KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

December 2020

NEWS FROM THE CJEU

Input VAT deduction of a holding company

CJEU, ruling of 12 November 2020 – case C- 42/19 – Sonaecom

This ruling from the Court of Justice of the European Union (CJEU) concerns a submission from a Portuguese court regarding the input VAT deduction of a holding company.

The case
In 2005, the holding company, Sonaecom purchased external consulting services subject to VAT. These services were for a market survey in relation to the acquisition of shares in the telecommunications operator, Cabovisão. Sonaecom intended to provide administrative services subject to VAT to Cabovisão. Ultimately, this acquisition did not take place. In addition, in June 2005, Sonaecom paid an investment bank a commission for services in connection with the organization, establishment, and hedging of a bond issue in the amount of EUR 150 million. Sonaecom intended to use the capital received to purchase shares in Cabovisão and thus invest in the new business area called “triple play”. As they did not realize this investment plan, Sonaecom subsequently decided to make this capital available to its parent company in the form of a loan. In the same tax year, Sonaecom claimed the corresponding input VAT amounts in full for the services purchased. Whether they were entitled to do so is disputed.

Ruling
The CJEU interprets Union law to mean that a holding that intervenes in the administration of its subsidiaries on a recurring basis is entitled to deduct VAT – including as input VAT – that was paid in the case of consulting services relating to a market survey carried out with regard to the acquisition of shares in another company, even if this acquisition did not ultimately take place.

Furthermore, the CJEU commented on the input VAT deduction of the VAT remitted on the commission paid to a financial institution for the organization and establishment of a bond for investment in a particular area. In this respect, Union law must be interpreted such that a holding that is involved in the administration of its subsidiaries

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on a long-term basis, is not entitled to deduct the VAT on the commission as input VAT, if these investments to not ultimately take place and the capital received for this bond is paid out in full to the parent company in the form of a loan.

Please note:
With regard to the input VAT deduction for supplies of services, ultimately the CJEU finds that it is not the intended but rather the actual use of these services by the trader which must be taken into consideration. Union law is based on the idea that a trader's input VAT deduction must correspond as precisely as possible to the actual use of the items and services purchased. A right to deduct input VAT that existed solely on the basis of a once existing intention of the trader to carry out transactions subject to VAT, and thus did not take the transactions actually effected by them into consideration, would create a competitive advantage for them compared to the other companies that effected similar transactions (in the same year), and consequently would violate the principle of tax neutrality.

The CJEU judgments of 8 June 2000 – case C-400/98 – Breitsohl– and case C-396/98 - Schloßstraße - are not mentioned by the CJEU so that there is no differentiation from its previous jurisprudence. Thereafter the judgment Schloßstraße, the input tax deduction is retained if the taxpayer is no longer entitled to waive the tax exemption for his sales due to a change in the law that occurred after receiving the input services but before commencing his sales activities.

The input tax deduction by holding companies is repeatedly the subject of discussions with the tax authorities and of legal disputes. In the judgment, the ECJ - even if it does not make a distinction from its earlier jurisprudence - provides further information under which circumstances an input tax deduction is possible with a mixed holding company.

Correction of an input VAT deduction in the case of real estate activities

CJEU, ruling of 12 November 2020 – case C-734/19 – ITH

The CJEU has issued its opinion on Romania's submission relating to the entitlement to deduct input VAT in the case of real estate activities if the originally planned activity is abandoned.

The case

Over the course of 2006 and 2007, the Romanian company, ITH concluded real estate sales contracts and agreements with third parties, and started two investment projects encompassing the erection of several buildings. The leasing of these buildings was intended to be subject to VAT.

Expenses in connection with the activities carried out were recorded in the accounting books as "ongoing investment" and ITH exercised the right to deduct input VAT. Subsequently, in particular against the backdrop of the economic crisis that occurred in 2008, both projects were initially suspended before the related investments were adjusted and recorded as expenses for the 2015 financial year. It is disputed if ITH must correct the input VAT deduction or not.

With regard to the second project, the tax authorities held the view that ITH had purchased the services for the account of the seller and therefore classified the transaction so that a commissioning agent structure was applicable. In this case, ITH should have invoiced all costs and the corresponding VAT to the seller.

Ruling

The CJEU ruled that the right to deduct input VAT for items – in the case at hand for real estate – and services carried out in relation to the execution of taxed transactions, remains intact if the originally intended investment project is abandoned as a result of circumstances beyond the taxpayer's control, and that no input VAT correction must be carried out if the taxpayer still intends to use these items for a taxed activity.

Moreover, the VAT Directive must be interpreted such that in the absence of a contract without representation the commissioning agent structure is not applicable if the entity liable for VAT builds a structure corresponding to the needs and requirements of another entity that shall lease that structure.

Please note:
According to the tax authorities, the right to deduct input VAT already arises in principle and according to the amount at the time that the supply was procured. In line with the CJEU, the entitlement to deduct input VAT also exists even if the intended use is not later fulfilled (Section 15.12 (1) VAT Application Decree (UStAE)).

The objective indications that prove the intended use must generally be considered on a case by case basis. Assertions are not sufficient. On the

contrary, specific evidence is required, subject to a rigorous standard of review (Section 15.12 (2) UStAE).

NEWS FROM THE BMF

Sale of a business in its entirety while corporate activity continues

BMF, guidance of 16 November 2020 – III C 2 – S 7100-b/19/10001 :004

The BMF has issued an opinion on the sale of a business in its entirety while its corporate activity continues. The provisions must be applied in all pending cases.

Accordingly, the transfer of a leased property results in the sale of a business in its entirety not subject to VAT if the purchaser, by taking over a leasing company from the seller, enters into the existing rental agreements due to acquiring the property. Taking the German Federal Tax Court (BFH) ruling of 12 August 2015, XI R 16/14, into consideration, the BMF discusses when a sale by a property developer is the sale of a business.

Cases relating to property developers

This is the case if the property developer purchases a building, renovates it, leases most of it, and subsequently sells it, if at the time of the sale – as a result of the leasing activity – the property developer has a leasing company that will be continued as a going concern. A refutable long-term leasing activity of the property developer must be assumed if the rental period consisted of at least six months. The sale of a business in its entirety does not exist if the commercial activity of the property developer lies primarily in erecting a building and finding renters/lessees for the individual units, to subsequently sell it upon completion at a higher price due to it already being rented out.

Multi-stage transfers

In addition, in the case of a multi-stage transfer with narrow connections in terms of time and substance, the continuation of the business activity necessary for the sale of the business must exist in principle, but not also personally at the individual purchaser, (cf. BFH ruling of 25 November 2015, V R 66/14). For the existence of legal consequences at every stage of the sale of a business, it is necessary that the individual purchasers at every stage of the transfer are traders in line with § 2 German VAT Law (UStG).

VAT treatment of travel services

BMF, guidance of 30 November 2020 - III C 2 - S 7419/19/10001 :001

In its guidance of 30 November 2020, the German Ministry of Finance (BMF) issued an opinion, with reference to Union law, on the VAT treatment of travel services. The provisions apply in all pending cases.

Last year, § 25 (1) sent. 1 UStG was amended. According to this, since it came into effect on 18 December 2019, the taxation of travel services also includes, among the broader requirements of this regulation, travel services which are intended for the recipient of the supply's company.

For travel services provided before 18 December 2019 to another trader for their company, the supplying trader can refer directly to the special provision of Art. 306 et seq. of the VAT Directive. In addition, for travel services purchased domestically for their company before 18 December 2019 from a trader resident in another EU country, a trader can also refer directly to Art. 306 et seq. of the VAT Directive. In its guidance, the BMF clarified the principles that must be taken into consideration in this respect.

Consequences of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union

BMF, guidance of 10 December 2020 – III C 1 - S 7050/19/10001 :002

The BMF has issued a statement on the consequences of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union.

On 31 January 2020, the United Kingdom of Great Britain and Northern Ireland (hereinafter: "United Kingdom") left the European Union. According to the provisions of the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, a transition period followed during which, among other things, the Union's VAT law for the United Kingdom continues to apply. This transition period will end at the end of 31 December 2020.

In its guidance, the BMF comments on the following points:

- Future UK and Northern Ireland VAT status
- Treatment of deliveries before 1.1.2021, in which the delivered item arrives in Great Britain or from there after December 31, 2020
- Treatment of services (long-term services), the provision of which begins before 1 January 2021 and ends after 31 December 2020
- Small one-stop shop (Mini-One-Stop-Shop / VAT on e-Services) for certain services
- VAT refund procedure
- Confirmation procedure according to § 18e UStG
- Liability for VAT when trading goods on the Internet (§§ 22f, 25e and 27 (25) UStG)
- Processing of requests for assistance
- Amendments of the VAT Application Decree

IN BRIEF

VAT-exempt cost-sharing group and VAT group

CJEU, ruling of 18 November 2020 – case C-77/19 – Kaplan Limited UK

This CJEU ruling concerns the interaction of VAT-exempt cost-sharing groups in accordance with Art. 132 (1) (f) of the VAT Directive and alliances as VAT groups in accordance with Art. 11 of the VAT Directive.

According to the CJEU, supplies of services from an independent alliance of people to the members of a VAT group must be viewed not as having been provided to the individual members but rather to the VAT group as a whole. In order for the VAT exemption in accordance with Art. 132 (1) (f) of the VAT Directive to apply, all members of the VAT group must be members of this independent alliance of entities.

In this respect, the existence of national law provisions according to which the member – who can be treated as liable for VAT – authorized to represent such a group of entities, for the purposes of the application of the VAT exemption stipulated for independent alliances of entities, possesses the characteristics and status of the members of the independent alliance of entities, is not relevant.

Input VAT refund in Germany infringes Union law

CJEU, ruling of 18 November 2020 – case C-371/19 – Commission./.Germany

Germany has infringed Art. 170 and 171 of the VAT Directive and Art. 5 of the Council Directive 2008/9/EC, as it has denied applications for VAT refunds that were made before 30 September of the following calendar year but to which no copies of the invoices – required, according to Art. 10 of the Council Directive 2008/9, by the legal provisions of the Member State of refund – were attached. Namely, applicants were not invited to complete their applications by providing – after the 30 September if necessary – these copies.

Input tax refund procedure 2019: relief for subsequent applications by 31 December 2020

Businesses from EU member states should have applied for reimbursement of input tax amounts for the 2019 calendar year by 30 September 2020 via the portal of their country of residence. Since the COVID-19 pandemic has led to restrictions and impairments in general life worldwide, special simplifications apply to this year's application period until 31 December 2020.

Also for businesses from third countries who would have to apply for the reimbursement of input tax amounts for the calendar year 2019 to the BZSt by 30 June 2020, special reliefs apply until 31 December 2020.

VAT liability for the operation of slot machines

BFH, resolution of 30 June 2020, XI S 8/20 und XI S 11/20

The BFH holds to the view that revenues from the operation of slot machines are liable to and subject to VAT. The BFH refers to its ruling of 11 December 2019, XI R 13/18 (Federal Tax Gazette. II. 296). According to this the following applies in particular:

1. Revenues from the operation of games machines with the possibility of winning (games of chance and gambling) are liable to VAT.

2. The person who puts up slot machines can invoke a VAT exemption in line with Art. 13 Part B (f) of the Sixth Council Directive for transactions up to and including 5 May 2006.

3. The person who puts up slot machines cannot invoke a VAT exemption in line with Art. 13 Part B (f) of the Sixth Council Directive for transactions from 6 May 2006.

Retroactive invoice correction and reverse charge procedure

Niedersachsen Lower Tax Court, ruling of 17 September 2020, 11 K 324/19; BFH ref.: V R 33/20

As the basis for an invoice capable of being corrected with retroactive effect, the BFH demands that the invoice contains the minimum requirements on five particular invoice details. Thus, a document is only an invoice if it contains details on the invoice issuer, the recipient of the supply, the description of the supply, the fee, and separately shown VAT.

In this respect it is sufficient if the invoice contains the details regarding these items and those details are not uncertain, incomplete or obviously irrelevant to such an extent as to be equivalent to a lack of details (BFH, ruling of 20 October 2016, V R 26/15; as well as BMF guidance of 18 September 2020, VAT Newsletter October 2020).

Whether this point of view should continue to be adhered to (leaving open the BFH, ruling of 22 January 2020, XI R 10/17) did not require a decision in the present case.In the case under dispute, the invoice issuer and addressee mistakenly assumed that the invoiced supply was subject to the reverse charge procedure and thus the invoice showed no VAT. This was later corrected.

Accordingly, in the Lower Tax Court's opinion, the retroactive invoice correction cannot be denied on the basis that a statement of VAT was missing from the invoice. On the contrary, those involved were not entitled – as they assumed that the tax liability lay with the recipient of the supply – to show VAT separately. Because in this case the invoice issuer would owe the VAT on the basis of § 14c UStG

Please note:
Like the tax court, the BMF also assumes in its guidance of 18 September 2020 (see VAT Newsletter October 2020) that a retroactive invoice correction is possible if the parties involved erroneously assumed that the reverse charge procedure was being used. It is currently unclear in which further constellations a retroactive invoice adjustment is possible. On the question of retroactive effect in intra-Community triangular business see Lower tax court Rhineland-Palatine, ruling. of 28 November 2019; BFH reference no. XI R 38/19; VAT Newsletter July 2020. It must be taken into account that these constellations involve risks insofar as they can lead to the loss of the input tax deduction for the recipient of the service if there is a corresponding limitation period.

Extension of the non-objection regulation for work deliveries planned

In a letter dated 1 October 2020 - III C 2 - S 7112/19/10001: 001 - the BMF redefined the term work delivery, combined with a non-objection regulation for sales up to 31 December 2020 (see VAT Newsletter October 2020).

The BDI, the DIHK and the ZDH then addressed the VAT treatment of factory deliveries and the adjustment of the UStAE to the BMF.

In a letter dated 8 December 2020, the BMF replied to the associations that it would further evaluate the issues and suggestions and discuss them with the highest tax authorities of the federal states. With regard to the arguments presented, the BMF will propose an extension of the non-objection regulation until 1 July 2021.

The further development until the end of the year remains to be seen.

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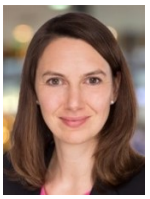

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