KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

November 2019

LEGISLATION

Law on further fiscal support for electromobility and the amendment of other tax provisions

German Parliament, Resolution of 7 November 2019

On 7 November 2019, the German Parliament (Bundestag) enacted the "Law on further fiscal support for electromobility and the amendment of other tax provisions". We have already presented selected significant VAT changes in the VAT Newsletter August/September 2019 on the government draft. In particular, the implementation of the Union law Quick Fixes in German law shall take place as of 1 January 2020. In comparison to the government draft, the following changes in particular have been made:

Reduced rate of VAT for electronic publications (§ 12 (2) no. 14 German VAT Law Draft (UStG-E))

Books, newspapers, magazines and other products in electronic formats identified in Number 49 (a) to (e) and Number 50 of Annex 2 to § 12 (2) no. 1 and 2 German VAT Law (UStG) shall be subject to a reduced rate of VAT. This shall apply regardless of whether the product is also offered in a physical form. Publications that consist entirely or mainly of video content or audible music shall not be given this advantage. Similarly, publications which are entirely or mainly for advertising purposes, including travel advertisements, shall be excluded.

In an extension to the government draft, the provision of access to databases, which contain a large number of electronic books, newspapers or magazines, or parts of these, shall also benefit. According to a European Commission opinion, in this respect, searchability, filter possibilities, and links do not constitute criteria for exclusion from the application of the reduced VAT rate. The Commission did, however, also specifically note that in its view, services provided electronically should not be allowed to be subject to reduced VAT, if their functions significantly exceed printed books, newspapers or magazines.

The VAT advantage is intended to promote reading, regardless of the type and functionalities of the provision of the reading material. The crucial element for separating publications that will receive the benefit from those

Content

Legislation

Law on further fiscal support for electromobility and the amendment of other tax provisions

Improved anti-fraud methods in electronic commerce and support for small businesses

News from the CJEU

CJEU submission on cross-border transactions between VAT group and subsidiary

VAT liability of subsidies

News from the BFH

CJEU submission on cross-border pharmacy discounts

Employer assuming relocation costs no taxable turnover

In Brief

Delivery to an unidentifiable recipient in the third country as a zero-rated export delivery

Deduction of import VAT as input tax

Invoice within the meaning of § 14c UStG

Margin taxation for the provision of holiday apartments

Events

Online course: Complex supplies with regard to VAT

Cologne VAT Congress 2019

that will not shall be the content provided. The criterion "entirely or mainly" shall not, in this regard, follow a schematic, quantitative limit per product but rather involve an overall assessment of the presentation, content and purpose of publication. To fulfill the criterion "mainly", it shall not be sufficient that the audiovisual portion make up a certain portion of the product. On the contrary, it must shape the whole so significantly, that the editorial text portion is only an appendix. Accordingly, publications that benefit from reduced VAT shall also include publications with a portion of multimedia and interactive elements (so-called "enhanced e-books").

The new regulation shall come into effect on the day after the pronouncement of the law.

Reverse charge procedure when transferring gas and electricity certificates (§ 13b (2) no. 6 UStG-E)
The tax liability of the recipient of a supply (trader) shall be extended to the transfer of gas and electricity certificates. The provision corresponds to Article 199a (1) (f) of the VAT Directive. For the prevention of evasive actions, the provision, as has already been realized in other EU Member States, shall apply to all gas and electricity certificates.

Up to now the reverse charging of VAT only comes into question if the supplying trader is not resident in Germany (§ 13b (1) and (2) sent. 1 no. 1 in connection with (5) sent. 1 UStG). According to the new provision, a reverse charge shall also take place if the supplying trader is resident in Germany. The aim of this extension is to prevent potential VAT deficits which arise if the VAT charged to the recipient of the supply is deducted by them as input VAT but the supplying trader does not pay the VAT invoiced to the tax authorities. This will be prevented through the tax liability of the recipient of the supply.

The new provision shall come into effect from 1 January 2020.

Please note:
As a result of the comprehensive contents of the provision, the draft law in question can be viewed as an unofficial "Annual Tax Law 2019". According to the Bundestag resolution, the Bundesrat (Federal Council) could approve the law in one of its last sessions of the year, on 29 November or 20 December, so that the legislative process could still be completed in this year.

Improved anti-fraud methods in electronic commerce and support for small businesses

European Commission, press release of 8 November 2019

In its meeting on 8 November 2019, the Economic and Financial Affairs Council (ECOFIN), reached agreement on proposals concerning VAT. This applies in particular to the following proposals:

VAT payment data for tackling fraud in electronic commerce
The new provisions should enable Member States to more effectively tackle e-commerce fraud from 1 January 2024. Namely, anti-fraud experts in the EU Member States shall receive access to VAT-relevant data from intermediaries such as credit card companies and other payment service providers, which are used for transacting more than 90 per cent of online sales in the EU. In practice, this shall mean that the payment service providers will be required to make certain payment data relating to cross-border sales available to the authorities of the Member States. Anti-fraud experts (from the "Eurofisc" network) shall then be able to look at and analyze this payment data. Thus, it will be possible to identify online sellers from the EU and from non-EU countries that do not fulfill their VAT obligations.

Simplified VAT rules for small traders
The existing special VAT rules for small companies are supposed to be updated from 1 January 2025 in order to promote cross-border activities. The new system is intended to reduce the administrative burden and bureaucracy for small companies, and for the same competitive conditions to be created regardless of the company's location in the EU. Up to now, different approaches in the EU have led to variations in the thresholds for availing of VAT exemptions from country to country. For companies that only do business in one Member State, in future the threshold of a maximum of EUR 85,000 shall apply, while for companies engaged in cross-border activities, an EU-wide threshold of EUR 100,000 shall be used.

NEWS FROM THE CJEU

CJEU submission on cross-border transactions between VAT group and subsidiary

CJEU, reference for a preliminary ruling (Sweden) of 30 October 2019

The Supreme Administrative Court of Sweden (Högsta förvaltningsdomstolen) has

made a submission to the Court of Justice of the European Union (CJEU). The CJEU submission concerns the VAT treatment of supplies of the main branch of a company in Denmark to its subsidiary in Sweden if the main branch is part of a VAT group in Denmark to which the subsidiary does not belong.

Submission to the CJEU
The case at hand concerns a bank group resident in Denmark, which is a member of a Danish VAT group. The head office passes on charges for the cost of an IT platform to its subsidiary in Sweden (which does not belong to any Swedish VAT group). Whether the Swedish subsidiary must pay Swedish VAT on the supplies received from the head office (reverse charge procedure) is disputed. The Supreme Administrative Court of Sweden is uncertain as to the VAT treatment and therefore made a reference for a preliminary ruling to the CJEU (see the Alert from KPMG in Sweden of 30 October 2019).

CJEU ruling Skandia America
As a rule, cross-border supplies within a company, for example between the main branch and a subsidiary, constitute non-taxable internal transactions (see CJEU, ruling of 3 March 2006 – case C-210/04 – FCE Bank). Movements of goods due to intra-Community transfers are excluded from this. Furthermore, in its ruling of 17 September 2014 – case C-7/13 – Skandia America – the CJEU ruled that based on Union law, services provided by a main branch in a non-EU country for the benefit of a subsidiary in a Member State, constitute taxable transactions if the subsidiary belongs to a VAT group (see VAT Newsletter October 2014).

Please note:
The ongoing CJEU proceeding remains one to watch. According to the draft of the German Ministry of Finance (BMF) guidance, the principles of the CJEU ruling Skandia America should only be utilized in cases in which the circumstances correspond to those of the ruling; namely to the extent that supplies are exchanged between a main branch in a non-EU country and its subsidiary, which belongs to a VAT group in a Member State (see VAT Newsletter August/September 2018). It is not yet certain whether the BMF will await the outcome of the CJEU proceeding in order to then review whether, and to what extent, its draft guidance will have to be amended.

VAT liability of subsidies

CJEU, ruling of 9 October 2019 – joined cases C-573/18 (C GmbH & Co. KG) and C-574/18 (C-eG)

The CJEU ruling concerns a submission from the German Federal Tax Court (BFH) regarding the question of under what circumstances subsidies from a third-party increase the basis of assessment for supplies subject to VAT.

The case
The case under dispute concerns two wholesalers for fruit and vegetables. As "producer organizations" in line with Art. 11 Council Regulation No. 2200/96 on the common organization of the market in fruit and vegetables, they sold produce that was grown by their members.

In accordance with the Regulation, the wholesalers each ran an operational fund. Half of this fund is financed from fees from the member producers and the other half from financial assistance from the European Union. Using the fund's resources, investments in individual operations of the members of the producer organization can be financed.

For this purpose, the wholesalers concluded contracts with various members regarding the purchase and use of capital goods. The wholesalers ordered the capital goods directly from primary suppliers, who also invoiced them for these goods. Subsequently, the wholesalers invoiced the producers concerned for a portion of their acquisition costs, plus VAT. The remaining costs were financed through the operational fund.

During a certain amount of time of using the purchased goods, the producers were obliged to supply their products to the wholesalers for marketing, and to pay a financial contribution in line with the Regulation on the sale of their products. These contributions were financed by the operational fund.

After the expiration of the ring-fencing deadline stipulated in the contracts for the purchase and use of capital goods, the wholesalers transferred their co-ownership shares in the purchased items to the producer for no consideration.

Ultimately, it is disputed whether the contributions which the wholesalers received as a subsidy from the operational fund should be considered to be fees for the supply of goods to the producers. The BFH presented the case under dispute to the CJEU for a preliminary ruling.

Ruling
According to Art. 11 part A (1) (a) of the Sixth EC Directive (now Art. 73 of the VAT Directive), the basis of assessment in the case of supplies of goods is the consideration which the trader receives from the recipient of the supply or a third-party, including the subsidies directly connected to the price of these transactions. The VAT due must not be included (see Art. 11 part A (2) (a) of the Sixth Directive (now Art. 78 (a) of the VAT Directive). By including the subsidy, the total value of the supplies is intended to be subjected to VAT and thus, the payment of a subsidy leading to a lower tax yield should be prevented.

The inclusion of a subsidy requires that the subsidy is directly connected to the price of the transaction in question. This is only the case if the subsidy is paid to the subsidized trader precisely for the supply of a particular item or the provision of a particular service. Furthermore, the subsidy granted to the recipient of the subsidy must benefit the recipient of the supply. That is to say that the price to be paid by the recipient of the supply must be set such that it is reduced by an amount equivalent to the subsidy granted, which thus enters into the calculation of the price which the supplying trader charges. The consideration represented by the subsidy must, in addition, be at least definable.

For the case under dispute, the CJEU affirms the inclusion of the subsidy in the basis of assessment. The payments were made to the wholesalers from the operational fund for the supply of capital goods and were for the benefit of the producers concerned. In particular, the wholesalers reduced the price charged to the producers as a consideration for the supply of these items by exactly the amount of the sum coming from the operational fund. Thus, there is a direct connection between the supply of these items and the consideration actually received. As a consideration for the supply of the goods, the wholesalers received a payment from the producers on the one hand and on the other, a payment made from the operational fund in question for this supply. The payments from the operational fund therefore took place solely for the purpose of the supply of these capital goods and so constitute payments directly connected to the price. The payments are also subsidies from “a third party”. First, the operation fund does in fact have legal capacity and second, the wholesaler may not use the assets of this fund for personal purposes.

Please note:
In practice, a careful examination is required to check if payments from third parties increase the basis of assessment for supplies subject to VAT as payments from a third party or as subsidies. The legislature amended the wording of § 10 UStG to reflect Art. 73 of the VAT Directive from 1 January 2019 so that subsidies directly connected to the price of the transactions could now explicitly influence the basis of assessment. But also before 1 January 2019, subsidies as a payment from a third party could also increase the basis of assessment.

NEWS FROM THE BFH

CJEU submission on cross-border pharmacy discounts

BFH, resolution of 6 June 2019, V R 41/17

On 6 June 2019, the BFH submitted the question to the CJEU if a pharmacy that supplies prescription medicines to statutory health insurance companies, is entitled, from a VAT law point of view, to a reduction in the basis of assessment due to the discount granted to people with statutory health insurance. The submission pertains to cross-border supplies of medicine in the internal market.

The case
In the case at hand, a company from the Netherlands supplies medicines to Germany. In this respect, shipments are made on the one hand to people with statutory health insurance and on the other to privately insured people. The company grants discounts in both cases. As a result of the distance sales regulations (§ 3c UStG), the company treats the supplies to those privately insured as domestic supplies subject to VAT and, due to the discounts, reduces the basis of assessment for these supplies. Shipments to those insured through statutory health insurance are treated by the company as zero-rated supplies in the Netherlands to statutory health insurance companies and it also invoices these accordingly. In doing so it assumed that the discounts had reduced the basis of assessment for the domestic supplies carried out to privately insured people and made a corresponding claim for a tax correction. The tax authorities did not agree. The legal action brought before the Lower Tax Court was unsuccessful.

Resolution
The BFH shares the view that the discounts for supplies to people with statutory health insurance cannot lead to a reduction of the basis of assessment for the supplies to people with private insurance, as these two supplies have nothing to do with each other. However, the BFH does not rule out that in accordance with Union law, a discount in the basis of assessment could be required for reasons of equal treatment and the principle of neutrality. In this respect, existing doubts on the interpretation of the national law made a preliminary ruling from the CJEU necessary for the BFH.

If the manufacturer of a product that is not in fact contractually connected to the final consumer, but forms the first link in a chain of transactions which lead to the final consumer, grants a price discount to the end user, according to the CJEU ruling of 24 October 1996 (case C-317/94 – Elida Gibbs), the basis of assessment for the VAT must be reduced by the amount of that discount. In this respect, in its reference for a preliminary ruling the BFH notes that the company, as a pharmacy from the Netherlands, made supplies in Germany to the respective statutory health insurance companies. These in turn provided their policy holders with prescription medicines as part of the insurance relationship and therefore outside of an exchange of services subject to VAT. Thus, there is no supply chain reaching all the way to the recipient of the discount. This could argue against the claim made by the company.

The BFH also notes that unlike the company, pharmacies in Germany are subject to a ban on discounts. In addition, in relation to the disputed supplies (to the statutory health insurance companies), the company did not realize any taxable event in Germany, so that there was no domestic tax which could have been reduced. With regard to the creation of the internal market, the requirement for a tax liability in Germany could however, be viewed as contrary to Union law.

Please note:
In its guidance of 13 July 2017 – III C 2 - S 7200/07/10011:003 (see VAT Newsletter August/September 2017), the BMF interpreted the CJEU case law to the effect that, for the application of the Elida Gibbs principles in a supply chain, both the transaction of the trader granting the discount and the transaction to the customer benefitting, must be subject to VAT in Germany. This was also affirmed by the Münster Lower Tax Court in its ruling of 28 March 2019, 5 K 2481-16 U, according to which a domestic supply chain is necessary. Up to now, the BFH has not explicitly stated whether the second transaction must be subject to VAT. To this extent, the current CJEU submission could potentially provide clarity.

Employer assuming relocation costs no taxable turnover

BFH, ruling of 6 June 2019, V R 18/18

If a company entitled to deduct input tax after its business activities commissions brokers to find accommodation for employees, it can claim the input tax deduction for this purpose. This BFH ruling concerns employees who were transferred from abroad to a group company site in Germany as a result of a transfer of functions within the group.

The case
In this dispute, a newly established company belonged to an internationally active group. Due to a transfer of functions within the group, employees working abroad were transferred to the company's site in Germany. Within the scope of this transfer, employees were promised that the company would assume the relocation costs. In particular, the employees should be assisted in their search for an apartment or a house. Accordingly, in the dispute year of 2013, the company paid brokerage commissions on invoices issued to it for employees who moved to the company from other group companies. The tax authority assumed that the assumption of costs had been agreed in the employment contract, which is why it had been a barter transaction. The basis for assessment is the fair market value of the consideration. The claim challenging the tax authority was successful.

Ruling
The BFH rejected the tax authority's appeal as being without foundation. By assuming the relocation costs, the company did not provide any service for consideration to the employees benefiting therefrom, so that it does not constitute a barter transaction. In this case, the assumption of costs should prompt group employees to undertake tasks at the company, taking into account considerable personal changes, such as those resulting from a family relocation. A one-off benefit was therefore intended to create the conditions through which the work could be performed, without this benefit being viewed as a consideration for work performed at a later stage.

Furthermore, no benefit in kind is to be taxed. In this case, the personal needs of the employee was secondary to company's commercial interests in not least bringing experienced group employees quickly to their site to establish the company as the new group service provided, regardless of the employees' previous place of work and residence.

The company is also entitled to deduct input tax. Due to its overriding company interest that surpasses employee interest in establishing a new family residence and the fact that a tax on withdrawals may not be justified, it is also entitled to deduct input tax. The cfompany is therefore entitled to deduct input tax in accordance with its business activities.

Please note:
The BFH also adds that the previous prohibition on deducting input tax for relocation costs in § 15 (1a) no. 3 UStG was lifted by the German Annual Tax Act 2007. The legislator has thus recognised the possibility of deducting input tax in this area.

IN BRIEF

Delivery to an unidentifiable recipient in the third country as a zero-rated export delivery

CJEU, ruling of 17 October 2019 – case C-653/18 – Unitel

In response to a submission from Poland, the CJEU ruling concerns whether a member state may deny the right to zero rating on exports if the purchaser of the exported goods is not identified.

According to the CJEU, goods have been exported and the zero-rating of the export delivery is applicable if the right to dispose of these goods as owner has been transferred to the purchaser and the supplier proves that the goods been dispatched or transported to a location outside the European Union and the goods have physically left the territory of the European Union as a result of that dispatch or transport.

However, the fact that exported goods are purchased by a recipient outside the European Union, which is not the company stated on the invoice and was not identified, does not rule out that these objective criteria are fulfilled. Hence, the classification of a transaction as a zero-rated export delivery cannot be made dependent on the recipient being identified. This is unless this would prevent proof being furnished that the transaction in question constitutes a supply of goods. However, the zero-rating may also be refused if it is established that the trader knew, or should have known, that the transaction involved fraud committed against the common system of VAT. That is for the referring court to determine. If no (zero-rated) supply of goods has taken place within the country, a taxable transaction has not taken place nor is there an entitlement to deduct input tax.

Deduction of import VAT as input tax

CJEU, Reference for a preliminary ruling (Slovakia) of 20 August 2019, case C-621/19 – Weindel Logistics Service SR

The reference for a preliminary ruling from Slovakia concerns the claim for assertion of import VAT as input tax by a logistics company.

The Slovakian court asks the CJEU whether the right to deduct input tax is dependent on the trader who paid the import VAT also having ownership – or the right to proceed as an owner – of the imported goods. The question also arises as to whether the right to deduct input tax arises only where the imported goods are used for the purposes of the trader's taxed transactions in the form of a sale of these goods within the country, a delivery to another member state or export to a third country. Finally, the Court asks the CJEU whether, in the present circumstances, the conditions for a direct and immediate link between the acquired goods and the output transactions are met.

The CJEU thus has the opportunity to further clarify its ruling on the deduction of import VAT as input tax (see CJEU ruling of 25 June 2015 – case C-187/14 – DSV Road; VAT Newsletter July 2015).

Invoice within the meaning of § 14c UStG

BFH, ruling of 26 June 2019, XI R 5/18

The BFH ruling concerns the requirement of an incorrect tax statement in accordance with § 14c UStG. If a trader shows a higher tax amount in an invoice for a delivery or service than that he is liable for by law, separately (incorrect tax statement), he also owes the additional amount (§ 14c (1) sentence 1 UStG). Any person who invoices a tax amount separately, despite not being entitled to separately disclose the tax (unjustified tax disclosure) owes the disclosed amount (§ 14c (2) sentence 1 UStG).

The general principles will determine whether the information in an invoice is incorrect. Hence – as in the review of whether an invoice contains sufficient information to entitle the deduction of input tax, – references in the invoice to other documents must also be taken into account within the scope of § 14c UStG. In addition, the tax authorities must also take into account the additional information provided by the trader (CJEU ruling of 15 September 2016 – case C-516/14 – Barlis 06, VAT Newsletter August/September 2016).

Therefore, in the dispute as to whether a document designated as "charge" (only) invoices for services or (also) for fee reductions, the content of a condition contract presented to the tax office must be used as a supplement if reference is made to the agreement in the document.

Furthermore, the BFH points out that a negative amount shown incorrectly or unjustifiably in an invoice is not owed within the meaning of § 14c UStG. It is not necessary to take a decision on whether something else might apply in cases of self-billing (invoicing by the customer) if the minus sign is used to indicate that the recipient of the service owes the supplier the payment of the stated VAT amount. This could at best result in a tax liability on the part of the recipient of the credit note (who does not object to it).

Margin taxation for the provision of holiday apartments

BFH, ruling of 22 August 2019, V R 12/19 (V R 9/16)

The BHF concludes from the CJEU ruling of 19 December 2018 (case C-552/17 – Alpenchalets Resorts; see VAT Newsletter January/February 2019) that the provision of holiday homes rented by other companies is subject to margin taxation on travel services, even if only ancillary services are rendered additionally.

Margin taxation implies in particular, that the supplier has acted as a tour operator. Whether the trader assumes a service on his own responsibility (tour operator) or merely acts as an agent for a third-party service (travel agent) depends on the overall picture of the individual case within the framework of the underlying legal relationship.

Given that an intermediary service requires actions in the name of a third party, the manner in which the trader presents himself to the outside world (to the travellers) is decisive for the definition. It must be taken into account that the will to act in the name of another remains irrelevant if it does not result from a declaration by the person acting (agent) or from the circumstances. It must therefore be objectively apparent to the recipient of the service that the agent intends to act in the name of another person and conclude the transaction. If the trader does not clearly indicate that he wants to act as the representative of another (the service provider), only he and not the person represented performs. As a rule, this must be carried out by means of the design of the prospectus and through clear instructions given outside its general terms and conditions.

EVENTS

* Please note that the language of these events is German.

Online course: Complex supplies with regard to VAT

Online course on 27 November 2019

In almost all sectors of the economy, customers are frequently offered several components in one supply. The delivery of goods, for example, is linked to a maintenance package and insurance services. This is just one of many conceivable variations. When an individual view of the components leads to differing VAT treatments, for example supplies of goods subject to VAT linked to potentially VAT exempt insurance services, the question always arises of how the total supply should be taxed. An inappropriate assessment, which is then used as the basis for pricing, can have a negative effect for the supplier. This online course shares the principles which attention must be paid to, and how these can be implemented in practice.

You can find additional information and the registration form here.

We are delighted to draw your attention to the following VAT-themed event from Verlag Dr. Otto Schmidt KG in cooperation with KPMG.

Cologne VAT Congress 2019

on 5 and 6 December 2019 in Cologne

Topics

- Annual Tax Act 2019
- Implementation of the Quick Fixes
- Update input VAT deduction
- input VAT deduction in Switzerland
- Current CJEU and BFH case law
- New rules concerning vouchers
- Risk minimization through digitization
- Current high court case law

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

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International Network of KPMG

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* Trade & Customs

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