KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

June 2019

NEWS FROM THE CJEU

Provision of fuel card as financing service

CJEU, ruling of 15 May 2019 – case C-235-18 – Vega International Car Transport and Logistic - Trading

The Court of Justice of the European Union (CJEU) ruling concerns a parent company that provides its subsidiaries with fuel cards. According to the CJEU, the provision should be classified as a VAT-exempt credit facility in the case in dispute.

The case
Austria-based Vega International provides transport for commercial vehicles of renowned manufacturers from the factory directly to the customer. This paid service is provided by various subsidiaries, including Vega Poland.

Vega International organizes and manages the provision of fuel cards of various fuel suppliers for all its subsidiaries. The vehicles transported by Vega Poland are refueled using personal fuel cards issued to the drivers. For organizational reasons and due to the level of cost involved, the fuel suppliers send Vega International invoices for the fuel. At the end of every month, Vega International then invoices its subsidiaries for the fuel plus an uplift of 2 percent.

The dispute is whether Vega International is entitled to input tax deduction on the invoices from the fuel suppliers.

Ruling
The CJEU rejected this for the case in dispute after taking account of the CJEU ruling of 6 February 2003 – case C-185/01 – Auto Lease Holland. As in the settled dispute, Vega International did not have access to the fuel as an owner. The fuel was actually purchased directly from suppliers by Vega Poland at its own discretion. Vega Poland was free to choose which petrol station to use for refueling the vehicles from a list of suppliers given by Vega International. Furthermore, Vega Poland was free to decide on the quality, amount, type of fuel as well as the timing of the purchase and nature of use. In addition, Vega Poland also bore all costs associated with refueling, as Vega International invoiced it for the fuel.

Content

It cannot therefore be assumed that the fuel was supplied to Vega International and that the latter passed on the item to Vega Poland. It is more the case that by using fuel cards, Vega International limited itself to providing its Polish subsidiary with a simple instrument that enabled the latter to purchase fuel, and Vega International only played the role of agent in the purchasing process. Vega International provided a VAT-exempt funding service (Art. 135 (1) letter b) VAT Directive) to Vega Poland by pre-financing the purchase of fuel, thereby acting as a standard finance or credit institution.

Please note:
The CJEU's comments on the right of disposal and the business model's financing function should potentially be considered with other matters. In the eMobility sector, for example, contractual structures are currently chosen for the charging of electric vehicles whereby the charging point owner, charging point operator and service provider of corresponding "fuel cards" and end users are bound in variously arranged service chains.

EMobility is also the subject of the VAT Committee of the EU. Actually, France has asked the VAT Committee to comment on the VAT regimes applicable to the recharging of electric vehicles when a charge point operator and mobility provider are involved. In particular, Member States are asked whether the principles of the above CJEU judgment of 6 February 2003 – C-185/01 – Auto Lease Holland – apply (VAT Committee of 13 May 2019, Working Paper No 369).

NEWS FROM THE BFH

CJEU submission on the unsuccessful operator

BFH, ruling dated 27 March 2019, V R 61/17

The case at issue concerns an operator that produced an investment item. The German Federal Tax Court (BFH) questions whether the operator has to correct the input tax deduction if it ceases the sales activity triggering the corrected input tax deduction and the investment item then remains unused in the scope of the previously taxable use. It asked the CJEU for clarification in this regard.

The case
A limited liability company (GmbH) operated a nursing and care home on a VAT-exempt basis. In 2003, the GmbH built a cafeteria that was accessible for visitors and residents. The additional new dining room was also used as a lounge where coffee and sometimes cakes were provided free of charge.

The tax office thought it unlikely that, according to the GmbH, no residents used the cafeteria with their visitors. An agreement was then reached to apply a 10 percent VAT-exempt usage of the cafeteria, resulting in a correction under Art. 15a German VAT Law (UStG) for the years from 2003.

Following an external audit, the tax office assumed that the GmbH no longer sold any goods in the cafeteria in the years in dispute 2009 to 2012. In February 2013, this business was deregistered, resulting in another correction under Art. 15a UStG, as there was now no use for transactions with a right to input tax deduction. An objection and appeal were lodged with the Lower Tax Court, both of which were rejected.

Ruling
The CJEU had to clarify whether lack of success beyond the taxpayer's control that led to simple non-use of an investment item triggered an input tax correction. The BFH indicated that the right to apply input tax deduction would also continue if the operator could not subsequently use the items and services that led to the deduction due to circumstances beyond its control in the context of the taxed transactions.

According to the tax office's findings which are binding for the BFH, the closure of the cafeteria business in the years in dispute was due to the lack of financial profitability and therefore to the claimant's lack of success that per se did not justify any change in circumstances.

In the BFH's view, the closure of the cafeteria business did not mean that the cafeteria was available for exclusively VAT-exempt use by residents. The cafeteria was no longer used as a taxable operation, but this was not replaced by increased usage by residents. In addition to unchanged usage by residents, there was now a dormant business with unused premises rather than the former operation of the cafeteria. It could be incorrect in law to interpret the lack of usage to mean that exclusive usage was now for VAT-exempt purposes.

Please note:
The preliminary ruling may also have additional consequences for the VAT treatment of empty buildings if the CJEU refers to the intended usage with regard to the dormant cafeteria business. If a building is wholly

or partially empty for a specific period following its initial usage, then under section 15a.2 (8) German VAT Application Decree (UStAE), it must be decided by the time of the actual renewed usage of the economic asset, with reference to the intended usage, whether the circumstances applicable to the original input tax deduction have changed.

VAT obligation for formal warnings in the area of copyright law

BFH, ruling of 13 February 2019, XI R 1/17

The BFH has ruled that formal warnings, given by the copyright holder to enforce copyright-related injunctive relief against the infringer, are subject to VAT. The consideration for the supply of a warning is the amount paid by the infringer.

The case
A recording company engaged the help of a law firm to issue warnings to people who had unlawfully distributed recordings online. In return for signing a punitive cease and desist declaration, and payment of a flat-rate of 450 Euro (net), they offered to refrain from legal prosecution of their claims. In this respect, they assumed that the payments received should be considered to be compensation for damages arising from the copyright violations and therefore were not subject to VAT. At the same time, they deducted the VAT charged to them by the law firm as input VAT.

Ruling
The BFH found the tax authorities to be in the right and rejected the VAT qualification as a compensation for damages which is not subject to VAT. It clarified that formal warnings to enforce copyright-related injunctive relief must be qualified as a supply, subject to VAT, provided by the person giving the warning to the person receiving the warning. This applies regardless of the individual terms used by those concerned and the civil law basis for the claim.

Warnings are also given in the interest of the copyright infringer concerned, as they offer the opportunity for the infringer to avoid a costly lawsuit. These must be viewed as a supply subject to VAT. It is irrelevant to the outcome if, at the point in time of the warning, it was not certain if the warning would be successful. Even if it is not clear that the person receiving the warning is the copyright infringer and will pay, there is a direct connection between the warning as a supply and the payment received for it.

Please note:
In this ruling the BFH has transferred its case law on formal warnings in accordance with the Law Against Unfair Competition (see BFH, ruling of 21 December 2016, XI R 27/14) to warnings in accordance with the Law on Copyright and Related Rights. In this regard, according to the BFH, warning letters in cases of competition violations and in cases of copyright infringement do not differ substantially in content. In both cases, the warning serves the same purpose, as the demand for submission of a punitive cease and desist declaration opens up the possibility of avoiding a lawsuit, and an entitlement to reimbursement is based on a (special legally codified) negotorium gestio.

On the identity of the issuers of invoices and supplying traders

BFH, ruling of 14 February 2019, V R 47/16

The BFH has confirmed its established case law, according to which the right to deduct input VAT requires the identity of the invoice issuer and of the supplying trader. This corresponds to CJEU case law, according to which, giving the address, name and VAT identification number of the invoice issuer should enable a connection between a particular economic transaction and the issuer of the invoice to be established.

The case
In this case, the plaintiff did not receive the offers on which the supplies were based from the invoice issuer but rather from A-AG. The goods were either sent directly from A-AG's warehouse to the plaintiff's customers, or the plaintiff collected them directly from A-AG's warehouse. The plaintiff only had contact with K, who had presented himself, in the course of the transactions under dispute, as a sales representative of A-AG. Thus, the Lower Tax Court concluded that the supplies were carried out by A-AG. However, A-AG was not the issuer of the invoices so no VAT could be deducted on the invoices claimed. The input VAT deduction was also rejected for reasons of equity.

Ruling
The appeal was not successful. The person to be considered as the supplier in a transaction normally stems from the agreements concluded under civil law. The supplier is, as a rule, the person who carries out the supplies or miscellaneous services to a third-party in their

own name either themselves or using a representative. Whether a supply must be attributed to the person acting or to someone else generally depends on whether that person has, in carrying out supplies for payment, dealt with the recipient of the supply in their own name or legitimately in the name of another. The BFH confirmed the Lower Tax Court, which considered A-AG to be the supplying trader but not the invoice issuer, and so no input VAT deduction was possible on the invoices claimed.

The Lower Tax Court had also appropriately ruled that the requirements under which an input VAT deduction can be granted using the equity process (§§ 163, 227 Fiscal Code of Germany) are not fulfilled.

As an exception, the input VAT deduction could come into consideration from the point of view of the general legal principle of protection of legitimate expectation. This assumes that the trader seeking the input VAT deduction acted in good faith, and took all measures which could reasonably have been demanded of him to ensure the correctness of the details given in the invoice and his participation in a fraud has been ruled out.

In this case, there is no basis for such a protection of legitimate expectation; in particular, it is not about the good faith of the plaintiff in relation to the invoice details. The plaintiff was aware of the circumstance which led the Lower Tax Court – rightly – to the conclusion that it was not the invoice issuer but rather A-AG who carried out the supplies at the heart of this dispute. There is no good faith in certain legal inferences and consequently it cannot be protected.

NEW FROM THE BMF

VAT treatment of prize money that is dependent on placement

BMF, guidance of 27 May 2019 – III C 2 – S 7100/19/10001:005

In the guidance at hand, the German Ministry of Finance (BMF) has issued its opinion on the VAT treatment of prize money that is dependent on placement. In particular, Section 1.1 UStAE, which deals with the exchange of services, will be amended in line with the new case law (see especially CJEU ruling of 10 November 2016, C-432/15, Baštová; VAT Newsletter December 2016).

Thus, participation in a competition (horseracing, poker tournaments, sporting competitions, beauty contests, playoffs, and similar) only constitutes a supply of services provided in return for remuneration if the organizer makes a payment which is not dependent on the placement. This could be, for example, a fee for entering, or prize money independent of placement. Staggering the payment is not, in this respect, detrimental. Prize money from the organizer which is dependent on placement does not constitute a payment for participating in a competition, as it is not paid for participating but rather for achieving a particular competition result.

Conversely, the miscellaneous supply by the organizer of games of chance (vending machine operators, casino operators, etc.) exists in the admission to play for a chance at winning; the player's bet is directly connected to the game being played and is therefore a paid consideration for participation.

According to § 12 (2) no. 3 German VAT Law (UStG), the reduced VAT rate of 7 per cent applies to participation in performance tests for animals. The administrative interpretation set out in Section 12.2 (5) sent. 2 UStAE contradicts the principles of the ruling and will therefore be amended.

Similarly, supplies which directly serve the promotion of livestock breeding are subject to VAT at the reduced rate in accordance with § 12 (2) no. 4 UStG. In Section 12.3 (3) sent. 1 no. 8 UStAE there is a clarification to the effect that breeders' premiums do not regularly constitute a payment as part of an exchange of services.

The principles of this guidance must be used in all open cases. However, no objection – including for the purposes of input VAT deductions – will be raised if those concerned, for a payment of prize money which is dependent upon placement in the case of participation in a competition which takes place before 1 July 2019 or an animal performance test carried out before 1 July 2019, mutually assume it is a payment subject to VAT.

Please note:
In addition, the BMF emphasized that the new case law should not be transferred to all types of supplies which are carried out in return for payment of a remuneration which is dependent on success. This can already be seen in the fact that the VAT Directive contains provisions on brokerage

services, for which a consideration is typically dependent on success. As a rule, a remuneration which is dependent on success is paid as a consideration for a taxable supply (e.g. placement, sales promotion, auction, currency exchange or similar). The uncertainty of payment does not, consequently, eliminate a direct connection without exception. Therefore, in reviewing whether payments dependent on success constitute an exchange of services, in future a distinction should be drawn between payments made for (uncertain) success or for a service which is actually carried out.

Sale of co-ownership shares as a supply of goods

BMF, guidance of 23 May 2019 – III C 2 – S 7100/19/10002:002

In this guidance, the BMF has issued an opinion on the VAT treatment of the sale of co-ownership shares.

The sale of co-ownership shares must, taking the BFH ruling of 18 February 2016, V R 53/14 into consideration, be viewed as a supply of goods. A qualification as a supply of services is not compatible with Union law (see CJEU ruling of 15 December – case C-63/04 - Centralan Property Ltd). The contradictory provisions in the UStAE up to now will be abolished.

Furthermore, the authority to dispose of a co-ownership share which is transferred as a security will not yet be made available. The general provisions on chattel mortgages in the UStAE apply.

The principles of this BMF guidance must be used in all open cases. For supplies carried out before publication in the Federal Tax Gazette, however, no objection will be raised – including for the purposes of input VAT deductions – if the parties concerned assume supplies of services in agreement with the previous administrative view.

Please note:
The amended legal view also has consequences for the place of supply. Instead of the provisions on place for services (see § 3a (2) UStG), henceforth, the provision on place for supplies of goods (§§ 3 (6) and (7) UStG) must be observed. In transferring a co-ownership share, if the item is transported across the border, a zero-rated intra-Community supply or export could also come into question and thus attention should also be paid to supporting documents. Finally, it is possible that the supply could also be subject to the reduced VAT rate in accordance with § 12 (2) no. 1 UStG.

IN BRIEF

Granting discounts in cross-border supply chains

Lower Tax Court of Münster, ruling of 28 March 2019, 5 K 2481/16 U; non-binding

If the first trader in a supply chain refunds the last purchaser a part of the payment that they made, or grants them a discount, this will, in principle, reduce the basis of assessment for the first trader's revenue (CJEU, ruling of 24 October 1996, case C-317/94 – Elida Gibbs).

The tax authorities are making the reduction of the basis of assessment dependent on the trader granting the discount having provided a supply subject to VAT in Germany (see Section 17.2 (1) sent. 5 UStAE). In this case, the treasury may not have a VAT surplus.

It is also the view of the Lower Tax Court of Münster that utilization of the "Elida Gibbs" principle for domestic supply chains is limited. Because it is only in this case that using the principle leads to VAT in a commercial chain amounting to zero altogether, that is, a tax neutral result is achieved. An appeal against the ruling has been permitted.

OTHER

VAT fraud in the EU: TNA – new tool to detect fraudsters

European Commission, press release of 15 May 2019; Hessian Ministry of Finance, press release of 8 May 2019

The new Transaction Network Analysis tool (TNA), which is in use by participating Member States since 15 May 2019, is intended to enable EU Member States to quickly exchange and jointly process VAT data and thus uncover suspicious networks earlier.

The TNA shall offer tax authorities fast and uncomplicated access to information on cross-border transactions so they can act swiftly if a potential case of VAT fraud is indicated.

The TNA, which was developed in close collaboration by the Member States and the Commission, should also enable a far more intensive cooperation within the EU expert network on fighting fraud ("Eurofisc") in the joint evaluation of data. Thus, carousel fraud can be uncovered and cut off even faster and more

efficiently. According to the European Commission, the TNA will promote the cooperation and exchange of information between national tax authorities, as Eurofisc civil servants will now be able to compare information with criminal records, databases and information from Europol and the European Anti-Fraud Office, OLAF, and to coordinate cross-border investigations.

Up to now, Germany has not actively participated in the TNA and has only occupied an observer status. “Germany must and can do more in the fight against VAT fraud!”, demanded the Hessian Finance Minister, Dr. Thomas Schäfer. He is calling for a stronger commitment from the federal government. In this way, the requirements should be put in place to enable the TNA to be deployed as quickly as possible: “Germany has had only observer status for too long during the development, instead of actively getting involved. It cannot be that Europe’s biggest country is only a spectator in the intensified fight against VAT fraud. That is a fatal signal to all the countries that do not take the fight against tax crime seriously. Germany must move from being in the audience to being in the driver’s seat!”, demanded Schäfer.

EVENTS

Webinar: VAT Technology
Webinar on 25 June 2019

The increasing complexity of processes, the growing volumes of data and the diversity of ERP systems make it difficult to achieve an overview of a complete and accurate picture of business transactions. Classic legal obligations relating to periodically compiled reports (monthly, quarterly, annual) are changing in some Member States into real time reporting relating to single transactions. In addition, internal compliance management systems (Tax CMS), and therefore the question of monitoring sources of errors, is coming more and more to the fore during auditing. Overcoming this challenge is hardly possible without having a digital VAT strategy in place. In this webinar we will show you various approaches to solving this issue.

You can find further information and the registration form for the event here very soon.

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