KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

October 2020

NEWS FROM THE CJEU

Input VAT deduction for extending a municipal road

CJEU, ruling of 16 September 2020 – case C-528/19 – Mitteldeutsche Hartstein Industrie AG

This ruling from the Court of Justice of the European Union (CJEU) concerns the input VAT deduction for the execution of works to upgrade a municipal road.

The case
Mitteldeutsche Hartstein Industrie AG is a managing holding company. A VAT group exists between it and its subsidiaries A GmbH and B GmbH. The Regional Council allowed A GmbH to operate a quarry on condition that they would develop one of the municipality's public roads, on which the quarry is located.

As the removal of limestone required this development, the municipality and A GmbH's predecessor in law concluded an agreement in which the municipality undertook to plan and extend the municipal road in question. Second, they undertook to make the road available to A GmbH's predecessor in law without restriction if the road remained open to the public. In return it was stipulated that A GmbH's predecessor in law would bear all of the costs in connection with the extension of this road. In 2006, A GmbH commissioned B GmbH to carry out the extension in accordance with the agreement entered into with the municipality. Following completion of the works, that section of the road was used by A GmbH's heavy goods vehicles as well as by other vehicles.

Whether the AG is entitled to deduct the input VAT amounts from the input services received from B GmbH is disputed. The German Federal Tax Court (BFH) put the corresponding question to the CJEU in a reference for a preliminary ruling.

Ruling
The CJEU essentially affirmed the input VAT deduction at hand. It is for the BFH to determine if the works to extend the municipal road in question were limited to what was necessary in order to ensure the AG would be able to operate the limestone quarry.

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If the works to extend this road were limited to the necessary extent, the right to deduct input VAT for all costs incurred due to these works must be accepted. Furthermore, the approval to operate the quarry, which was unilaterally granted by the district government, does not constitute a consideration for the works to extend the municipal road.

Ultimately, a benefit in kind for the municipality in accordance with Art. 5 (6) Sixth EC Directive must be denied as a result of the actual end use. First, the works to extend the road are for the benefit of the AG and demonstrate a direct and immediate relationship to its overall commercial activity, giving rise to the transactions that are subject to VAT. Secondly, the costs of the plaintiff in the main proceedings regarding input services in connection with the works to extend this road are among the cost elements of the output transactions carried out by them.

Please note:
It will be exciting to await the BFH's subsequent ruling and in particular its statements on the taxation of a benefit in kind in accordance with § 3 (1b) sent. 1 no. 3 German VAT Law (UStG). To avoid suffering any loss of rights, companies affected should keep these VAT assessments open if applicable.

It is possible that the BFH will not be able to avoid – in the light of the abovementioned CJEU judgement – interpreting § 3 (1b) sent. no. 3 UStG restrictively or, to the extent the wording does not allow it – denying a benefit in kind in accordance with Union law.

NEWS FROM THE BMF

Retroactive invoice correction

BMF, guidance of 18 September 2020 – III C 2 – S 7286-a/19/10001 :001

For the first time, the German Ministry of Finance (BMF) has officially confirmed that, as a result of BFH and CJEU case law, corrections to invoices may be carried out with retroactive effect to the date of the originally issued invoice.

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A document is an invoice capable of being corrected retroactively if it contains the following minimum details: 1. supplying trader, 2. recipient of the supply, 3. description of the supply, 4. fee (net amount), 5. separately detailed VAT.

In this respect it is sufficient if the invoice contains these details and the details are not vague, incomplete or obviously inapplicable as to be equivalent to details missing entirely.

Thus, for example, a general statement such as "product sales" – which does not allow supply being invoiced to be clearly and easily verified – is not sufficient to constitute an invoice capable of being retroactively corrected. However, in the case of a lawyer the information "consultation" is sufficient. In addition, a VAT amount not previously shown in a document, such as in the case of the sale of a business in its entirety, or a VAT exemption for which the requirements were not fulfilled, cannot be corrected with retroactive effect. Conversely, if a change of taxpayer liability in line with § 13b (2) and (5) UStG is erroneously assumed, a retroactive correction of the invoice can be carried out if the transfer of tax liability is indicated on the invoice.

If the VAT amount shown on an invoice is too low, the additional amount can first be remitted in the VAT period in which the recipient of the supply is in possession of the invoice that shows the appropriate amount of VAT. The input VAT deduction for the VAT amount that was originally understated already exists at the time of receipt of the invoice showing the understated VAT.

The requirement to show the net amount of the fee has already been satisfied if this can be readily calculated on the basis of the gross invoice amount and the separately shown VAT. Conversely, the fact that the VAT can be calculated using the fee and the gross invoice amount cannot serve as a substitute for showing the VAT amount separately.

An invoice correction requires a specific and unambiguous reference to the original invoice. This can be provided by means of a reference to a correction, change or addition to the previous invoice. In addition, it has been clarified that a retroactive correction can also be carried out by cancelling and reissuing the invoice.

A retroactive correction of monthly/quarterly VAT returns within a VAT period, i.e. within a calendar year, can be dispensed with. Furthermore, an invoice correction can be carried out at any time up to the conclusion of the final oral hearing at the Lower Tax Court. However, a change to the previously assessed VAT must still be possible as a matter of tax law, e.g. subject to review (§ 164 German Tax Code (AO)), as the retroactive correction, in the tax

authorities' opinion, does not constitute an event with retroactive effect in accordance with § 175 AO.

An input VAT deduction without an invoice entirely is not permitted. The right to an input VAT deduction can, however, be invoked as an exception if the trader has an invoice that did not satisfy all the formal requirements and was also not corrected. In this case, while subject to strict stipulations, the input VAT deduction must also be granted, if the tax authorities have at their disposal all the details needed to review the material requirements.

The principles set out in the BMF guidance must be applied in all open cases. No objection will be raised for invoice corrections transmitted up to 31 December 2020, which have a retroactive effect, even if the input VAT deduction is first claimed in the VAT period in which the corrected invoice is issued. An appeal in this regard will be eliminated if the input VAT deduction was already granted on the original invoice.

Please note:
The 13-page BMF guidance is of crucial importance in practice for those who issue invoices and those to whom invoices are addressed. If a retroactive invoice correction is achieved, interest on back payments of VAT (§ 233a AO) due to an improper purchase invoice can be avoided. However, there are also risks to be taken into account (possibly up to the loss of the input tax deduction) that may be associated with the retroactive effect of the invoice correction.

It also continues to be extremely important that purchase invoices are examined with regard to formal and material legal aspects, as not all incorrect invoices are capable of being corrected with retroactive effect. The processes must be adapted accordingly, so that in particular any necessary correction is assigned to the correct period upon receipt. In this regard we would like to once more refer to the importance of a well-established Tax Compliance Management System.

In this context, we would like to refer to the webinar we organized on 28 October 2020 with the retrospective correction of invoices.

Introductory guidance on the changed requirements in the case of intra-Community supplies of goods

BMF, guidance of 9 October 2020 – III C3 – S 7140/19/10002 :007

The law on further fiscal support for electromobility and the amendment of other tax provisions of 12 December 2019 (Federal Law Gazette I p. 2451) changed, in particular, the material legal requirements for the existence of an intra-Community supply of goods in § 6a (1) sent. 1 UStG and a corresponding zero-rating in § 4 no.1 (b) UStG. According the BMF the following applies:

Tightening of requirements for zero-rated intra-Community supplies of goods

An intra-Community supply of goods also requires (§ 6a (1) sent. 1 no. 2 (a) and (b) UStG), that the purchaser in another Member State (than the Member State in which the intra-Community supply of goods is carried out) be registered for VAT purposes. This means that at the time of the supply of goods, the purchaser must have a VAT identification number that was issued to them by another Member State. The BMF guidance does not contain any further statements in this regard.

Furthermore, an intra-Community supply of goods is explicitly made dependent on the purchaser using a valid VAT identification number issued to them by another Member State (§ 6a (1) sent. 1 no. 4 UStG) vis-à-vis the supplying trader. On the term "usage", the BMF refers to Section 3a.2 (10) sent. 2 to 9 VAT Application Decree (UStAE). According to this, usage demands a positive act by the customer, generally already at the time at which the contract is concluded. For example, it is sufficient if, when the master data of a customer are recorded for the first time, a declaration is taken from the customer that this VAT identification number should be used for all future individual orders. The later use of a VAT identification number by the purchaser that is valid at the time of the supply conveys retroactivity for the purposes of zero-rating.

Please note:
Verification of the usage of the purchaser's valid VAT identification number by the supplying trader continues to have great importance. An automatic check is possible, for example, using KPMG's V.I.S. tool.

A change to § 4 no. 1 (b) UStG means the zero-rating will fail if the supplying trader does not fulfil their duty to submit an EC Sales List (recapitulative statement) (§ 18a UStG) or to the extent they submit an incorrect or incomplete statement with respect to the supply of goods in question. The

BMF explicitly states that the trader does not fulfill the requirements for the zero-rating, if they do not submit the recapitulative statement correctly, completely, and on time. The determination as to whether the requirements have not been fulfilled can only ever be made retrospectively, as a recapitulative statement regarding an intra-Community supply of goods is not submitted until later, namely by the 25th day following the end of the reporting period in which the intra-Community supply took place.

§ 18a (10) UStG remains unaffected: If the trader realizes at a later date that the recapitulative statement they have submitted is incorrect or incomplete, they are required to correct the originally submitted recapitulative statement within one month. If the trader does not correct the erroneous recapitulative statement for the reporting period in which the supply affected was carried out, according to the BMF, the zero-rating for the supply in question must be retroactively denied. A correction of errors in a recapitulative statement other than the original does not give rise to a revival of the zero-rating for the supply concerned.

Tightening of requirements in the case of intra-Community transfers as well

Similarly to an intra-Community supply in accordance with § 6a (1) UStG, in the case of intra-Community transfers in accordance with § 6a (2) UStG, the zero-rating depends on the instance being subject to tax in the other Member State and the transport being appropriately declared in the recapitulative statement in line with § 4 no. 1 (b) UStG.

Please note:
If, in the case of an intra-Community transfer, the trader does not have a valid VAT identification number from the Member State of destination, the transfer is subject to VAT, which – due to a lack of an input VAT deduction – results in a definitive VAT charge for the trader.

Consequences for the input VAT refund procedure

Input VAT amounts which are separately shown in invoices for export supplies or intra-Community supplies shall not be refunded if it is established that the requirements of § 6 (1) to (3a) UStG and § 6a (1) and (2) UStG do exist or could exist.

Standardization of documentary evidence in the case of VAT exempt intra-Community supplies of goods

The documentary evidence for the VAT exemption of intra-Community supplies of goods has been uniformly regulated in the EU since 1 January 2020. A new Art. 45a was inserted into the Implementing Regulation (EU) no. 282/2011 (DVO), which contains two rebuttable presumptions. The implementation was carried out thought the insertion of a new § 17a German VAT Operating Regulation (UStDV). The previous § 17a UStDV, which governed the documentary evidence, became § 17b UStDV. The BMF clarified that no prioritization exists between the two provisions.

Postponement of the due date for import VAT

BMF, guidance of 6 October 2020 – III B 1 - Z 8201/19/10001 :005

The Second Corona Tax Relief Law inserted a new paragraph (3a) – Special Provisions for Import VAT – into § 21 UStG. Based on this, in the case of import VAT for which a payment moratorium is approved, an amended deadline applies (see VAT Newsletter June 2020).

That means that the deadline for import VAT for which a payment moratorium has been granted on the basis of a “long time limit”, is postponed to the 26th of the second month following the import and thus by approx. 40 days.

The date from which this regulation can be applied will be announced, in accordance with § 27 (31) UStG, in a BMF guidance as soon as it has been determined by when the IT requirements can be established.

The regulation will now be implemented in the moratorium period that begins on 1 December 2020. Specifically, according to the BMF, this means that the deadline for imports for the moratorium period December shall be deferred as standard from 16 January 2021 to 26 February 2021.

The term work supply

BMF, guidance of 1 October 2020 – III C 2 - S 7112/19/10001 :001

In its ruling of 22 August 2013, V R 37/10, the BMF determined, with regard to the reverse charge procedure in the case of

construction services, that work supplies exist as soon as, in addition to obtaining the authority to dispose (§ 3 (1) UStG) of a third-party item, that item can be reworked or processed. Thus, for example, book binding works could be a work supply to the extent it involves the reworking of items that do not belong to the person supplying the service.

In addition, the BFH determines that the reworking or processing of the supplier's own items does not suffice for the assumption of a work supply. For example, while the preparation of meals at a food stall can be considered to be a supply of goods, the supply carried out by the operator of the food stand is not a work supply in line with § 3 (4) sent. 1 UStG due to a lack of reworking or processing of items not owned by the stand operator. Similarly, the manufacture of other movable parts such as cars do not give rise to a work supply as a result of the agreement of special specifications such as optional extras.

Section 3.8 (1) sent. 1 UStAE was amended in line with the BFH case law. The principles of the BMF guidance must be applied in all open cases. No objection will be raised if, in relation to statutory VAT arising before 1 January 2021 – including for the purposes of input VAT deductions and cases relating to § 13b UStG – the trader has treated supplies of goods in accordance with the previous version of Section 3.8 (1) sent. 1 UStAE.

Please note:
The review of the relevant business transactions by the end of the year at the latest is essential against the background of the changed definition of the work supply by the tax authorities. If transactions previously assessed as deliveries of work no longer qualify as deliveries of works in the future, this can, for example, have an impact on the applicability of the tax liability of the recipient of the service according to § 13b UStG. In this context, the relevant tax determination and the associated processes within the Tax CMS may have to be adjusted. Against this background, companies domiciled abroad could also have registration obligations in Germany if the previously applied reverse charge procedure for individual case constellations should no longer apply due to the changed definition.

MISCELLANEOUS

SAP S/4HANA – An opportunity for tax departments
KPMG Whitepaper

The changeover to SAP S/4HANA presents the ERP world in Germany with its largest change in decades – and to a certain extent, according to this Whitepaper from KPMG, it is in fact already in the thick of it.

Processes, structures and systems will be fundamentally rethought and realigned. In doing so, tax departments are not generally identified as a significantly relevant provider of information for this type of project. Nevertheless there are many opportunities to resolve defects that have in the past led to a lack of transparency relating to tax and to miscalculations. What's more, as a result Tax Compliance can be entirely rethought and assured.

Now is the chance to address topics – that in the past were often problematic due to the ubiquitous availability of data – in a completely new way, to incorporate expectations and needs into the creation process, and to influence landmark decisions. Reason enough to take a detailed look at the many facets of a successful, from a tax point of view, SAP S/4HANA implementation.

To begin with, this Whitepaper deals with basic information on the topic of SAP S/4HANA-implementations, before then going into detail on substantive aspects of types of tax (income tax, withholding tax, transfer pricing, VAT). KPMG's Whitepaper is available for download here.

IN BRIEF

Non-binding guidelines at the EU level on the e-commerce package from 1 July 2021

At the end of September 2020, comprehensive non-binding explanatory notes on the e-commerce package from 1 July 2021 were published by the European Commission's Directorate-General for Taxation and Customs Union (DG TAXUD). You can find the English version of the guidelines here.

The publications of versions in the other official EU languages is planned for the end of 2020. Moreover it is intended that Chinese and Japanese versions will also be available then.

According to our information, two supplementary guidance notes on the e-commerce package shall also be published at the end of 2020, one on the customs

process, the second on One Stop Shops (OSS).

EVENTS

Please note that the language of these events is German

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

This year the event will take place as a hybrid event. Participants will be able to livestream the Cologne VAT Congress.

Cologne VAT Congress 2020

on 3 and 4 December in Cologne

Topics

- New legislation 2020/2021 at a German and EU level
- VAT and bankruptcy
- Retroactive correction of invoices
- Developments arising from the German Annual Tax Act 2020
- Current BFH and CJEU case law, and selected BMF guidances

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

PREVIEW

Temporary reduction of VAT rates from 1 July 2020

The Second Law to Implement Tax Relief Measures to Overcome the Corona Crisis (Second Corona Tax Relief Law) of 29 June 2020 (Federal Law I p. 1512) redefined § 28 (1) and (2) with effect from 1 July 2020.

According to this, for the 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 will apply. In its guidance of 30 June 2020, the BMF already issued its opinion on numerous questions in relation to the application, and also partially created simplifications for practical applications (see VAT Newsletter July 2020). Another BMF guidance is expected shortly on the basis of numerous practical questions. We will probably present this in the next VAT newsletter.

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International Network of KPMG

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

Our homepage / LinkedIn

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* Trade & Customs

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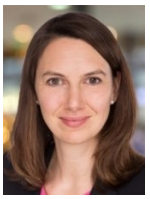

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