KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

July 2020

LEGISLATION

Postponement of the E-Commerce regulations until 1 July 2021

EU press release of 24 June 2020

On 5 December 2017, the Council of the European Union agreed on various legal acts concerning the taxation of distance sales. These dealt in particular with intra-Community distance sales in the B2C area, distance sales via electronic interfaces, the expansion of the One-Stop-Shop (OSS), the elimination of the VAT zero-rating on imports of small value consignments, and changes to the Regulation on Administrative Cooperation. These regulations will enter into force on 1 January 2021.

On 8 May 2020, as a result of the practical difficulties brought about by the measures to contain the Coronavirus pandemic, the European Commission proposed postponing the introduction of new VAT provisions for electronic trading for six months.

The Ambassadors of the Member States to the EU reached a preliminary agreement on 24 June 2020 on the postponement of the introduction for six months – i.e. from 1 July 2021 instead of from 1 January 2021.

The Council should formally adopt the postponement without further discussion as soon as the text has undergone a legal and linguistic review.

NEWS FROM THE CJEU

Hosting services in a computer center

CJEU, ruling of 2 July 2020 – case C-215/19 – A

This Court of Justice of the European Union (CJEU) ruling concerns the VAT treatment of hosting services in a computer center and in particular the question of whether the place of supply is the place where the property is located.

The case

Company A offers hosting services in a computer center. Customers are operators active in the area of information technology in Finland and other Member States, and use their own servers to provide their

Content

customers with data connections.

First, A makes available an equipment cabinet fitted with a locking door, which customers can use to house their server. Second, the customers are provided with electricity and various services, which are intended to ensure the use of these services happens under optimal conditions, especially with regard to humidity and temperature. Furthermore, the customer can only access the equipment cabinet allocated to them after they have presented an identification document for control purposes and received the appropriate key from a third-party.

The point under dispute is the VAT appraisal of the hosting services.

Ruling
First of all, the CJEU denies that the hosting services are VAT-exempt transactions from the letting of immovable property. According to CJEU case law, the VAT exemption does not apply to an activity which is not merely the passive provision of immovable property but also entails, on the part of the owner, an entire range of commercial activities such as supervision, administration and ongoing maintenance, and provision of other facilities so that, to the extent there are no quite exceptional circumstances, the letting of this immovable property cannot constitute the main service (CJEU, ruling of 28 February 2019 – case C-278/18 – Sequeira Mesquita).

In addition, the equipment cabinets themselves are not "immovable property". Firstly, they do not form a significant component of the building in which they stand, so that the building would not be considered "incomplete" without them. Secondly, they are not installed "permanently", as they are only screwed to the floor and thus could be moved without destroying or changing the building.

The CJEU also denied that the hosting services must be viewed as services in connection with immovable property, so that their place of supply is not the location of the property. The customers have no right to the exclusive use of the part of the building in which the equipment cabinets are located. First, they can only actually gain access to the equipment cabinet allocated to them after they have received the corresponding key from a third-party after presenting an identification document for control purposes. Second, the customers do not appear to have the right to monitor or limit the use of the part of the building in question. Third, the equipment cabinet itself does not have to be classified as immovable property. On the contrary, the services in the B2B area are, in principle, more subject to VAT where the customer operates their company.

Please note:
The tax authorities set out their principles on the place of supply of services in Section 3a.3 VAT Application Decree (UStAE). With reference to the CJEU ruling of 27 June 2013 – case C-155/12 – RR Donnelly Global Turnkey Solutions Poland – there is, in the case of the storage of items, a close connection to immovable property if the recipient of this service has been explicitly granted the use of a specific piece of property or a portion thereof. In the case presented, the customers did not, however, have any right to the exclusive use of that part of the building in which the equipment cabinets are located.

Legal effects of an external audit

CJEU, ruling of 2 July 2020 – case C-835/18 – SC Terracult

This CJEU ruling concerns the question of whether transactions, which have already been the subject of an external audit, can still be treated by the taxpayer as differing – from a VAT perspective – from the previous legal assessment. The CJEU affirms that this is the case, if the statute of limitations on the assessment has not yet passed.

The case
Donauland is a Romanian trading company. It supplies canola to the German trading company Almos. Donauland treated the transactions as intra-Community supplies of goods to Germany.

At the point in time at which a tax audit was carried out at Donauland, they were unable to provide documentation that the canola supplied had left Romania. The tax authorities therefore denied a zero-rating, and demanded VAT in the amount of approx. EUR 100,000. Donauland did not file an objection to the corresponding tax assessment notice from March 2014, which thus became definitive.

Donauland subsequently issued amended invoices to Almos, showing VAT for domestic supplies. However, Almos objected to this immediately after receiving the invoice and informed Donauland that the reverse charge system must be applied to the supplies in

question (see Art. 199a (1) of the VAT Directive), and requested corrected invoices.

Therefore, Donauland issued newly corrected invoices and requested the refund of the incorrectly identified and paid VAT in the amount of EUR 100,000 from the tax authorities. The tax authorities rejected this on the basis of the definitive tax assessment notices of March 2014.

The legal action brought against this decision was not successful in the first instance. The appeals court, however, had doubts that the practice of the tax authorities complies with Union law and submitted the case to the CJEU for a preliminary ruling.

Ruling
As the transaction is subject to the reverse charge procedure, the erroneously invoiced and paid VAT must, in principle, be refunded to the supplier. According to consistent CJEU case law, the right to the refund of taxes levied in a Member State in breach of Union law, is the consequence and complement of the rights conferred on individuals by EU law as interpreted by the Court (CJEU, ruling of 14 June 2017 – case C-38/16 – Compass Contract Services). In this case the erroneously shown VAT could also be corrected. In the case under dispute, as a result of the application of the reverse charge procedure, the CJEU does not see any risk of loss of tax revenue.

Donauland was wrongly refused the existing statutory right to receive a refund, within five years, for the erroneously invoiced and paid VAT by means of a correction of the invoices issued. This was incorrectly justified by saying that Donauland, in accordance with national rules, should have challenged the first tax assessment notice before it became definitive in order to receive this refund. The enforceability does not however contradict the refund, if the period of assessment has not yet expired (cf. in this respect, CJEU, ruling of 26 April 2018 – case C-81/17 – Zabrus Siret; VAT Newsletter May 2018).

Please note:
The CJEU ruling could also be of importance for the legal norms applying in Germany. It could be interpreted such that the period of assessment set down in § 169 German Tax Code (AO) is in principle permissible but also significant for VAT reductions claimed retrospectively. If this deadline has not yet expired, however, a VAT reduction in accordance with the CJEU case law cannot in principle be refused. This CJEU opinion could, for example, call into question the increased enforceability of VAT assessment notices, issued as a result of an external audit (§ 173 (2) AO). Referring to the case decided, it may also have been of importance that the inaccurate invoice was objected to immediately upon receipt and evidently neither paid nor used for a deduction for input VAT purposes. Otherwise, the aspect of the risk of loss of tax income may potentially have had to be looked at in greater detail.

Distance sales regulation and double taxation

CJEU, ruling of 18 June 2020 – case C-276/18 – KrakVet Marek Batko

This CJEU ruling concerns the question of the admissibility of double taxation in VAT law in connection with the substantive requirements of the distance sales regulation in accordance with Art. 33 of the VAT Directive.

The case
The Polish company KrakVet sells, among other things, products for animals to a number of customers in Hungary using its Hungarian website.

In the course of 2012, on this website they offered buyers the possibility to conclude a contract for the transport of the goods they sold with a shipping company located in Poland, without themselves being a party to this contract. The buyers were also able, however, to collect the purchased goods directly at KrakVet's warehouse, or to choose a different shipping company than the one recommended. In addition, KrakVet made use of this shipping company for certain of their own logistics needs.

If necessary, the goods were delivered by this shipping company to the warehouses of two courier companies located in Hungary, which then distributed them to the Hungarian customers. Payment for the goods purchased was made by cash on delivery to the courier service or by prepayment to a bank account.

The Polish tax authorities hold the view that the place of fulfilment of KrakVet's transactions is in Poland, such that they must pay VAT in that Member State. The Hungarian tax authorities, on the contrary, holds the view that the transactions must be taxed in Hungary. KrakVet brought an action against this in Hungary.

Ruling
The CJEU affirms the possibility that the tax authorities of two

Member States could characterize a specific case differently from a VAT point of view. The correct application of the VAT Directive, however, allows avoidance of double taxation. Therefore, it is up to the taxpayer to take legal proceedings against the decision(s). If the court seised determines that one and the same transaction is subject to a different tax treatment in another Member State, it is entitled, or even required, to make a submission to the CJEU for a preliminary ruling (CJEU, ruling of 5 July 2018 – case C-544/16 – Marcandi).

Furthermore, the CJEU commented on the question of whether, in the case under dispute, the distance sales regulation in accordance with Art. 33 of the VAT Directive applies. According to the CJEU, the items must be considered to be sent or transported "by or for the account of the supplier", if the role of the supplier predominates both for the commissioning and for the organization of the major phases of the shipment or transport of the items; this must be examined by the submitting court, taking all circumstances into consideration. This could be the situation in KrakVet's case. At the same time, the CJEU also touched upon a misuse of law due to the composition of the shipment, which in principle must be denied in the case of the participation of independent companies.

Please note:
The starting point of the CJEU ruling is so-called decoupling. In this, the supply of a good and its transport to the customer are decoupled from one another and not accounted for as a unit by the supplier. In particular in B2C-E-Commerce, the relevant composition of the facts must be examined to see if the special distance sales regulation in accordance with § 3c German VAT Law (UStG) or the general shipping regulations of § 3 (6) UStG will apply.

Companies must also consider that in the CJEU's opinion, double taxation in VAT law can only be avoided through the role of jurisdiction in the individual States. This is because in the case of doubt, the national courts are obliged to make a submission to the CJEU. Bilateral mutual agreement procedures from the tax authorities, such as exist in income tax law, do not exist in VAT law.

NEWS FROM THE BFH

CJEU submission on VAT group

BFH, resolution of 7 May 2020, V R 40/19

The German Federal Tax Court (BFH) submitted two questions on VAT groups to the CJEU for a preliminary ruling, calling into question the basic concept of a VAT group, namely the attribution of all transactions to the controlling enterprise.

The case
In this case a foundation under public law is the controlling enterprise of a university, which also maintains a section for university medicine. On the one hand, the foundation is economically active; on the other, the foundation, as an establishment under public law, undertakes statutory tasks of public authority for which it does not count as a trader. The foundation is the controlling enterprise of U-GmbH. U-GmbH provided, inter alia, cleaning services for a consideration to the foundation. These services encompassed the entire building complex of the university medicine area, including the area of public authority responsibility.

The tax authorities considered the cleaning services rendered by U-GmbH for the public authority area as existing within the VAT group between the plaintiff and U-GmbH. The cleaning services served a non-commercial activity and triggered a benefit in kind at the foundation in accordance with § 3 (9a) no. 2 UStG (Art. 6 (2) (b) of the Sixth EC Directive). The objection lodged against this was not successful. On the other hand, the Lower Tax Court allowed the legal action, saying that the requirements of a benefit in kind in accordance § 3 (9a) no. 2 UStG did not exist. The tax authorities opposed this with its appeal proceedings.

Resolution
The BFH asked the CJEU if the Union law authority to introduce a VAT group rule must be exercised in such a way that a) the treatment as an entity subject to VAT applies to one of these entities, which becomes the taxpayer for all of those entities' transactions, or such that b) the treatment as an entity subject to VAT – and thus also accepting significant tax deficits – must necessarily lead to a VAT group separate from its closely related entities, in which case there is a notional establishment created specifically for VAT purposes

The BFH holds the view that this question must be answered pursuant to alternative a). This also corresponds to decades of BFH case law. Nevertheless, the Senate is forbidden to reach its own decision on the first legal

question in this case as the BFH Senate XI considers it, particularly in light of the CJEU ruling 17 September 2014 – case C-7/13 – Skandia America (USA), to require clarification from the CJEU as to whether a Member State is allowed to determine a member of a VAT group (the controlling enterprise) is the entity subject to VAT instead of the VAT group (see BFH resolution of 11 December 2019 – VAT Newsletter April 2020). The BFH notes that beyond the case at hand, the answer to this question is of great importance for tax revenues in the Federal Republic of Germany.

If the answer a) applies, ultimately the second question arises: Does it follow from CJEU case law on non-commercial purposes in line with Art. 6 (2) of the Sixth EC Directive (CJEU ruling of 12 February 2009 – case C-515/07 – VNLTO), that in the case of a taxpayer that carries out both commercial and statutory activities, the provision of a benefit in kind from the area of its commercial activity must not be subject to VAT for the area of its statutory activity in accordance with Art. 6 (2) (b) of the Sixth EC Directive?

Please note:
The question of whether a VAT group is a discrete taxpayer or – in accordance with the consistent BFH case law up to now – functions as a taxpayer via the controlling enterprise, is of great importance for all existing tax groups. In particular, it must be examined if assessments that are not yet definitive should be procedurally kept open, to preserve the legal position of clients. If a discrete taxpayer is to be assumed, previous assessments against the controlling enterprise – to the extent permitted procedurally – must be potentially dismissed, while, if applicable, assessment that are already (partially) time-barred may arise for the tax group as a discrete taxpayer.

NEWS FROM THE BMF

Temporary reduction of the general and reduced rate of VAT from 1 July 2020

BMF, guidance of 30 June 2020 – III C 2 - S 7030/20/10009 :004

Due to the Second Law to Implement Tax Relief Measures to Overcome the Corona Crisis (Second Corona Tax Relief Law) of 29 June 2020 (Federal Law Gazette (BGBl.) I p. 1512), § 28 (1) and (2) UStG will be rewritten.

According to this, for the time period from 1 July 2020 to 31 December 2020, a general VAT rate of 16 per cent and a reduced VAT rate of 5 per cent shall apply. In its guidance of 30 June 2020, the German Ministry of Finance (BMF) issued its opinion on numerous questions regarding application and, to some extent, also created simplifications for the purposes of practical application.

Legal starting point
According to § 27 (1) sent. 1 UStG, the VAT rate changes on transactions, which will be implemented from 1 July 2020 until 30 December 2020, must be applied in line with § 1 (1) no. 1 and 5 UStG. This also applies on the basis of § 27 (1) sent. 2 UStG, to the extent that the VAT arose on prepayments before 1 July 2020; in this case, the calculation of VAT must be corrected for the period of the provisional return in which the supply is actually carried out.

Transactions in line with § 1 (1) no. 1 UStG are supplies – subject to VAT – carried out for a consideration or their equivalent benefit in kind, for example to staff. Reverse charge transactions are also included. Transactions in line with § 1 (1) no. 5 UStG are intra-Community purchases in Germany. For the change in VAT rate, the sole deciding factor is whether the transaction is carried out after 30 June 2020. This can be either the entire supply or a partial supply. The critical factor in this regard is not the point in time of the contract, the point in time of the payment being received (see above also), the point in time that the invoice is issued, or the point in time at which the VAT arises in accordance with §§ 13, 13b UStG. Whether the trader is subject to VAT on the basis of agreed payments (general case) or received payments (§ 20 UStG) is not crucial either.

The changed VAT rates must also be used in calculating import VAT, restricted to imports which take place after 30 June 2020 and before 1 January 2021.

BMF guidance
The BMF guidance contains numerous explanations and transitional arrangements on individual questions such as, for example, on advance invoices, long-term supplies, partial supplies, payment reductions, redemption of price discounts and refund vouchers, single-use vouchers, refund of deposit amounts, granting of annual bonuses, annual rebates and similar, VAT on telecommunications services, VAT on supplies of electricity, gas, water, heating and cooling as well as wastewater disposal, passenger transport, transactions in the hospitality industry in the transition to the changed VAT rates and on the exchange of items.

In the case of single-use vouchers, it should also be mentioned that the point in time at which they are issued is the relevant issue. This does not change if the single-use voucher will only be redeemed after being issued and the exact point in time of the redemption is not certain.

If the supplying trader issues an invoice to another trader for a supply carried out after 30 June 2020 and before 1 August 2020, showing the VAT rate applicable before 1 July 2020 (19 per cent instead of 16 per cent, or 7 per cent instead of 5 per cent) and has remitted this VAT amount, no objection will be raised, in order to keep the matter simple, if the trader does not correct the VAT shown in the invoices. For practical reasons, during the transition period in July 2020, a trader that is entitled to deduct input VAT will be granted an input VAT deduction on the basis of the VAT rate shown. For transactions on which the recipient of the supply owes VAT in accordance with § 13b UStG, this also applies for the VAT calculated by the recipient of the supply.

Please note:
Among other courses, KPMG held the following web courses on the limited VAT reduction from 1 July 2020 to 31 December 2020, and you can view the recordings of these at the following links:

02.07.2020 UPDATE: Reduction of VAT rates as of 1 July 2020 – Legal implementation and BMF guidance

02.07.2020 UPDATE: Senkung der Mehrwertsteuersätze zum 1. Juli 2020

Restaurant and catering services from 1 July 2020

BMF, guidance of 2 July 2020

As a result of the First and Second Corona Tax Relief Laws, restaurant and catering services (with the exception of duties on drinks) will be taxed at 5 per cent from 1 July 2020 until 31 December 2020, and at 7 per cent from 1 January 2021 until 30 June 2021.

According to the BMF, in relation to the limited application of the reduced VAT rate for restaurant and catering services (with the exception of duties on drinks), no objection must be raised if, in the case of dividing the total purchase price of so-called "combo offers" (for example a buffet, all-inclusive offer), the portion of the payment allocated to drinks is considered to be 30 per cent of the inclusive price. A paragraph 12 to this effect will be added to Section 10.1 UStAE.

With reference to so-called Business Packages, in which supplies are partially not subject to reduced VAT, the portion of payment applicable to these supplies may, according to the BMF, be estimated at 15 per cent instead of the 20 per cent used up to now (cf. non-objection regulations in Section 12.16 (12) sent. 2 UStAE).

MISCELLANEOUS

Results of special VAT audits 2019

BMF website, announcement of 20 May 2020

The special VAT audits carried out in 2019 in relation to VAT in Germany led to a gain of around EUR 1.55 billion. The results of special VAT auditors participating in general external audits or in tax investigation audits are not included in these gains.

Special VAT audits are carried out independently of the regular cycle of general external audits and without differentiating on the basis of the size of the company. In 2019, 77,857 special VAT audits were carried out. An annual average of 1,770 special VAT auditors were deployed.

Each auditor carried out an average of 44 special audits. This means an average gain of around EUR 0.88 million for each auditor deployed.

The statistics show that the gain per auditors in the past few years has stayed about the same. The continuing reduction of the number of auditors (2015: 1,918) and the number of audits (2015: 88,321) has, however, resulted in a reduction of the total gains (2015: EUR 1.68 billion).

IN BRIEF

Compensation in the case of a breach of a contractual minimum binding period

CJEU, ruling of 11 June 2020 – case C-43/19 – Vodafone Portugal

This CJEU ruling concerns the question of whether a compensation payment in the case of the breach of a contractual minimum binding period is subject to VAT.

The CJEU affirms that Art. 2 (1) (c) of the VAT Directive must be so interpreted that amounts which an economic operator receives if a service contract – which stipulates compliance with a minimum binding period in

return for the granting of advantageous conditions to the customer – is ended early for reasons arising on the customer's side, must be considered to be the payment for the provision of a service for a consideration in line with this provision.

From a commercial perspective, the operator determines the price for their services and the monthly rate, taking into consideration the costs for this service and the minimum period of the contractual obligation. The amount owed in the case of a premature ending must be considered to be an integral component of the price, which the customer has undertaken to pay for the fulfilment of the contractual obligations by the service provider.

Retroactive correction of invoices in the case of intra-Community triangular transactions

Lower Tax Court Rhineland-Palatinate, ruling of 28 November 2019, 6 K 1767/17; BFH ref.: XI R 38/19

The Lower Tax Court Rhineland-Palatinate concludes that in the course of an intra-Community triangular transaction, the correction of an invoice which is capable of being corrected, has retroactive effect to the time of the first issuance of the invoice. An appeal has been lodged against this ruling. The Lower Tax Court Münster, in its court order of 22 April 2020, 15 K 1219/17 U,AO, has also ruled and permitted the appeal.

The cases concerning the retroactivity of an invoice correction which have thus far received a positive ruling from the BFH concern the tax number (BFH, ruling of 20 October 2016, V R 64/14), the description of services (BFH, ruling of 20 October 2016, V R 26/15), the name and address of the recipient of the supply (BFH, ruling of 20 October 2016, V R 54/14) and the showing of no VAT with reference to § 13b UStG (BFH, ruling of 22 January 2020, XI R 10/17). The legal evaluation of both Lower Tax Courts exceeds these formal aspects and concerns a declaration on the material valuation of the facts (here: existence of a triangular transaction). It remains to be seen if such a conclusion has substance.

At any rate, the BFH, in its ruling of 14 November 2012, XI R 8/11, ruled that the lack of a note on exemption from VAT in the invoice can lead to a refusal of same (in the absence of an invoice duplicate in accordance with §§ 14, 14a UStG on the basis of § 17a German VAT Operating Regulation). Thus, a comment "VAT@zero for export" does not allow sufficient clarity to infer that it refers to an intra-Community invoice. The ruling was issued before the case law from the CJEU and BFH on retroactive invoice correction so that it remains open whether the BFH would rule in this way again in the case of an invoice correction.

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