NEWS FROM THE CJEU

Bermuda Triangle of VAT
Part 1: Intra-Community Chain Transactions
Request for a preliminary ruling (Austria), Federal Financial Court, ruling of 30 November 2016 – case C-628/16 – Kreuzmayr

A chain transaction takes place when at least three parties are involved in commercial transactions with respect to the same goods and these goods are transported or dispatched directly from the first party to the last. If in the process the goods cross an (intra-Community) border, then only one of the supplies can be zero rated as an export or intra-Community supply of goods (VAT exemption with entitlement of input VAT deduction).

In the absence of clear provisions in EU law and differing regulations in the EU member states, the question frequently arises as to the criteria by which the zero rated (“moved”) supply is to be defined.

In this connection, the Austria Federal Financial Court has put three questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling.

The Case
In the case in question, three parties (X1, X2 and X3) are involved in commercial transactions in respect of a certain object (mineral oil products). The goods moved directly from X1 in Germany to the last party in the chain, X3 in Austria, which meant that the transaction constituted an intra-Community chain transaction.

X2 presented its Austrian VAT identification number (VAT ID no.) to X1 and committed himself to take care of transporting the goods to Austria. On the basis of an agreement with X2, X3 assumed responsibility for transportation by picking up the goods at X1 in Germany and transporting them to Austria using its own staff or third parties (carriers).
The Federal Financial Court apparently assumes that X3 already had disposal over the goods in Germany as an owner would have. X2 did not inform X1 that he had already sold the goods on before they left Germany, nor could X1 know that X2 did not carry out transportation by himself or through third parties.

Questions for the CJEU
The first question that the Federal Financial Court has put to the CJEU is whether in such a constellation the supply between X1 and X2 is the moved (zero rated intra-Community) supply of goods in Germany.

If the answer to the first question is no (meaning that the supply from X2 to X3 is the moved, zero rated supply of goods in Germany), the Federal Financial Court asks whether X3 can nonetheless deduct Austrian input VAT charged by X2.

If the answer to the first question is yes, the Federal Financial Court asks whether the supply from X1 to X2 retroactively loses its status as an intra-Community supply of goods in Germany when X1 subsequently learns that X3 arranged for transportation and already had disposal over the goods in Germany as an owner would have.

Significance for German Law
The CJEU submission shows the extent to which the definition of the moved supply in intra-Community chain transactions can vary in the absence of provisions in EU law. If the last party in the chain (here: X3) is responsible for transportation, there are currently the following varying viewpoints:

The German tax authorities assign the supply to the last party in the chain (here supply from X2 to X3) as the zero rated, moved supply (see Section 3.14 (8) sentence 2 of the German VAT Application Decree (USAE)).

The Fifth Senate of the German Federal Tax Court, in its ruling of 11 August 2011, V R 3/10 was issued in relation to transportation being arranged by the enterprise in the middle of the chain (here: X2) The Senate had the view that the first supply in the chain (here supply from X1 to X2) is in general the zero rated, moved supply. Only in the case that X2 informs X1 about the sale of the article to a second purchaser (here: X3) before the transportation takes place, the supply from X2 to X3 is to be assigned as the movement of goods. In this constellation only, according to the ruling, X1 is able to know that the transportation of the article cannot be assigned to its supply (see VAT Newsletter November 2011).

The Eleventh Senate of the German Federal Tax Court, in its ruling of 25 February 2015, XI R 30/13 (see VAT Newsletter May 2015), had the view that, if transportation is arranged by the last party in the chain (here: X3) then the first supply (here: from X1 to X2) is to be assigned as the transportation or dispatch, unless the first purchaser (here: X2) transferred to the last purchaser (here: X3) the power of disposal over the supplied article as an owner would have when the article was still in Germany.

Please note:
In its guidance of 28 December 2015 – III C 2 - S 7116-a/08/10002:003 (see VAT Newsletter January/February 2016), the German Federal Ministry of Finance (BMF), on the basis of the more recent adjudication, put forward possible proposed legislation for new rules on chain transactions. This is a technical contribution to the discussion at working level. The BMF and associations are in dialog in order to achieving practical rules. It is yet to be seen whether the legislators will first await the outcome of the request for a preliminary ruling in matter of C-628/16 – Kreuzmayr.

Bermuda Triangle of VAT
Part 2:
Intra-Community Triangular Transactions
Request for a preliminary ruling (Austria), Supreme Administrative Court, ruling of 19 October 2016 – case C-580/16 – company Hans Bühler KG

An intra-Community triangular transaction is a special case of an intra-Community chain transaction which is expressly covered by EU law and is essentially aimed at avoiding (unnecessary) registration obligations within the EU.

It requires in particular that three enterprises that are identified for the purposes of VAT in different member states enter into commercial transactions in respect of the same goods. Whether the identification for VAT purposes requires only a VAT ID no. or whether the domicile of the enterprise is also of significance is regarded in very different ways in the EU member states.

The Austrian Supreme Administrative Court has submitted two questions to the CJEU in this regard for a preliminary ruling.
The Case
A limited partnership domiciled in Germany (D1) operates a production and trading company in Germany. It has a German VAT ID no. In addition, in the period from October 2012 to April 2013 it had an Austrian VAT ID no. D1 was intending to set up a permanent establishment in Austria. So far this intention has not been realized.

D1 used its Austrian VAT ID no. in the period from October 2012 to 2013 for “triangular transactions” only. On several occasions it procured goods from suppliers domiciled in Germany (D2) and sold them on to a customer domiciled in the Czech Republic (CZ). In each case the goods were supplied from D2 in Germany directly to CZ in the Czech Republic.

On its invoices submitted to D1, D2 quoted its German VAT ID no. and D1’s Austrian VAT ID no. Meanwhile D1, on its invoices submitted to CZ, quoted its Austrian VAT ID no. and CZ’s Czech VAT ID no. It also stated on its invoices that the transaction was an “intra-Community triangular transaction” and that CZ was the party liable for tax.

What is at issue is whether the intra-Community acquisitions of goods effected in Austria through use of an Austrian VAT ID no. by D1 count as having been taxed on the basis of the transaction constituting an intra-Community triangular transaction (cf. Art. 41, 42 of the VAT Directive, § 3d sent. 2 of the German VAT Law (UStG) for the German legal position). If that is not the case, then D1 would have to register accordingly in Austria until it has demonstrated taxation of the intra-Community acquisition in the Czech Republic. D1 would also in general have to invoice for the supplies to CZ in the Czech Republic with Czech VAT and report these supplies together with the intra-Community acquisitions on Czech tax returns.

Questions for the CJEU
In requesting a preliminary ruling, the Austrian Supreme Administrative Court wishes to know whether the conditions are met for an intra-Community triangular transaction even if the purchaser (the enterprise in the middle) is domiciled in that member state from which the article is dispatched but uses the VAT ID no. of another member state.

In addition, the Austrian Supreme Administrative Court has asked the CJEU whether only an EC Sales List submitted on time ensures exemption from taxation of the intra-Community acquisition.

Please note:
The CJEU submission is also of significance in particular for the interpretation of German VAT law. According to the legal wording, the prerequisite for an intra-Community triangular transaction is that the enterprises involved are identified for the purposes of VAT in different member states. According to Section 25b.1 (3) UStAE, domicile in one of these member states is not required; instead what matters is whether the enterprises involved present VAT identification numbers from different member states.

This is now being questioned by the Austrian Supreme Administrative Court.

Furthermore, the German VAT law does not envisage that only timely submission of an EC Sales List by the first purchaser can provide exemption from taxation of the intra-Community acquisition. If the first purchaser has not reported the sale in its EC Sales List, however, it may be subject to a fine pursuant to § 26a (1) no. 5 UStG. The same applies if the first purchaser does not submit the EC Sales List correctly, completely or on time.

NEWS FROM THE BFH
Legally watertight processing of developer cases
BFH, ruling of 23 February 2017, V R 16/16, V R 24/16

With regard to the developer cases, the BFH reaches the conclusion that the VAT according to § 27 (19) sent. 1 UStG may only be imposed against the supplying contractor if he has a assignable entitlement to the VAT payment against the developer. The tax authorities have to accept an assignment pursuant to § 27 (19) sent. 3 UStG even if the VAT has already been paid to the tax authorities. It is irrelevant whether there is an invoice stating the VAT separately.

The case
In the present case a contractor provided construction work to a developer in 2012. Both assumed that the developer as the recipient of the work was liable to tax pursuant to § 13b UStG. In January 2014, the developer applied for refund of the VAT with the tax authorities that he had paid for the receipt
of the construction work. In October 2014, the tax authorities informed the contractor that the developer asked for refund of the VAT for the construction work in dispute. The tax authorities also gave notice that they will take action against the constructor as the party liable to tax pursuant to the BFH ruling of 22 August 2013, V R 37/10 (see VAT Newsletter December 2013). The VAT assessment was to be changed in accordance with § 27 (19) sent. 1 USIG. The tax authorities pointed out to the assignment option pursuant to § 27 (19) sentences 3 and 4 USIG. In December 2014, the tax authorities assessed the VAT to be higher. The additional amount was paid in 2015. In April 2015, the contractor unsuccessfully applied for the acceptance of the assignment of a claim to the additional VAT payment against the developer in discharge of his obligations.

It is in dispute whether the tax authorities were entitled to change the VAT assessment, but obliged to accept the assignment offer.

Ruling
The tax authorities were entitled to change the VAT assessment pursuant to § 27 (19) sent. 1 USIG. Thus, § 176 German Tax Code (AO) did not contradict this change. However, this is only justified if the contractor has an assignable entitlement for the payment of the legal VAT against the developer. This is what the BFH concludes from the EU legal principles of protection of legitimate expectations, legal certainty and neutrality.

In the present case, the BFH confirms an assignable entitlement. According to it, the company is entitled to contractual changes pursuant to § 313 (1) German Civil Code (BGB). The BFH left it open whether the requirements of a contractual adjustment pursuant to § 313 (2) BGB or of a change pursuant to the principles of a supplementary interpretation of the contract were fulfilled as well. In the present case, it was not assumed that the developer had asserted warranty claims against the company or has declared any offsetting. The claim was also assignable in the present case, because the agreed assignment-prohibition was suspended based on § 354a (1) sent. 1 German Commercial Code (HGB).

On the other hand, the tax authorities are obliged to accept the assignment offered to them. The contractor was entitled to receive payment from the developer and it offered the assignment of this entitlement formally to the tax authorities. As a result, the discretionary power granted to the tax authorities pursuant to § 27 (19) sent. 3 USIG was reduced to zero so that every decision other than the acceptance of the assignment offer would have been a discretionary error.

It is irrelevant to the BFH whether the company had already paid the claimed amount arising from the changed VAT assessment. Ultimately, the issuance of the invoice stating the VAT is neither required for the assignment pursuant to § 27 (19) sent. 3 USIG, nor for the power to make changes pursuant to § 27 (19) sent. 1 USIG but only for the special fulfillment pursuant to § 27 (19) sent. 4 USIG.

Please note: According to the wording of § 27 (19) sent. 4 USIG, the VAT liability of the contractor expires through assignment of the VAT payment against the developer only under four conditions. Firstly, there needs to be a settlement with an open tax statement. Secondly, the assignment needs to remain effective. Thirdly, the contractor needs to notify immediately the developer about the assignment pointing out that the payment does not constitute a discharge of its obligations. Fourthly, the contractor must have fulfilled its obligation to cooperate. Due to the open formulation the last point might be controversial in practice.

Termination of the VAT group due to insolvency
BFH, ruling of 15 December 2016, V R 14/16

The ruling relates to the consequences of opening insolvency proceedings for an existing VAT group.

The case
A GmbH (limited liability company) carried on a business activity. As a controlling company with six subsidiaries as controlled companies, it formed a VAT group.

The GmbH filed for insolvency with the competent court for itself and its subsidiaries and applied for self-administration. In the beginning, the local court appointed P as a trustee and ordered that the GmbH is entitled to manage and dispose of its assets under the supervision of the preliminary trustee P.

Later, the local court opened the insolvency proceedings for the
follows: In the event of a group company, the BFH points out as assets of the controlling insolvency proceedings over the With regard to the opening of these proceedings does not made against it. The further claims arising from the controlled company will then be terminated if the insolvency result, the VAT group assets of its subsidiaries. As a company applies only to its own assets, but not to the assets of its subsidiaries. As a As a result, the VAT group is terminated if the insolvency proceedings are opened for the controlling company. The VAT claims arising from the transactions of the previous controlled company will then be made against it. The further existence of the VAT group would be incompatible with the VAT principle of the corporate unit of the organs and with the principle of the VAT group to aim to simplify the administrative work.

Regardless of these conditions on part of the controlling company, the VAT group ends with the controlled company’s opening of the insolvency proceedings. The BFH argued that the financial integration is missing at that point. At the same time, the BFH points out to its ruling according to which the VAT group may also be terminated already by appointing a provisional insolvency administrator (see last BFH ruling of 24 August 2016, V R 36/15). The financial integration is also terminated if the insolvency court orders self-administration pursuant to §§ 270 ff. InsO. The controlling company does not have any powers of intervention anymore. If the subsidiaries are legal entities, the supervisory board, the shareholders' meeting or the relevant bodies have not influence over the management pursuant to § 276a sent. 1 InsO. In addition, the dismissal and re-appointment of members of the management board are only effective, if the administrator agrees.

Please note: In its guidance of 12 December 2016, the BMF presented a draft of a guidance on the VAT group and gave the associations the opportunity to make their statements. In addition, the draft guidance deals with questions on input tax deduction in the event of acquisition, holding and disposal of holdings. As soon as the final guidance is published, we will update you on the core messages in our VAT Newsletter.

Probable the BMF will also comment in this or in the following guidances on insolvency law-related questions in connection with the VAT group.

**Supplies through consignment stocks**

*BFH, ruling of 16 November 2016, V R 1/16*

The BFH has confirmed its new jurisdiction on supplies through consignment stocks. Supplies from the EU into a German consignment stock are not subject to German VAT, if it is known already at the beginning of the dispatch from the EU to whom the supplies are bindlingly delivered to and if the supply is stored in the consignment stock only for a short period of time (see ruling of 20 October 2016, V R 31/15, VAT Newsletter January/February 2017). This contradicts the previous practice of the tax authorities, which principally assumes a registration duty in Germany.

**The case**

From 2005 to 2010, a Dutch BV supplied screens to a wholesale company registered in Germany. The BV delivered the goods from the Netherlands to a consignment stock located on the business premises of the wholesaler. Only the wholesaler had access to that stock. The BV was only granted access to the stock for inventory purposes and upon appropriate notice given in advance. The wholesaler was entitled the sell the stock inventory within the scope of the normal business operations to its customers. The BV remained owner until the wholesaler sent a list (once per week) about goods sold to its customers in the previous week.
The BV’s selling price to the wholesaler was determined on the day on which the wholesaler re-sold the goods. The goods were ordered from the BV by the wholesaler according to the mutually agreed storage guidelines. The BV was obliged to leave the goods at least for three weeks in the stock. Upon expiration of this time period, the wholesaler was entitled to send back the entire stock or parts thereof to the BV. It is in dispute whether the sales to the wholesaler are to be qualified as zero-rated intra-Community supplies.

Ruling
The BFH reaches the conclusion that the transactions of the BV in Germany are taxable, because the place of the supply is defined according to § 3 (7) sent. 1 UStG, but not according to § 3 (6) UStG. Pursuant to § 3 (6) UStG, the goods need to be dispatched to the customer, who has to be known already at the time of dispatch.

According to these principles, the place of the disputed supply was in the consignment stock in Germany, because the customer was not known at the time the goods were dispatched. In the present case, it was only clear that the wholesaler will keep the items and pay the relevant price when they were taken from the consignment stock. A binding purchase agreement was only concluded between the contracting parties after the goods were stored as the wholesaler was not initially obliged to buy the goods stored in the consignment stock by BV.

Please note:
It remains to be seen when the BMF will comment in a guidance on the newer BFH jurisdiction on the supplies through consignment stocks. According to the Regio-nal Tax Office in Frankfurt (guidance of 23 February 2017 – S 7100a A-004-St 110), the BFH ruling of 20 October 2016, V R 31/15 was not published officially, because with regard to this legal question the present appeal proceedings V R 1/16 were pending. If in such cases companies contradicted the taxation of the German supplies, the proceedings were suspended pursuant to § 363 (2) sent. 2 AO.

By providing an official certificate issued in the state where he/she is resident, the trader needs to prove that he/she is registered as a trader under a tax number (so-called certificate of entrepreneurial status).

New regulations resulting from the BMF guidance
The trader needs to submit the refund application on an officially stipulated data form to the BZSt. Further information on the electronic transmission are available on the website of the BZSt. Submissions on an officially prescribed form (hard copy or via fax) may only be admitted if the electronic submission poses an unreasonable economic or personal burden to the trader.

With regard to the itemized list of the input tax amounts, the following applies: It is not necessary to explain for which specific business activity the purchased items or received other services were used. A general explanation showing the type of business activity is sufficient (e.g. International transportation of goods in June).

NEWS FROM THE BMF

Input tax refund proceedings for traders outside the EU since 1 July 2016

The BMF guidance relates to the status of input tax refund applications since 1 July 2016 filed by traders that are not resident in the EU.

Further applying regulations
The application for refund needs to be filed within six months upon expiration of the calendar year in which the refund claim has occurred (limitation period). The trader needs to calculate the refund himself/herself. The input tax amounts still need to be proven through original invoices and import documents. The original invoices and import documents must be received in hard copy by the German Federal Central Tax Office (BZSt) within the limitation period.

The refund amount applied for must be at least EUR 1,000. This does not apply if the refund period is the calendar year or the last period of the calendar year. With regard to these refund periods, the refund amount applied for must be at least EUR 500.

NEWS FROM THE LEGISLATION

More invoices of small amounts permitted

German Parliament’s Journal (Bundestag), press release 18/11778 of 29 March 2017

On 30 March 2017, the German Parliament has decided on a second law intended to relief the burden of bureaucracy particularly of medium-sized businesses (Second Bureaucracy Reduction Act). The law particularly provides for VAT changes and simplifications of keeping delivery notes. These
changes are to become effective retroactively as of 1 January 2017. The law still needs to be approved by the German Federal Council (Bundesrat).

**Increase of the limits of invoices for small amounts**
The issuer of an invoice needs to observe numerous information that need to be stated on the invoice. However, with regard to invoices for small amounts, less requirements apply. Thus, for example, the full name and the full address of the recipient of the supply is not needed. The limit of invoices for small amounts is now to be increased from EUR 150 to EUR 250 (§ 33 sent. 1 (draft VAT Implementing Regulation - (UStDV-E)). The original draft provided for an increase to EUR 200 only.

**Liability in case of subrogation**
In § 13c UStG, the liability for the VAT to be paid to the tax authorities is regulated. The liability relates particularly to cases in which the supplier assigns its payment claim against the customer. The assignee is liable if the debt is collected. This is the case if the assignee collects the debt or assigns it to a third party and the supplier does not pay the VAT at all or pays it too late to the tax authorities.

According to the BFH (ruling of 16 December, XI R 28/13) the liability of the assignee shall also be given if it provided cash to the supplier within the scope of a so-called real factoring with which the supplier could have paid its VAT liability.

In response to this BFH ruling, a legal regulation on the limitation of liability should be introduced according to the previous administrative regulations (section 13c.1 (27) UStAE).

Subsequently, the obligation through the assignee shall not be considered as received insofar as the supplier receives a consideration in cash against the subrogation. This does not apply if the amount is paid to an account to which the assignee has access (§ 13c (1) sent. 4 and 5 UStG-E).

**Simplification of retaining delivery notes**
Received or sent delivery notes are subject to the retention obligation pursuant to § 147 (1) no. 2 and 3 AO. They even need to be retained if the information is stated on the invoices. The retention obligation for delivery notes is six or ten years pursuant to § 147 (3) sent. 1 AO if the delivery notes are used as posting documents. In future, the retention period is to terminate when the invoices is received or sent (§ 147 (3) sent. 3 and 4 AO-E).

Please note:
The German Federal Council pointed out in its statement that an invoice from several documents may exist pursuant to § 31 UStDV that state the necessary information pursuant to § 14 (4) UStG. If the invoice refers to the delivery notes e.g. with regard to the quantity or the type of the delivered goods or the time of the services, they are to be considered as part of the invoice and must not be disposed of in future either.

IN BRIEF

**Requirements of an invoice correction due to excess VAT charge**
Lower Tax Court of Münster, ruling of 13 September 2016, 5 K 412/13 U; ref. no. of the BFH: XI R 28/16

The ruling of the Lower Tax Court of Münster relates to a lease of a senior nursing home as VAT exempted property lease (§ 4 no. 12 (a) UStG). Based on an additional home facilities agreement, the inventory was also leased. The Lower Tax Court of Münster reached the conclusion that leaving the inventory is a supply ancillary to the exempt property lease, because the inventory for an operable and functioning senior nursing home is mandatory.

Since the lessor charged VAT for the inventory, there was an excess tax charge pursuant to § 14c (1) UStG. For an effective correction, the tax authorities did not only demand the invoice to be corrected, but also the VAT to be refunded to the recipient of the supply (see section 14c.1 (5) UStAE with example). In contrast, the Lower Tax Court of Münster could not find any indication in the law that makes the refund necessary. The tax authorities filed an appeal against the ruling. The BFH could leave the question still open in its ruling of 12 October 2016, XI R 43/14, (see VAT Newsletter January/February 2017).
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Impressum
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