KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

March 2018

NEWS FROM THE CJEU

Chain transactions: hurdles for this practice without protection of legitimate expectations

CJEU, ruling of 21 February 2018 – case C-628/16 – Kreuzmayr

The ruling concerns the allocation of a zero-rated intra-Community supply of goods (VAT exemption with entitlement of input VAT deduction) within a chain transaction. The first supplier's positive knowledge of the resale of the goods in another EU state does not appear to be a decisive allocation criterion for the Court of Justice of the European Union (CJEU). The tenor of the CJEU ruling of 26 July 2017 – case C-386/16 – Toridas – could, conversely, be interpreted in a different way (see VAT Newsletter August/September 2017).

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 assumes that X3 already had disposal over the goods in Germany as an owner.

Ruling
The allocation of the zero-rated intra-Community supply of goods within a chain transaction requires a comprehensive appraisal of the individual case. In particular, the point in time at which the distributor provides the final customer with the authority to dispose of the item must be clarified.

If the distributor provided the final customer with the authority to dispose of the item before the intra-Community transport, the

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intra-Community transport cannot be allocated to the first delivery to the distributor. In the case at hand, the intra-Community transport therefore had to be allocated to X2's delivery to X3.

In the comprehensive appraisal, the intentions of the purchaser at the time of the purchase must also be taken into consideration. The intentions must, however, be supported by objective points of view. In the case at hand, X2 and X3 obviously knew that the authority to dispose had been transferred to X3 before the intra-Community transport in Germany. This must be taken into account for the place of the second supply. X1's classification of the first supply is irrelevant. Their assumption was made solely on the basis of the information which was erroneously conveyed to them by X2.

It is not important that X1 was not informed that X2 resold the goods to X3 before an intra-Community transport. It is also irrelevant that X2 appeared at X1 using a VAT identification number which was issued by the Member State of destination.

Please note:
Moreover, the CJEU also touched upon an invoice with VAT for an intra-Community supply. If, within an intra-Community chain transaction, there is an intra-Community supply of goods, this may not be invoiced with VAT. The customer cannot deduct the VAT shown in the invoice as input VAT.

A protection of legitimate expectation for the customer does not exist. On the contrary the customer can, in accordance with the national law, demand the repayment of the VAT paid but not due. In this respect the customer has, in general, reference to civil proceedings against the supplier. A refund by the tax authorities only comes into question in exceptional cases (see CJEU, ruling of 26 April 2017 – case C-564/15 – Farkas; VAT Newsletter May 2017).

Travel services: legislative changes needed

CJEU, ruling of 8 February 2018 – case C-380/16 – Commission / Germany

The ruling is on a claim brought against Germany by the European Commission in 2016 (see VAT Newsletter August/September 2016). The CJEU came to the conclusion that the provision in § 25 of the German VAT Law (UStG) on the taxation of travel services is not consistent with EU law (Art. 306 ff. of the VAT Directive).

The case
Margin taxation of travel services under § 25 UStG is an option in Germany only where the recipients of the supply are not themselves traders or where the travel services are not provided for their businesses.

Where recourse is had to margin taxation, the allocation of input travel services can create technical problems with accounting. For that reason, § 25 (3) sent. 3 UStG gives the tour operator the option of applying margin taxation for groups of services (e.g. for a trip or season) or for all services in the taxation period, rather than for every single service.

The European Commission takes the view that both provisions breach EU law.

Ruling
The European Commission's claim was successful.

The CJEU affirms that EU law does not allow the exclusion from the special arrangement for travel services of such services as are provided for taxpayers who use them for their businesses.

It also constitutes a breach of EU law if tour operators are allowed to determine a flat-rate taxable amount for groups of services or for all services provided during a taxation period.

On both points, it referred, in particular, to its own ruling of 26 September 2013 – case C-189/11 – Commission/Spain (see VAT Newsletter September/October 2013). Member States are obliged to apply the VAT Directive even if they believe there to be room for improvement in it, until such time as the EU's legislators decide on a substantial amendment of the special arrangement.

Please note:
The German VAT Law on travel services needs to be amended in line with EU law, taking into account the CJEU's rulings.

Tour operators need not wait for the VAT Law to be amended. Under this ruling from the CJEU, they can rely on EU law, which, unlike § 25 UStG, is not guided by whether a travel service is provided for an end consumer rather than for a trader. In this instance, they are subject to the provisions of EU law as a whole. As such, they need to bear in mind that EU law has no provision comparable to § 25 (3) sent. 3 UStG and so they need to allocate actual input travel services to each and every travel service (see BFH, ruling of 21

November 2013, V R 11/11; VAT Newsletter May 2014).

EU law on travel services is itself the subject of a study produced by KPMG Ireland for the European Commission. The study, which contains proposals for reform, may be downloaded from this link.

Real estate vacancy and input VAT adjustment

CJEU, ruling of 28 February 2018 – case C-672/16 – Imofloresmira – Investimentos Imobiliários

The CJEU makes clear that the interim vacancy of real estate does not lead to an input VAT adjustment if the contractor still wishes to lease the real estate subject to VAT.

The case

Using an option for VAT, the Portuguese company Imofloresmira rented, subject to VAT, two properties. After the lease agreements came to an end, parts of the real estate stood empty for more than two years. The Portuguese tax authorities were therefore of the opinion that Imofloresmira should have to correct the input VAT from the expenses of the previous years (depending on the case annually or finally). In total, Imofloresmira was liable for adjustments in the amount of approximately EUR 1,376,000.

However, Imofloresmira had continuously advertised the available space in these properties with a view to leasing them. Among other things, it created a brochure, a mailing list and an internet site, press releases with a wide-ranging public distribution, as well as billboards on the properties in question. Furthermore, Imofloresmira also amended its offering, namely by providing space for lease at competitive prices on the one hand, and on the other offering the opportunity of a grace period to the lessees for the time during which the properties were being made ready. The presenting court considered that Imofloresmira verifiably intended to lease the real estate while charging VAT, and made the necessary effort to carry out this intention.

Ruling

First of all, the CJEU discussed the right to an input VAT deduction in relation to the expenses incurred by Imofloresmira. A trader retains the right to deduct input VAT as soon as this right has arisen, even if they were unable to use, in the context of taxed transactions, the items or services which led to the deduction due to circumstances independent of their volition. Due to the principle of neutrality this applies both to the initial as well as the interim vacancy in a property if the company has, in each case, demonstrably intended to lease the unoccupied spaces subject to VAT.

In this case, the CJEU also rejected a partial input deduction adjustment in accordance with Art. 185 of the VAT Directive (see § 15a German VAT Law (UStG) for the German law). While the necessity to make a correction can also exist, without the taxable person deliberately causing a change of use (for example, VAT-exempt rental of housing instead of the previously commercial rental), as a result the principle of tax neutrality in particular may not be compromised.

Finally, Art. 137 (2) of the VAT Directive does grant Member States broad discretion to allow them to determine the modalities of practicing an option right and even to exclude this entirely. Having said that, the Member States cannot use this authority to withdraw a right to deduct input VAT which has already accrued.

The tax authorities could only demand the retrospective refund of the deducted amounts, if the right to an input VAT deduction is exercised in a fraudulent or abusive manner.

Please note:

The interim vacancy of a real estate property which is rented subject to VAT can lead to an input VAT adjustment. This is the case if the company cannot prove that it wants to continue to rent or lease the property subject to VAT. Companies affected must ensure adequate documentation. According to the tax authorities, the objective evidence (e.g. rental contracts, newspaper advertisements, engaging a realtor, correspondence with interested parties, marketing concepts, costing documentation) proving the intention to use the property must be regularly taken into consideration on a case-by-case basis. In doing so, the overall picture of the relationships is crucial. Assertions are not sufficient. On the contrary, concrete proof is required, which is subject to a more rigorous standard of review. In this respect, uncertainties are to the detriment of the contractor (see Section 15.12 (2) of the VAT Application Decree (UStAE)).

NEWS FROM THE BFH

Submission to the CJEU: outsourcing in the banking sector

BFH, ruling of 28 September 2017, V R 6/15

The BFH has made a submission to the CJEU, asking it to rule on whether support services provided to a bank for the purpose of operating ATMs are exempt from VAT.

The case

The case concerns a company providing a bank with services in connection with the operation of ATMs. The company set up functioning ATMs with software and hardware bearing the bank's logo at the locations intended for them and was responsible for their proper operation. The company replenished the ATMs with cash provided by the bank, activated the necessary exchange of data between the holder of the bank card and the bank that had issued it and, when the transaction was approved, issued the money through the ATM.

Contrary to the company's understanding of the law, the tax authority took the view that the services were liable to VAT. However, the Rhineland-Palatinate Lower Tax Court (ruling of 23 October 2014, 6 K 1465/12) contended that they were not.

The ruling

The BFH doubts that the services are tax-exempt and believes the matter needs to be clarified by the CJEU. In its past rulings, the CJEU has taken the view that the exemption from VAT for payment and transfer services does not apply to a service described as "processing debit and credit card payments" and performed by a taxable person, where a person acquires through it, by means of a debit or credit card, a movie theatre ticket that they then sell in the name of and on behalf of another entity (CJEU, ruling of 26 May 2016 – case C-607/14 – Bookit; see VAT Newsletter June 2016).

The only distinction to be drawn between the activity of the company in this case and that of Bookit is, in the eyes of the Court, that in Bookit's case the desired transaction consisted in the purchase of a movie ticket and in this case in the issue of funds through cash dispensers. This difference in the use to which the service was to be put by the customer might well not be sufficient to justify a differing legal view of the service's nature.

Please note:

The BFH's order for reference of 28 September 2017, V R 6/15, is of great importance to banks that have recourse to service providers in order to optimize the cost-efficiency with which their functions are performed. As banks in general are not entitled to deduct input tax, or may do so only to a limited extent, the expected cost benefits are jeopardized if the service provided to them is liable to VAT; see the BFH's press release of 24 January 2018. It is now for the CJEU to decide to what extent the outsourcing in this case can be tax-exempt.

IN BRIEF

Export via the shop counter – inadmissible national restriction

CJEU, ruling of 28 February 2018 – case C-307/16 – Pienkowski

The ruling concerns the zero-rated supply to travelers who are not resident in the EU of items which are carried in personal luggage. This zero-rating is also known as "export via the shop counter". The zero-rating (Art. 147 of the VAT Directive) assumes that the items purchased will be transported to a non-EU country before the end of the third calendar month following the supply. Member States can make the zero-rating dependent upon the total value of the supply exceeding EUR 175 including VAT. The proof of export will be generally provided by invoices or corresponding receipts, which must be furnished with an endorsement stamp from the outgoing customs inspection in the EU.

In Poland, the zero-rating requires that the seller's turnover in the previous tax year amounted to more than PLN 400,000 (about EUR 94,531). If this is not the case, a zero-rating is only possible if the seller has concluded a contract with a trader who has received an entitlement to refund tax to travelers from the Polish tax authorities.

The CJEU holds the view that both of these prerequisites are not in line with Union law. The zero-rating is not dependent on the seller having realized a minimum turnover in the previous tax year or – if this prerequisite is not fulfilled – on them having concluded a contract with a trader who is entitled to give tax refunds.

Insofar as the prerequisites for zero-rating upon export are documented, no VAT will be owed for such a supply. In such a case there is generally no risk of tax evasion or financial losses to justify the taxation of the revenue in question.

Right to reimbursement interest – inadmissible national restriction

CJEU, ruling of 28 February 2018 – case C- 387/16 – Nidera

The ruling concerns reimbursement interest in the case of the delayed repayment of an input VAT surplus to a Lithuanian contractor. An input VAT surplus can arise particularly if, for a tax period, less VAT is owed for output transactions than can be deducted as input VAT for input purchases.

Based on CJEU case law, the Member States have only limited room to maneuver when it comes to determining the details of reimbursements. In particular, these details must allow the trader to acquire the entire claimed amount resulting from the input VAT surplus under appropriate conditions. This implies that the reimbursement will take place in a reasonable timeframe. By the same token, the contractor may never incur any financial risk through the chosen reimbursement method (see CJEU, ruling of 6 July 2017 – case C-254/16 – Glencore Agriculture Hungary; VAT Newsletter July 2017).

If the reimbursement does not take place within a reasonable period of time, the financial losses incurred must be compensated. Union law contains no explicit regulation in this respect. Therefore, national law must set down the conditions for the payment of this type of interest, in particular the interest rate and the method of calculation for it. In doing so, the principle of tax neutrality must be observed.

With respect to the Lithuanian law, the CJEU has come to the conclusion that a reduction of the interest, due to circumstances which arise independently of the contractor, is in violation of Union law. These circumstances include the (high) amount of the interest in comparison to the amount of the input VAT surplus, the (long) duration of the missing reimbursement and the reasons for that, as well as the losses actually incurred by the contractor in the case of a compounded interest rate.

Location of seminar events

Reference for a preliminary ruling (Sweden) of 20 November 2017, case C-647/17 – Srf konsulterna

Art. 53 of the VAT Directive regulates the place of supply of services to a contractor in relation to the right to admission and the associated services for cultural, artistic, sporting, scientific, educational, entertainment or similar events such as trade fairs and exhibitions. In these cases, the services are carried out at the location at which these events actually take place. Consequently, the services are notably not taxed in the place where the recipient of the supply has their place of business (Art. 44 VAT Directive).

The referring Swedish court is asking the CJEU how the term "right of admission to an event" in Art. 53 of the VAT Directive must be understood. Specifically, the court wishes to know whether a service in the form of a five-day accounting course also falls under this article, if the course is provided solely to businesspeople and requires that the registration and payment take place in advance.

Professional associations: entrepreneurial status and input VAT deduction

Lower Tax Court of Berlin-Brandenburg, ruling of 13 September 2017, 2 K 2164/15; BFH ref. V R 45/17

The ruling from the Lower Tax Court of Berlin Brandenburg concerns the entrepreneurial status and input VAT deduction of a professional association.

In the tax authorities' opinion, in the case at hand there is no exchange of services between the association and the individual members, as the association is active in fulfilling its community purposes, which serve the overall concern of all members, in accordance with its articles of association. For doing so, the association charges membership dues, which are intended to enable it to carry out these tasks (Section 1.4 UStAE). Therefore, the association is not commercially active, an input VAT deduction is not possible and the invoices for the members were not entitled to show VAT in accordance with § 14c UStG.

In contrast, the Lower Tax Court reached the conclusion that a professional association can also provide taxable services to its members insofar as it performs statutory duties such as public relations work, improving political and societal perceptions and economic

conditions for the companies and industry groups which are organized in the association. The fact that every member of the professional association does not profit from these individual activities to the same extent and may not call upon the same range of services, does not stand in the way of the assumption of paid services. What is pivotal, rather, is that the members have the possibility to avail of the services in return for their membership dues. The Lower Tax Court supports its argument using case law from the CJEU (in particular the ruling of 21 March 2002 – case C-174/00 – Kennemer Golf and Country Club) and the BFH (most recently the ruling of 20 March 2014, V R 4/13) on sports clubs. An appeal against the ruling has been lodged.

VAT liability for construction work for a property developer

Lower Tax Court of Munich, ruling of 10 October 2017; 14 K 344/16; BFH ref. V R 49/17; Lower Tax Court of Baden-Wuerttemberg, ruling of 17 January 2018, 12 K 2323/17; BFH ref. V R 7/18

The two Lower Tax Court rulings concern property developers who resold or rented the developed properties in the years 2010 to 2013. Both courts reached the conclusion that the property developers are not, in accordance with § 13b UStG, those liable for VAT on construction work which was carried out by domestic skilled construction workers for them (see existing BFH ruling of 2 August 2013, V R 37/10; VAT Newsletter December 2013).

Furthermore, the available provision of § 17 UStG cannot be used directly nor at the expense of the developer. Contrary to the tax authorities, the property developer's reimbursement claim does not depend on whether they have retrospectively paid the VAT to their contract partner (skilled construction worker) or whether the tax authorities can set it off against transferable (based on civil law) amounts owed by the supplying contractor to the financial authorities in accordance with § 27 (19) UStG (that however, is the opinion of the German Ministry of Finance (BMF), guidance of 26 July 2017, VAT Newsletter August/September 2017).

Being liable for VAT can also not be justified on the basis of the principle of good faith and the principle of neutrality. Appeals have been lodged against both rulings.

Reimbursement interest from property developers

Lower Tax Court of Munich, ruling of 20 December 2017, 2 K 1368/17, BFH ref. V R 3/18; Lower Tax Court of Baden-Wuerttemberg, ruling of 17 January 2018, 12 K 2324/17, BFH ref. V R 8/18

The two rulings from the lower tax courts concern reimbursement interest in accordance with § 233a German Tax Code (AO) in property developer cases (see article in this newsletter). Interest on the reimbursement must be paid in accordance with § 233a (1) AO. If the tax assessment is changed, the decisive amount for calculating interest is the difference between the VAT assessed and the previously assessed VAT. Interest will only be applied to a difference to the benefit of the property developer up to the amount of the reimbursement. The interest period is set in accordance with § 233a (2) AO. It begins 15 month after the end of the calendar year in which the VAT arose. Contrary to the tax authorities, § 233a (2a) AO shall not apply.

This provision states that as long as the tax assessment is based on the consideration of a retrospective event (§ 175 AO), the interest period begins 15 month after the end of the calendar year in which the retrospective event occurred. A retrospective event, in the tax authorities' view, is the effective date of the setoff with the (based on civil law) transferable VAT claim or the payment of the VAT by the property developer to the supplying contractor. An assessment of reimbursement interest is therefore out of the question. Appeals have been lodged against each of the rulings which granted reimbursement interest.

OTHER

Review of VAT refunds in the Member States of the EU

EU Commission, press release of 15 February 2018

The European Commission has initiated a compliance review to examine if VAT reimbursements to companies in the EU Member States conform to the applicable EU law and CJEU case law.

In the next eight months, tax regulations in the individual Member States will be examined to ensure that the reimbursement procedure makes it possible for companies to claim back VAT credits in their own country, and in other EU countries, quickly and easily. The study will, for example,

examine how long it takes for the procedure to be completed in each country. In addition, it will look at what unnecessary obstacles exist in the reimbursement system, which could lead to financial risks for the companies. Insofar as the European Commission, as a result of the study, determines that EU law has been violated, it could initiate infringement proceedings.

UPCOMING EVENTS

VAT 2018 – Current Developments and Hot Topics

What is going to change in the VAT area in 2018? KPMG experts will inform you about current developments and make you familiar with the new developments in the legal situation and selected rulings of the CJEU, BFH and individual Lower Tax Courts. Get to know typical pitfalls from the commercial practice and also learn how to avoid them. We will conclude this overview with a presentation of selected administrative guidances.

Please find further information on these events here.

10 April 2018 – Leipzig
12 April 2018 – Berlin
13 April 2018 – Braunschweig
17 April 2018 – Stuttgart
17 April 2018 – Munich
18 April 2018 – Bremen
19 April 2018 – Kiel
19 April 2018 – Nuremberg
20 April 2018 – Karlsruhe
20 April 2018 – Dortmund
24 April 2018 – Hamburg
24 April 2018 – Bielefeld
25 April 2018 – Cologne
26 April 2018 – Mannheim
03 May 2018 – Duesseldorf
04 May 2018 – Hanover
07 May 2018 – Ulm
08 May 2018 – Frankfurt

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