that the services mentioned therein fall within the scope of the Decree of the State Secretary of Finance. This implies that there is no evidence of fraud or abuse. The contractor (interested party in this case) is then entitled to a deduction of the ABB charged.

Denying the deduction of ABB solely on the basis that the amount of ABB stated on the invoice was calculated at an incorrect rate disregards the purpose of the Decree of the Secretary of State for Finance being to prevent cumulation of ABB according to the Supreme Court.



Implications for the construction sector

The ABB is a complicated tax. This also applies to the construction sector. The decision of the State Secretary of Finance brings some relief but does not make the ABB less complicated. This ruling shows understanding for this.

On the basis of this Supreme Court ruling, subcontractors and contractors can make use of the right to deduct ABB for actual construction activities carried out, provided that there are no indications of fraud or abuse, regardless of which ABB rate was charged on the invoice. The condition remains that they must be actual construction activities and the invoices must clearly reflect that the services rendered are actual construction activities.

Contact

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