KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

January / February 2019

NEW IN LEGISLATION

Statement on the planned reform of the VAT system in the EU from 1 July 2022

European Parliament, report of 25 January 2019, A8-0028/2019

On 25 May 2018, the European Commission released its detailed proposals on the reform of the VAT system from 1 July 2022. The proposals flesh out the plans of 4 October 2017 for an extensive reform of the VAT system in the EU (see VAT Newsletter October 2017) and supplement the changes already agreed for 2019 and 2021 on 5 December 2017 (see VAT Newsletter January/February 2018).

The European Parliament has now made its statement and suggested some amendments to the recitals. In relation to the changes to VAT Directive, the European Parliament proposes, among other things, changes to the legal institution of a Certified Taxable Person – CTP (which is to be introduced), and to the VAT rates:

- to support applications for CTP status, the Commission shall introduce a customized procedure for small and medium enterprises;
- there shall be a uniform list of serious criminal offences which in particular would prevent the acquisition of CTP status;
- to attain CTP status, solvency must be proven for the previous 3 years;
- CTP status shall be recorded in the VAT Information Exchange System (VIES);
- the tax authorities shall have to review the conditions for CTP status at least every two years;
- CTP status shall not be granted if the status of Authorized Economic Operator (AEO) has been denied in the previous 3 years, and
- An EU web information portal shall be established which contains the exact details on the VAT rates used in the Member States.

Please note:
It remains to be seen whether and to what extent the Commission proposals will be amended. Ultimately, the proposals require the agreement of all Member States.

Content

The European Parliament's statement is not binding for the legislative process. It will be interesting to see if the introduction of the legal institution of "Certified Taxable Person" comes to pass. In the case of the four so-called "quick fixes" on chain transactions, consignment stocks and intra-Community supplies, which will be introduced in the EU on 1 January 2020, not all Member States were in agreement with having "Certified Taxable Person" as a requirement, so that the originally planned introduction could not be implemented.

NEWS FROM THE CJEU

Input tax deduction for foreign branches

CJEU, ruling of 24 January 2019 – case C-165/17 – Morgan Stanley

The Court of Justice of the European Union (CJEU) is providing guidance in this ruling for the determination of input tax deduction for branches of international financial service providers. However, attention should be paid to the principles beyond the financial services sector.

The case
An investment bank based in the United Kingdom (UK) has a branch based in France. This branch receives various services subject to input tax that were used either exclusively or only partially for providing internal supplies to the head office in the UK.

Given the option exercised of taxing its financial supplies, the French branch claimed full deduction of the input tax incurred on internal supplies.

In view of the partial use of internal supplies, the tax office rejected this with the argument that these supplies were outside the scope of value added tax (VAT) and only permitted the deduction of a small portion of the input tax incurred for services to the head office. The referring court is asking the CJEU about the extent to which, in its judgement, French and British regulations are relevant for the deduction of input tax.

Ruling
With regard to VAT incurred in France, the following deduction methodology may be inferred from the CJEU's ruling:

Expenditure exclusively used for supplies made by French branches to third parties

French provisions on input tax deduction should apply.

Expenditure exclusively used for exempt supplies made by the head office to third parties

Input tax cannot be deducted.

Expenditure exclusively used for taxable supplies made by the head office to third parties

Input tax can be deducted if these supplies also qualify for input tax deduction as if they had been made in France (double layer test).

Expenditure used for exempt and taxable transactions made by the head office to third parties

A proportion of input tax may be deducted, for which a separate input tax distribution rule must be applied (transnational pro rata rate).

The taxable supplies made by the head office to third parties must be included in the numerator, provided they also qualify for input tax deduction as if they had been made in France.

All supplies made by Morgan Stanley & Co International Plc with third parties must be recorded in the denominator. As such however, the only output supplies of the head office to be included are those into which the input tax amounts of the French branch flowed by way of internal supplies it made to the head office. The output supplies qualifying for input tax deduction must be examined on two fronts for VAT purposes. They may only be included if they qualify for input tax deduction under UK and French law.

Expenditure used both for transactions made by the head office with third parties and for transactions made by the French branch with third parties

A proportion of input tax may be deducted, for which a separate input tax distribution rule must be applied (transnational pro rata rate).

The taxable supplies made by the French branch to third parties and the taxable supplies made by the head office to third parties must be recorded in the numerator, provided they also qualify for input tax deduction as if they had been made in France.

All supplies made by the French branch with third parties and all supplies made by the head office must be recorded in the denominator.

Please note:
The CJEU interprets the VAT directive as binding for all member states. However, it remains to be seen whether and how the national tax authorities will react to this ruling on input tax deduction for head office/branch arrangements. The CJEU's requirements pose the following challenges for those affected companies in their system-side presentation and recording of supplies:

- To carry out the double layer test, companies must be familiar with and take account of the structure of supplies and their VAT liability in the applicable EU member states.
- The need for a transnational pro rata rate can only be met if relevant supply

positions/input tax are identified as such in the ERP system.

Taxation of payments by instalment according to Union law

CJEU, ruling of 29 November 2018 – case C-548/17 – baumgarten sports & more GmbH

Following a submission from the German Federal Tax Court (BFH), this CJEU ruling concerns the taxation of instalment payments in accordance with Union law.

The case
The case at hand concerns a GmbH (limited liability company) which provides services as a sports agent in the area of professional football. Its transactions are carried out at agreed fees and it pays taxes on its revenue in accordance with § 13 (1) no. 1 (a) German VAT Law (UStG). In the case of a successful placement, the GmbH receives a commission from the acquiring club if the player subsequently signs an employment contract and holds a license issued by the German Football League (Deutsche Fußball Liga GmbH). This commission is paid to the GmbH every six months for as long as the player remains under contract to the club in question and continues to hold the German Football League license.

The point in time at which the GmbH has to pay VAT on its transactions is disputed. The tax authorities assumed that the GmbH also had to pay, in 2012, taxes on the placement services it provided in 2012 even to the extent that they formed part of a payment for placements which they could not contractually claim until 2015. The BFH has doubts as to the interpretation of Art. 63 of the VAT Directive and a pre-financing of the VAT of more than two years.

Ruling
According to Art. 63 of the VAT Directive, a taxable event and chargeability arise at the point in time at which the service is provided. According to Art. 64 of the VAT Directive, services which give rise to successive payments are deemed to have been provided upon expiry of the period to which these payments relate. Consequently, for services which give rise to successive payments, the taxable event and the chargeability arise upon the expiry of the period to which these payment relate.

In the case of a service such as the one at issue in these proceedings, which consists of the placement of a player with a club for a certain number of seasons, where the placement is remunerated under a condition of payments by instalment over the course of several years, this appears to be the case. Thus, the GmbH does not have to pay VAT on its transactions at the time of the start of the placement, but thereafter every six months, if there is an entitlement to commission.

Please note:
In the next stage of proceedings, the BFH must take into consideration that in accordance with the CJEU ruling, the commission payments are not to be taxed at the time of the placement; rather, in accordance with Art. 64 of the VAT Directive, they will be taxed upon the expiry of the period to which the commission payment relates. This means that a lengthy pre-financing of VAT by the supplying trader will be avoided.

The BFH will have to form a position on whether this conclusion, which is based on Union law, can also be achieved by means of an interpretation of national law. According to § 13 (1) no. 1 (a) sent. 2 UStG, VAT arises in the case of partial deliveries upon the expiry of the provisional reporting period in which the partial deliveries are carried out if, for certain parts of a commercially divisible delivery, the remuneration is specially agreed. Based on the way the German law is designed here, the taxation is brought forward (upstream).

Thus, the question arises as to whether this definition of a partial delivery also encompasses the case under dispute. Ultimately, the placement service is not itself divisible but the underlying service mediated is divisible, which gives rise to a de facto downstream taxation of the placement service.

NEWS FROM THE BFH

A co-ownership by defined shares is not a trader

BFH, ruling of 22 November 2018, V R 65/17

The BFH has amended its case law on the VAT treatment of a co-ownership by defined shares. According to the BFH, a co-ownership by defined shares cannot be a trader. Instead, the co-owners provide the supplies, which are subject to VAT, proportionately as individual traders.

The case
An inventor developed systems for endoscopic tissue characterization in association with others. They jointly licensed the inventions to a KG (limited partnership). For the granting of the license, the KG issued credit notes to them on the basis of the standard VAT rate of 19% (self billing). The inventor, however, paid VAT to the fisc on the license fees at a rate of 7%. His competent tax authority became aware of this as part of a tax disclosure and amended the tax assessment. The inventor opposed this, among other

reasons on the grounds that it was not he but rather a co-ownership between him and the other inventors which is the trader and thus liable for VAT in relation to the granting of the license to the KG.

Ruling
In the case at hand, the inventor and the others involved jointly created an invention, so that, in accordance with § 6 sent. 2 of the German Patent Act, they were jointly entitled to the patent rights. A community of inventors can exist as a co-ownership by defined shares in accordance with §§ 741 et seq. German Civil Code (BGB) or as a joint ownership (GbR) in accordance with §§ 705 et seq. BGB. If the parties involved have not reached any particular agreement, the parties, due to the mere fact of their joint activities in inventing, have a co-ownership relationship in accordance with §§ 741 et seq. BGB. A co-ownership by defined shares must therefore be affirmed.

The BFH views the inventor as the supplying trader, who must pay VAT on the license fees accruing to him on the basis of the statutory VAT rate. The BFH substantiated this using the fact that from a VAT point of view, a co-ownership by defined shares cannot be a trader. According to civil law, the co-ownership by defined shares does not have legal capacity and therefore cannot incur liabilities and thus, from a VAT law perspective, can also not provide any services. The BFH is explicitly abandoning its case law to the contrary.

This means that, according to the BFH, inconsistencies – such as those which could arise if a partnership (for example in the case of a joint lease to a third party) were to be viewed as a trader with legal capacity in relation to tax law, while this legal capacity, if the partnership lacks trader status, would not preclude an input VAT deduction for the co-owner – shall be dropped.

With this ruling, the BFH continues to follow German Federal Court of Justice case law, according to which technical proprietary rights are not protected by copyright. Due to a lack of copyright protection, a reduced VAT rate does not apply. Furthermore, the BFH affirmed tax fraud on the part of the inventor, as he, when submitting provisional VAT returns on the basis of the reduced VAT rate, would have had to inform the tax authorities that he was being invoiced at the standard VAT rate.

Please note:
The change to BFH case law captures not only communities of inventors, as in the case at hand, but is also of great importance, for example, in relation to the popular real estate collective (see § 1008 BGB), as the BFH emphasized in its press release. The tax authorities' view until now also considered that a co-ownership by defined shares could be a trader (see Section 2.1 (2) VAT Application Decree with reference to the BFH case law). It remains to be seen how the tax authorities will react to the new legal position.

NEWS FROM THE BMF

Liability for VAT when trading goods on the internet

BMF, guidance of 17 December 2018; III C 5 - S 7420/14/10005-06; BMF, guidance of 28 January 2019 – III C 5 - S 7420/19/10002 :002

Through the law on the prevention of VAT deficits when trading goods on the internet and for the amendment of additional tax provisions of 11 December 2018 (see VAT Newsletter December 2018), special duties for the operators of electronic marketplaces (see § 22f UStG) and regulations on liability when trading goods on an electronic marketplace (see § 25e UStG) were inserted into the German VAT Law. In addition, a new section 25 was inserted into § 27 UStG (General Transitional Provisions). In accordance with Art. 20 (3) of the abovementioned law, the regulations mentioned entered into force on 1 January 2019.

BMF guidance of 17 December 2018
According to the law of 11 December 2018, the operators of electronic marketplaces, as laid down in § 25e (5) and (6) UStG, shall on the one hand, keep a record of certain data relating to the users who carry out transactions in Germany for which a VAT liability may arise. On the other hand, it should under specific conditions be possible to make them liable for the VAT incurred and not paid on the transactions carried out on their electronic marketplace. This applies in particular if they allow traders, who generate revenue in Germany which is subject to VAT and who are not registered for tax here, to offer goods on their marketplace.

The "certificate on the registration as (a trader) liable for VAT in line with § 22f (1) sent. 2 UStG" – USt 1 TI – introduced in the German Ministry of Finance (BMF) guidance of 17 December 2018, serves to allow a trader to prove to the marketplace operator that they are registered for tax. The application can be made using form USt 1 TJ.

BMF guidance of 28 January 2019
In its guidance of 28 January 2019, the BMF clarified the new legal position. According to the law, the liability regulations will in general apply for the first time to transactions after 28 February 2019. If the supplying trader is resident in Germany, the EU or

the EEA, the liability regulations will first apply to transactions after 30 September 2019 (§ 27 (5) sent. 4 UStG).

According to the law, the obligation to keep records in accordance with § 22f (1) to (3) UStG, however, has already applied since 1 January 2019. Against this backdrop, for reasons of simplicity, no objections will be raised if the operator of an electronic marketplace does not fulfil this obligation to keep records for traders who are not resident in Germany, the EU or the EEA until 1 March 2019, and for the remainder of traders until 1 October 2019.

Legal certainty for property developers in the case of construction work

BMF, guidance of 24 January 2019 – III C 3 - S 7279/19/10001 :001 – IV A 3 - S 0354/14/10001 :019

In its ruling of 27 September 2018, V R 49/17 (see VAT Newsletter December 2018), the BFH took a position on the refund of VAT by the tax authorities in property developer cases. If a property developer assumed, due to a mistake in law, that as a recipient of a supply they were liable for VAT on the construction services they obtained, they can make a claim for the omission of this unlawful taxation without restriction.

In contrast to the tax authorities, it is not important that they are fulfilling an additional demand from the supplying trader or that the possibility of offsetting by the tax authorities exists.

Note 15a of the BMF guidance of 26 July 2017, which stands in contrast to BFH case law, will therefore be removed by the BMF guidance of 24 January 2019, with effect for all cases that are still open.

IN BRIEF

Requirement for travel services

CJEU, ruling of 19 December 2018 – case C-552/17 – Alpenchalets Resorts

In this ruling the CJEU has taken a position in relation to the scope of application of the special arrangements in relation to travel services. The ruling deals with a submission from the BFH.

In the case at hand, Alpenchalets Resorts rented houses in Germany, Austria, and Italy from their owners and in turn rented these on in its own name to private customers for vacation purposes. In addition to the provision of accommodation, the services included cleaning and, if applicable, laundry services and a “bread roll” service. Alpenchalets determined the VAT in accordance with the special arrangements for travel services on the basis of its profit margin, and used the standard VAT rate. Later, it unsuccessfully applied for an adjustment to the tax assessment and the use of the reduced VAT rate. The lawsuit was not successful.

The CJEU maintains that the mere provision of (third-party) accommodation by the company can fall under the special arrangements (see CJEU ruling of 12 November 1992 – case C-163/91 – Van Ginkel). This serves to prevent a complex tax regulation in which the VAT provisions to be used would be dependent on what elements the services offered to the travelers encompassed. In order to accommodate the customers’ wishes, tour operators offer many different forms of vacation and travel, which allows a traveler to combine, in whatever way they wish, transport, accommodation and other services which the operator can provide.

Ultimately, the reduced VAT rate stipulated in Art. 98 (2) of the VAT Directive does not apply to lodgings in holiday homes, which fall under the special arrangements for travel services.

OTHER

Brexit Quick Check from KPMG

The withdrawal agreement negotiated between the British government and the EU was rejected by a large majority in the British House of Commons on 15 January 2019. The likelihood of a disorderly exit of the UK from the EU (a hard Brexit), if the parties cannot reach agreement on an extension of the exit deadline of 29 March 2019, has therefore increased. Even if an extension of the exit deadline were to be agreed, the scenario of a hard Brexit or the imposition of customs duties would not be ruled out.

Many companies are unfamiliar with the financial risks arising due to the potential accrual of customs duties and the cost of customs declarations in the case of a (hard) Brexit.

The Brexit Quick Check allows KPMG to calculate these financial disadvantages efficiently and cost-effectively. In this way, companies can be supported in preparing necessary and suitable measures in the case of a (hard) Brexit scenario. You can find further details and information on the procedure using the following Link.

NEW – LinkedIn page of KPMG, Indirect Tax Services

Follow us on the new official LinkedIn page of KPMG, Indirect Tax Services. Stay up-to-date with our news and current information on specialist conferences, KPMG events and webinars on VAT-related matters. This site also features our newsletters which contain current information about VAT and the latest findings from customs and international economic law. We also post here job descriptions for the Indirect Tax Services division. Why not have a look, we'd welcome your visit.

EVENTS

VAT 2019 - current developments and key issues

VAT law is complex and subject to constant change. Apart from legislative amendments on 1 January 2019, it is already clear that several immediate measures on the reform of trade in goods must be urgently implemented by EU member states at the beginning of 2020. Administrative directives and case law must also be taken into account in practice. The event offers a compact overview of current issues and potential solutions to meet the compliance requirements for affected companies.

Further information on the event can be found here.

12 March 2019 – Duesseldorf

14 March 2019 – Dortmund

14 March 2019 – Frankfurt

19 March 2019 – Hannover

19 March 2019 – Berlin

19 March 2019 – Freiburg

20 March 2019 – Hamburg

21 March 2019 – Nuremberg

21 March 2019 – Cologne

21 March 2019 – Bielefeld

21 March 2019 – Stuttgart

26 March 2019 – Munich

26 March 2019 – Bremen

26 March 2019 – Leipzig

27 March 2019 – Kiel

02 April 2019 – Mannheim

04 April 2019 – Ulm

* Please note that the language of this event is German.

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International Network of KPMG

If you would like to know more about international VAT issues please visit our homepage KPMG International**. Further on this website you can subscribe to TaxNewsFlash Indirect Tax and TaxNewsFlash Trade & Customs which contain news from all over the world on these topics. We would be glad to assist you in collaboration with our KPMG network in your worldwide VAT activities.

Our homepage / LinkedIn

You can also get up-to-date information via our homepage and our LinkedIn account Indirect Tax Services.

* Trade & Customs

** Please note that KPMG International does not provide any client services.

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