KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

May 2019

NEWS FROM THE CJEU

Requirement for additional information in the input VAT refund procedure

CJEU, ruling of 2 May 2019 – case C-133-18 – Sea Chefs Cruise Services

The Court of Justice of the European Union (CJEU) concludes that, in the input VAT refund procedure, the one-month deadline for submitting additional information to the Member State of refund is not a strict time limit. This means that even in cases of non-compliance with the deadline, this information can still be presented in a judicial procedure.

The case
Sea Chefs Cruise Services, a company based in Germany, filed an application – using the German Federal Central Tax Office's (BZSt) electronic portal – in France for a refund of input VAT for the year 2014.

Subsequently, the French tax authorities sent an email requesting additional information from Sea Chefs Cruise Services. As the company did not reply within the one-month period given to it, the French tax authorities denied the application for a refund.

Sea Chefs Cruises GmbH took legal action against the decision to refuse the refund. In support of its suit, it presented to the French court the additional documents and information which had been requested by the tax authorities.

The French tax administration considers the legal action to be inadmissible as non-compliance with the one-month deadline to answer led to the expiry of the refund application. The French court would like to know from the CJEU, by means of a reference for a preliminary ruling, whether the deadline of one month stipulated in Art. 20 (2) of the Directive 2008/9/EC is a strict time limit.

Ruling
The CJEU denied the question. Although it is not clear from the wording of Art. 20 (2) of the Directive 2008/9/EC if the deadline referred to therein is a strict time limit, from the context in which it is given in Directive 2008/9, it can be inferred that it does not have an exclusionary character.

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This view is supported in particular by the fact that the directive does not contain a precisely defined "no later than", which would make it very clear that an application for a refund is only permissible if it is submitted before the expiry of the deadline set down for that, and that this deadline therefore represents a strict time limit, which, if not complied with, leads to the forfeiture of an entitlement to a refund of VAT. In the context of Directive 2008/9/EC, the absence of this word is an indication that the Union legislator did not want to set down a strict time limit in Art. 20 (2).

Furthermore, within the meaning of Art. 20 of the Directive 2008/9/EC the additional information could be demanded from someone other than the trader or the authorities in the Member State in which the taxpayer is resident. In this case, the absence of an answer or a delayed answer from this other person or authority could lead to the trader losing the right to an input VAT refund, although they had not had any possibility of influencing the submission of an answer in any way. This would violate the basic principles of the VAT system.

Please note:
If the trader has allowed a statutory deadline to elapse, whether it is possible to still make a later submission should be examined. In general this is not the case with strict time limits. According to German procedural law, it is only in cases of no-fault that the option of restitutio in integrum (§ 110 Fiscal Code of Germany) arises. Due to the severe legal consequences, strict time limits must be clearly identifiable for the trader, according to the CJEU. If there is a doubt as to whether a deadline set down in national or Union law must be qualified as a strict time limit or not, it may be possible to make use of the determining criterion stipulated by the CJEU of "no later than" or similar in those other cases.

NEWS FROM THE BFH

CJEU submission on the input VAT refund procedure

BFH, resolution of 13 February 2019, XI R 13/17

The German Federal Tax Court (BFH) has doubts as to what details are necessary in an input VAT refund application to designate the "number of the invoice". In this respect, it has asked the CJEU for clarification.

The case
A company resident in Austria applied for a refund of input VAT for the second half of 2012. The application for a refund was submitted electronically to the BZSt via the portal set up by the tax authorities in Austria.

In the main, the application was made on the basis of invoices for the delivery of fuel. In the official annex to the application, for each individual invoice under the sequential numbers 1, 7, 12, 18, 19, and 24, the column "document number" does not show the invoice number given on each invoice but rather an additional reference number, which is also given on each invoice and recorded in the company's accounting books. Therefore, whether this was a valid refund application is disputed.

Resolution
The BFH tends towards affirming the validity of the refund application, however it does not consider the issue of whether this finding is consistent with Union law to be absolutely certain. Therefore, it has submitted the issue to the CJEU for a preliminary ruling.

The first question concerns Art. 8 (2) (d) of the Directive 2008/9/EC, according to which for every Member State of refund and for every invoice the number of the invoice, inter alia, must be given in an application for a refund. The BFH would like to know if the indication of the reference number of the invoice, which is shown on an invoice as an additional classification criterion besides the invoice number, suffices. According to the BFH, the principle of neutrality and the principle of proportionality suggest this is so.

If the question at hand is to be denied, the BFH would like to know if a refund application which contains a reference number instead of the invoice number is considered to be formally complete and, in line with Union law, considered to have been submitted in a timely manner. The BFH holds the view that the validity of a refund application does not require accuracy of information but rather formal completeness. This also corresponds to the view of the European Commission.

Finally, the BFH notes that in this case, the relevant column for the invoice number required by the BZSt in the annex to the refund application does not have the designation "invoice number" as its heading but rather the general wording "document no." Furthermore, the portal provided by the Austrian administration for the electronic submission of applications has an (additional) different designation of "reference number". The inexact

designation, perhaps, cannot be held against the trader.

Please note:
The BFH's view that the validity of an application for a refund of input VAT does not require accuracy of information but rather formal completeness is also of importance in other cases.

Thus, for example, in an EU VAT refund application the type of the items and service purchased must be itemized by certain code numbers. If the code 10 is used for miscellaneous, the type of the items supplied and services rendered must be given. If the person submitting the application filled in "ProfFees" or "Goods" under code 10 then, according to the Lower Tax Court of Cologne (ruling of 20 January 2016, ref. 2 K 1514/13, non-binding) a formally complete application exists. The reason for this is that the entries exceed the threshold of complete emptiness and in relation to the details demanded contain an explanatory (added) value, albeit a minimal one.

Description of goods in the low-cost segment

BFH, ruling of 14.3.2019, V B 3/19

In preliminary legal proceedings, the BFH has taken a position on the description of goods in the low-cost segment. The BFH has serious doubts as to whether an input VAT deduction requires that invoices must give the type of items supplied using the descriptions customary in the trade, and whether, in this respect, giving the type of goods ("trousers", "blouses", "sweaters") is sufficient. The application for a suspension of operation (AdV) must therefore be granted.

The case
A trader operated in the wholesale trade for textiles and fashion accessories in the low-cost segment. Each of the goods was purchased in large quantities. The price of the individual items was between EUR 10 and EUR 12, and otherwise in the lower and mid single-digit range.

In her VAT return, the wholesales claimed input VAT on invoices from several companies in which the items were merely identified with details such as tunics, trousers, blouses, tops, dresses, t-shirts, sweaters, boleros, or in some cases also ladies pullovers (long-sleeved in 3 colors) or ladies tops (long-sleeved in 4 colors).

The tax authorities issued amended VAT assessments in which the input VAT was not accepted. Following an unsuccessful appeal, the wholesaler brought a legal action to the Lower Tax Court and applied for an AdV of the VAT assessment notices. The Lower Tax Court denied the application for a stay.

Ruling
Following a complaint from the wholesaler, the BFH granted the requested AdV as there were serious doubts about the denial of the input VAT deduction. The doubts arose as:

- There is not yet any supreme court legislation on the requirements for descriptions of goods in the low-cost segment and this question has received different responses from the Lower Tax Courts; in addition, there is an appeal pending at the BFH in relation to this question under the reference XI R 2/18.
- The importance and scope of the BFH resolution of 29 November 2002, V B 119/02 on the description of goods for high-value clocks and watchers is unclear, and
- it is possible that to conform with Union law, § 14 (4) no. 5 German VAT Law must be interpreted such that the necessity of a "description customary in the trade" has no significant impact as long as no other description of goods is required beyond the type of the items supplies. This could also be supported by the fact that, the description of goods required by Art. 226 no. 6 of the VAT Directive does not mean that, for example, the specific supply rendered must be exhaustively described (CJEU ruling of 15 September 2016 – case C-516/14 – Barlis 06, point 26; VAT Newsletter August/September 2016).

Please note:
At the outset, the BFH indicated that for the granting of the AdV it is not necessary that there is a preponderance of reasons demonstrating unlawfulness in line with a probability of success. Moreover, the grievance procedure again the AdV is not suitable to finally clarify the legal question that arises. According to the BFH, the decision must be reserved for the principal proceedings. It is entirely possible that the BFH will submit the issue to the CJEU for a preliminary ruling when it is dealing with the case in principal proceedings once again.

NEWS FROM THE BMF

Acquisition of molds, models and tools abroad

BMF, letter of 16 April 2019 – III C 2 – S 7100/19/10003 :004

The German Federal Ministry of Finance (BMF) has issued a statement of position on the VAT treatment of the acquisition abroad of molds, models and tools which remain there for the production of goods, where the produced goods are delivered to Germany. The letter to the Federation of German Industries (BDI) and the Association of German Chambers of Industry and Commerce (DIHK) is based on a submission dated 23 March 2018.

Principles for exports and intra-Community deliveries apply analogously for acquisitions

The BMF letter of 27 November 1975 on export deliveries – which, according to Section 6a.1 para. 5 in conjunction with Section 6.1. para. 6 no. 2 of the VAT Application Decree (UStAE) also applies to intra-Community deliveries – stipulates for molds, models and tools located in Germany only the conditions under which these are to be regarded as ancillary services to the goods produced or as independent deliveries. There is as yet no corresponding set of rules for molds, models and tools that are acquired abroad by domestic enterprises.

According to the BMF letter of 16 April 2019, the general principles of uniformity (see Section 3.10 UStAE) apply, for the purposes of VAT treatment, in determining whether the purchase of molds, models and tools by German entreprises in connection with the delivery of the produced goods from EU and third countries is an ancillary service to the main service or an independent service. At the same time, however, the BMF emphasises that the test criteria laid down in the BMF letter of 27 November 1975 for export cases must be applied analogously to the acquisition of molds, models and tools from the EU and from third countries.

No simplification rule

The BMF does not meet the wishes of the associations for the introduction of simplification rules. If different legal opinions exist in the participating countries with regard to the VAT implications of a situation, the problems cannot be resolved by the German tax authorities always applying a no-objection rule such that the legal assessment of the other state can be followed. According to the BMF, the tax offices must therefore decide on each individual case, weighing the risks accordingly.

IN BRIEF

Draft law on quick fixes

Draft bill, 8 May 2019

On May 8, 2019, the German Ministry of Finance published the draft bill for a "Law on Further Fiscal Promotion of Electromobility and for Amending Further Tax Provisions".

The bill contains, in particular, the planned regulations for the implementation of the so-called Quick Fixes under European Union law as of 1 January 2020 into German law as well as other VAT changes such as the introduction of the reduced tax rate for e-books.

We will inform you about the further developments in the legislative procedure in the VAT newsletter.

OTHER

CJEU submission on the transfer of company cars to employees

Lower Tax Court of Saarland, resolution of 18 March 2019, 1 K 1208/16

The Lower Tax Court of Saarland asked the CJEU a question by way of a reference for a preliminary ruling on the place of transfer of company cars to employees. This question is important for commuters living in border areas and working in another country.

The case

A public limited company (SA) established in Luxembourg provides two employees working in its company in Luxembourg who are resident in Germany with a company vehicle each, forming part of its business assets, these vehicles also being used for private journeys. It withheld a share of the costs of the company car provided to one of the employees from that employee's salary during the years to which the dispute relates. The SA is registered in Luxembourg under the "simplified taxation procedure", under which no input tax can be deducted. Consequently, it did not apply any input tax on the costs relating to the two company cars. In return, the simplified taxation procedure in Luxembourg did not result in any taxation of the transfer of the vehicle to the employees. The dispute concerns whether the SA has to tax the transfer of company cars in Germany.

Ruling
The Lower Tax Court suspended the proceedings and asked the CJEU whether Article 56(2) or Article 45 sent. 1 of the German VAT Directive is relevant for taxation. Under Article 56(2) of the VAT Directive, the place of leasing of a means of transport to non-taxable persons, with the exception of short-term hires, is the place where the customer is established, domiciled or habitually resident. Otherwise, under the first sentence of Article 45 of the VAT Directive, the place of supply of services to a non-taxable person is the place where the supplier has established its business.

The Lower Tax Court contests, among other things, the view of the tax authorities that the leasing of a company car by an enterprise to its employees for private use regularly qualifies as long-term leasing of a vehicle and considers the proportion of the work performed by the employee for private use of the vehicle to constitute payment (see Section 15.23(8) UStAE).

It is questionable, however, whether leasing pursuant to Article 56(2) of the VAT Directive also covers a benefit in kind equivalent to a paid service, and hence that in the concrete case the place of supply would also be Germany.

In the opinion of the Lower Tax Court, the provision of vehicles does not take place under a leasing agreement, but is instead governed by labor law. This is because it relates exclusively to the employment relationship with the employees. In the initial proceedings, the SA did not lease any vehicles to any other persons, and in particular its business purpose was not the commercial leasing of vehicles.

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