KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

March 2021

NEWS FROM THE CJEU

Skandia America II

CJEU, ruling of 11 March 2021 – case C- 812/19 – Danske Bank

The Court of Justice of the European Union (CJEU) concludes that services provided by a Danish head office to its branch in Sweden is subject to VAT because the Danish head office is part of a VAT group in Denmark.

The case

Danske Bank is a company with its head office in Denmark. It carries out its activities in Sweden through a branch located there. The Danske Bank headquarters is a member of a Danish VAT group. The Swedish branch does not belong to a Swedish VAT group.

In the course of its activities in the Scandinavian countries, Danske Bank uses an IT platform. This is the same, to a large extent, for all branches. The costs arising in connection with the use of the platform by the Swedish branch for the purposes of its activity in Sweden are charged to it by the head office of Danske Bank.

Whether the fact that the head office of Danske Bank belongs to a Danish VAT group means that this VAT group must be viewed as a separate taxable person in relation to the Swedish branch, and whether the Swedish branch must pay VAT on the IT services received using the reverse charge procedure, is disputed.

Ruling

The CJEU has already ruled that services provided by a head office in a non-EU country for the benefit of its branch in a Member State are subject to VAT if the branch is a member of a VAT group (CJEU, ruling of 17 September 2014 – case C-7/13 – Skandia America; see VAT Newsletter October 2014).

The principle established in this ruling also applies, according to the CJEU, if the services are provided from a head office located in one Member State – and belonging to a VAT group – and a branch located in another Member State.

For the CJEU it is not relevant, whether a head office (as in the Danske Bank case) or a branch (as in the Skandia America case) is part of a VAT group.

Content

Nor does it make any difference whether the headquarters are located outside the EU (as in the Skandia America case) or within the EU (as in the Danske Bank case).

Please note:
The CJEU ruling has significant impacts on cross-border services in corporations if a VAT group (VAT grouping) is involved and there is only a limited right to deduct input VAT, such as in the case of banks and insurance companies in particular.

The German Ministry of Finance (BMF) will have to revise its BMF guidance on the consequences of the CJEU ruling on Skandia America (see VAT Newsletter August/September 2018). In the BMF's view, the principles of this ruling must only be used in cases in which the facts correspond to those of the ruling, that is, to the extent services are exchanged between a headquarter in a non-EU country and its branch offices belonging to a VAT group in a Member State. This perspective contradicts the CJEU statements in the Danske Bank ruling.

Cross-border pharmacy discounts

CJEU, ruling of 11 March– case C-802/19 – Firma Z

The CJEU has taken a position on the question of whether a pharmacy that supplies prescription medicines to statutory health insurance companies is entitled, from a VAT law perspective, to a reduction in the basis of assessment as a result of granting discounts to those with statutory health insurance. The submission pertains to cross-border supplies of medicine in the internal market.

The case
In the case under dispute, a company from the Netherlands supplied drugs to Germany. In this respect, the shipments were made on the one hand to people with statutory health insurance, and on the other to privately insured people. In both cases, the company granted discounts. Due to the distance sales regulations (§ 3c German VAT Law (UStG)), the company treated the supplies to privately insured people as domestic supplies subject to VAT and, as a result of the discounts, reduced the basis of assessment for these supplies.

Shipments to those insured through statutory health insurance were treated by the company as zero-rated intra-Community supplies in the Netherlands to statutory health insurance companies and invoiced accordingly. In doing so the company 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 with this. Proceedings before the Tax Court were not successful.

Ruling
In the case at hand, the sale of the medicine concerned is the subject of two supplies: the first from the company to the statutory health insurance company, and the second from this health insurance company to the people insured by it. In the case of the first supply it is an intra-Community supply that is zero-rated in the Netherlands. Therefore, the statutory health insurance company is obliged, as a legal entity, to pay VAT in Germany on the intra-Community purchase. The second supply, from the statutory health insurance company to those it insures, does not fall within the scope of VAT.

As the company does not have a basis of assessment for VAT for a supply subject to VAT, it must be determined that the requirements for a reduction of the basis of assessment in accordance with Art. 90 (1) of the VAT Directive are not satisfied.

Apart from that, the company wanted, as a result of a discount that it granted to the people with statutory health insurance, to reduce its basis of assessment in relation to supplies to people with private health insurance. As both the German Federal Tax Court (BFH) and also the European Commission have accurately pointed out, the common VAT system rules out taking the reduction in the basis of assessment regarding one transaction into account for the calculation of the basis of assessment of another transaction.

As the company does not have a basis of assessment of a supply subject to VAT, this constellation does not require examination of whether a chain of transactions in line with the CJEU ruling of 24 October 1996 – case C-317/94 – Elida Gibbs – exists.

Please note:
The CJEU ruling must be distinguished from constellations in other cases. Based on the principles of the CJEU Elida Gibbs ruling, there is a reduced charge for the first trader in a supply chain if that trader, on the basis of its supply (subject to VAT), issues a refund to a subsequent recipient in the supply chain. The recipient who benefits does not need to have a direct supplier relationship with

the first trader. The CJEU affirmed a reduced charge in its ruling of 20 December 2017 – case C-462/16 – Boehringer Ingelheim Pharma – in the case of price discounts for the benefit of a private health insurer (see VAT Newsletter January/February 2018).

Intra-Community acquisitions of items in Poland – exercising the right to deduct input VAT

CJEU, ruling of 18 March 2021 – case C-895/19 – A

This CJEU ruling concerns the question of whether the previous Polish provision regarding the deduction of input VAT in the case of a delay in declaring intra-Community purchases of items in Poland violates the VAT Directive.

The case:
The VAT owed on intra-Community purchases of items in Poland arises upon the invoice being issued, at the latest on the 15th day of the month following the intra-Community acquisition. Since 1 January 2017, the Polish VAT law contains a deadline requirement according to which availing of an input VAT deduction is made dependent on the submission of a VAT return within three months following the end of the month in which the VAT arises. If this 3-month deadline has expired, the taxpayer can only claim the input VAT for the intra-Community purchase in the current period, while the VAT owed must be retroactively reported (Art. 86 (10b) pt. 2, b Polish VAT Law). This regularly results in default interest in Poland.

A taxpayer applied to the Polish tax authorities for a binding ruling ("preliminary tax notice") in this respect. In their binding ruling the Polish tax authorities denied a retroactive input VAT deduction on intra-Community purchases. The taxpayer brought a legal action to repeal the binding ruling. As part of the legal dispute between this Polish taxpayer, represented by KPMG Poland, and the Polish tax authorities it had to be clarified if the Polish provision violates Art. 167 and 178 of the VAT Directive and if it is possible to deduct input VAT even in the case of a later declaration of intra-Community purchases in Poland at the time at which the VAT arose.

Ruling
The CJEU ruled that Art. 167 and 178 of the VAT Directive stood in opposition to the Polish national provision on the 3-month deadline. In its reasoning the CJEU explained, inter alia, that the Polish provision on the input VAT deduction in the case of delayed declarations of intra-Community purchases goes beyond the necessary, firstly in order to ensure the exact charging of VAT and secondly to prevent tax evasion. In particular, the Polish provision does not take into consideration the circumstances of the individual case (good faith of the taxpayer).

Please note:
In this case the CJEU has determined that the previous Polish provision on input VAT deductions in the case of delayed declarations of intra-Community purchases is not compatible with the VAT Directive. As a result the input VAT deduction, after examination of the individual case, can also be claimed (retroactively), even in the case of delayed declarations, in the month in which the VAT on the intra-Community purchase arises.

To the extent that taxpayers have accrued and paid interest (generally 8% p.a.) in connection with subsequent declarations of intra-Community purchases in Poland, a correction of the VAT returns can generally be carried out and an application made to the Polish tax authorities for a refund of the interest. KPMG Poland is offering help in this respect and reviewing each individual case.

In the case that an application for a refund of interest already paid is approved, the Polish tax authorities shall, along with the refund of default interest, pay an additional refund interest. The refund interest shall increase if the application is made within 30 days of the publication of the CJEU ruling. Carrying out a prompt review is therefore recommended.

The above mentioned CJEU ruling refers to the intra-Community purchase of items. It could potentially also be applied to input supplies for which the recipient of the supply owes VAT in accordance with the reverse charge procedure. In this respect, it remains to be seen what further developments arise.

NEWS FROM THE BFH

CJEU submission on input VAT deduction of a managing holding company

BFH, resolution of 23 September 2020, XI R 22/18

The BFH submitted a question to the CJEU concerning whether a managing holding company can deduct the input VAT on inputs that are passed on as a shareholder contribution to a

subsidiary that is not entitled to deduct input VAT

The case
The ruling was based on the following simplified case: The plaintiff acted as a managing holding company and, through accounting and management services for its subsidiaries, was generally entitled to deduct input VAT on inputs. Conversely, the subsidiaries provided supplies that were, to a large extent, exempt from VAT and were thus not entitled to deduct input VAT.

It was unclear if the holding company is also entitled to deduct input VAT if it placed the input supplies against the granting of a share in the general profits in the subsidiaries, and the inputs purchased were not directly and immediately related to the holding company's own transactions but rather (largely) to the VAT exempt activities of the subsidiaries.

Resolution
In this respect the BFH submitted the following question to the CJEU:

Should Union law be interpreted as meaning that a managing holding company, which provides output transactions to subsidiaries, has the right to also deduct input VAT for supplies that they obtain from third parties and place against the granting of a share in the general profits in the subsidiaries?

In particular, is this the case where the input supplies obtained are not directly and immediately related to the holding company's own transactions, the services acquired are not found in the price for the transactions (provided to the subsidiaries) subject to VAT, and do not belong to the general cost elements of the holding company's own economic activity?

If this is affirmed, the following supplementary question arises:

Does it constitute an abuse of rights for the purposes of CJEU case law if a managing holding company is "interposed" in the purchase of supplies of subsidiaries in such a way as to itself purchase the supplies for which the subsidiary, if purchasing the supplies directly, would not be entitled to deduct input VAT, places these supplies in the subsidiaries for a share in their profits and subsequently, uses its position as the managing holding company to claim the full input VAT deduction on the inputs?

Or can this interposition be justified for non-tax law reasons, although the full input VAT deduction is in itself contrary to the system and would lead to a competitive advantage for holding constructs compared to single level companies?

Input VAT split in the case of mixed use buildings

BFH, ruling of 11 November 2020, XI R 7/20

If, in the case of buildings that are used in part for activities subject to VAT and in part for VAT exempt activities, there are significant differences in the equipment of the rooms used, the input VAT amounts must be divided in accordance with the (building-specific) so-called transaction key. This was ruled by the BFH, thereby confirming its previous case law.

The case
In the case at hand, a company erected a mixed use building complex in 2009 and 2010 containing a supermarket, leased subject to VAT, and a retirement complex, leased on a VAT exempt basis ("neighborhood center").

As the deduction of input VAT in the case of mixed used buildings is only permitted to the extent that the inputs purchased (here: building materials, trades services, etc.) are used for the output transactions subject to VAT, the company had to divide the input VAT arising on the building in accordance with § 15 (4) UStG. It initially did this based on the so-called surface area key (the area of the building leased subject to VAT as a portion of the entire area), which led to only just a third of the input VAT being deductible.

Later, the company claimed that as a result of the significant differences in equipment of the leased areas, the input VAT allocation should be carried out in accordance with the so-called transaction key (the transactions subject to VAT as a portion of the all transactions), so that about half of the input VAT is deductible. The tax authorities denied this; the Lower Tax Court agreed with the denial. The "neighborhood center" is (regardless of its division in terms of land register law) one building and, despite the significant differences in equipment (supermarket on the one hand, retirement complex on the other), the input supplies are essentially alike.

Ruling
The BFH judged this differently and ruled that under the premise that one building exists, in the case at hand the transaction key must be applied. From a VAT point of view, a certain percentage of the "neighborhood

center" is used for activities subject to VAT, which excludes recourse to the specific equipment of a certain part of the building. In addition, the person liable for VAT must not prove that the transaction key is more precise than the surface area key – on the contrary, the tax authorities are only allowed to apply the surface area key if it is more precise.

The fact that the company itself had initially chosen to apportion input VAT using the surface area key was, in the view of the BFH, equally harmless, as the key selected by the taxpayer is not binding if it – as in the case at hand – is not appropriate. The BFH could not, however, deliver a final ruling on the case under dispute as the Lower Tax Court, to which the case was referred back, must still review the level of the input VAT amounts, and determine whether invoices exist that would allow an input VAT deduction in the years under dispute.

NEWS FROM THE BMF

Extension of the provision on non-objection for work supplies to 1 July 2021

BMF, guidance of 11 March 2021 – III C 2 - S 7112/19/10001 :001

In its guidance of 1 October 2020, the BMF newly defined the term work supplies. The background to this is that the BFH, in its ruling of 22 August 2013, V R 37/10, determined, in relation 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 of a third-party item, that item can be reworked or processed. Furthermore, the BFH determined that the reworking or processing of the supplier's own items does not suffice for the assumption of a work supply.

Section 3.8 (1) sent. 1 VAT Application Decree (UStAE) will be amended in line with the BFH case law. The principles of the BMF guidance must be applied in all ongoing cases. With regard to all statutory VAT arising until before 1 January 2021 – including for the purposes of input VAT deductions and cases of § 13b UStG – no objection will be raised if the traders have treated supplies in accordance with the previous version of Section 3.8 (1) sent. 1 UStAE.

In the BMF guidance of 11 March 2021 this non-objection provision has now been extended to VAT arising until before 1 July 2021.

Reciprocity in the input VAT refund procedure

BMF, guidance of 15 March 15.3.2021 – III C 3 - S 7359/19/10005 :001

In the BMF guidance from 17 October 2014 on the input VAT refund procedure one directory of the non-EU countries with which reciprocity exists and one of those non-EU countries with which there is no reciprocity were published.

These directories were replaced with the BMF guidance of 15 March 2021. The changes are based on the determination that reciprocity with the United Kingdom exists since 1 January 2021. In addition, it was determined that reciprocity to Antigua and Barbuda, Iran, Liberia, and the Kingdom of Eswatini (formerly Swaziland) no longer exists and also does not exist to Laos, Gambia, Kosovo, and St. Kitts and Nevis.

Reverse charge procedure in the case of telecommunications services

BMF, guidance of 23 December 2020 – III C 3 - S 7279/19/10006 :002

The German Annual Tax Act 2020 has expanded the tax liability of the recipient of a supply to include telecommunications services since 1 January 2021. The background to the provision is the battle against tax fraud using telecommunications services. From a Union law perspective, the provision is based on Art. 199a (1) (g) of the VAT Directive. Based on the provision, the recipient of the supply owes the VAT if they are a trader whose main activity relates to the acquisition of these supplies and whose own use of these supplies plays a minor role (so-called reseller).

Reseller can also include, for example, a group purchasing company that makes purchases centrally in its own name for the account of other group companies, or a rental company.

Reseller

The main activity of a company with relation to the purchase of telecommunications services, according to the BMF criteria, consists in the provision of such services if the company sells on more than half of the supplies it purchases. The company's own use of these supplies plays a minor role if no more than 5 per cent of the supplies purchased are used for its own purposes. The ratios in the previous calendar year are generally relevant. If the company uses more than 5 per cent but not

more than 10 per cent of the telecommunications services purchased for its own purposes, a minor role must still be assumed if the average of the supplies used for its own purposes in the previous three years did not exceed 5 per cent of the supplies purchased in this period.

If, for example, group companies are joined in a VAT group, according to the tax authorities only the purchasing party should be considered as being a reseller.

Certification according to sample form USt 1 TQ
It must be assumed that a company is a reseller, if the tax authorities, upon application or ex officio, has issued a certificate based on the sample form USt 1 TQ to that company that is valid at the time of the purchase of telecommunications services. The validity of the certification is limited to a maximum of three years. The certificate can only be revoked or withdrawn with future effect.

If the tax authorities have issued a certificate based on the sample form USt 1 TQ to a company, that company is also the one liable for VAT as the recipient of the supply, if it does not use this certificate vis-à-vis telecommunications providers.

Interim arrangement until end March 2021
In the case of telecommunications services that are provided after 31 December 2020 and before 1 April 2021, no objection will be raised in the case of the supplying trader and the recipient of the supply if the parties to the contract mutually assume, in accordance with § 13a (1) no. 1 UStG, that the tax liability lies with the supplying trader. The prerequisite for this is that the transaction is taxed by the supplying trader in the appropriate amount.

This also applies accordingly in cases in which the fee or a portion of the fee was collected after 31 December 2020 and before 1 April 2021 and the supply is first carried out after the fee or portion of the fee is collected.

Please note:
Companies affected should check to what extent telecommunications services and not other services exist and if the recipient of the supply must be classified as a reseller. If the reverse charge procedure is applicable, for transactions from April 2021 invoices showing no VAT but with a note referring to the reverse charge procedure must be issued. It must also be noted that timely applications for new USt 1 TQ certificates to be issued should be submitted respectively this should be requested by the recipient of the service, provided that the latter requests an invoice without VAT due to the applicability of the reverse charge procedure.

VAT evaluation of donations in kind

BMF, guidance of 18 March 2021 – III C 2 - S 7109/19/10002 :001

The BMF has published principles on evaluating donations in kind from a VAT law perspective and a provision regarding the basis of fairness for donations in kind during the Corona crisis.

Guidelines for VAT evaluation
A donation in kind from corporate assets constitutes a “free gift” that is treated as equal to a supply for a consideration. As a benefit in kind, donations in kind are subject to VAT to the extent that the item (to later be donated) has provided an entitlement, in full or in part, to deduct input VAT. The basis of assessment for a donation in kind is determined not on the basis of the original cost of purchase or manufacturing, but rather on the basis of a notional purchase price at the point in time of the donation. This also applies for items produced in the company itself.

A new paragraph 1 will be inserted in Section 10.6 VAT Application Decree with provisions on determining the basis of assessment for items that, as a result of their condition, are no longer marketable or only marketable in a very limited way at the point in time of the free of cost benefit in kind.

In the case of groceries, this must be assumed if the best before date will shortly expire, or if the ability to be sold as fresh goods, for example baked goods, fruit and vegetables, is no longer possible due to imperfections. This also applies to non-food articles with a best before date such as cosmetics, toiletries, pharmaceutical items, pet food or construction products, as well as flowers and other perishable goods. For other items, marketability is limited if they, as a result of substantial material or packaging errors (for example, errors in filling, incorrect labelling, damaged returns) or a lack of salability (for example last year’s goods or seasonal goods such as Christmas or Easter items) it is no longer possible to sell them, or only possible with great difficulty.

If such items are dispensed with as part of a free of cost benefit in kind (for example as a donation) a lower basis of assessment can be used compared to goods that are still marketable. The reduction must be carried out to the extent of the limitation of marketability, so that the use of a basis of assessment of EUR 0 only comes into consideration in the case of worthless goods (for example groceries or non-food items about to expire or fresh goods which are no longer salable).

In the case that new goods without any damage whatsoever are withdrawn from sale for economic or logistical reasons no limited marketability, in particular, exists. Even if these new goods would otherwise be destroyed, because for example packaging is damaged, or in the case of clothes there are clear signs of having been tried on, or goods are dirty without being damaged, this does not result in the new goods losing their salability entirely. In these cases, too, a notional purchase price must be calculated on the basis of objective estimates.

The principles must be applied in all open cases.

Provision regarding the basis of fairness
For donations in kind during the Corona crisis (1 March 2020 to 31 December 2021) a temporary provision regarding the basis of fairness shall apply, according to which VAT on free of cost benefits in kind shall be waived.

The prerequisite for this is a donation of goods to tax-privileged organizations (to be) made in the period from 1 March 2020 and 31 December 2021. Retailers benefiting are those directly, and not insignificantly, negatively affected from an economic perspective by the Corona crisis.

Taxation of travel services by companies based in third countries - extension of the non-objection regulation

BMF, guidance of 29 March 2021 - III C 2 - S 7419/19/10002: 004

With a BMF guidance of 29 January 2021 (see VAT Newsletter January / February 2021) it was decided that § 25 UStG is not applicable to travel services by companies based in third countries and without a permanent establishment in the community area.

For reasons of the protection of legitimate expectations, there will be no complaints if the special regulation of § 25 UStG is applied to travel services carried out by companies based in a third country and without a permanent establishment in the community area up to 31 December 2020. This non-objection regulation will now be extended by one year until 31 December 2021.

NEWS FROM THE BZST

Digital Package from 1 July 2021 – Applications possible from 1 April 2021

BZSt, press release of 12 March 2021

From 1 July 2021, the changes agreed in the EU's Digital Package will enter into force. These changes were implemented in Germany through the Annual Tax Law 2020.

The special provisions existing up to now on mini-one-stop-shops, valid for telecommunications, broadcasting, television, and other services provided in an electronic manner (TFRE supplies) to non-traders in the rest of the Community territory will be expanded to One-Stop-Shop (OSS). The future scope of application shall cover in particular all cross-border services provided by a trader resident in a non-EU area or in an EU Member State to a non-trader at the place of supply, as well as intra-Community distance sales. In addition, the special provision Import-One-Stop-Shop (IOSS) for distance selling of items imported from non-EU countries with a value of up to EUR 150 will be introduced.

Please note:
According to § 3a (5) UStG the place of supply of TRFE supplies provided to non-traders is in principle the place in which the recipient of the supply is resident or has their place of residence or usually resides. § 3a (5) sent. 3 UStG provides for a threshold limit of EUR 10,000 up to which these supplies of services continue to be subject to VAT in the Member State of residence of the supplying trader. From 1 July 2021, this provision shall be extended to include intra-Community distance sales according to § 3c UStG (previous distance sales regulation) whose place of supply up to the transaction threshold is the place where the transport begins. In this way intra-Community distance sales and TRFE supplies that are provided to non-traders resident in other Member States, must similarly be included in calculating the threshold value.

In contrast, up to now, country-specific thresholds between 35,000 Euro and 100,000 Euro

per country have been used within the framework of the distance sales regulation according to § 3c UStG. As a result, the place of taxation is shifted to the seat of the beneficiary much more frequently and more quickly. The distance selling regulation according to § 3c UStG applies in particular to B2C deliveries in which the supplier arranges for the goods to be transported (indirect participation is already sufficient).

The supplying trader can forgo the application of this transaction threshold from the beginning for example to avoid a monitoring of the 10,000 Euro threshold. This results in the place of supply of the other services identified always being located at the place in which the recipient of the supply is resident or has their place of residence or usually resides, and the place of supply of intra-Community distance sales always being the place in which the transport or dispatch ends. The trader is bound by such a declaration of waiver for at least two calendar years.

The special provisions OSS and IOSS will make it possible for traders to declare and pay VAT owed in other Member States of the European Union, or underlying the scope of application of the special provisions centrally via the Federal Central Tax Office (BZSt).

Traders can apply to participate in the special provisions OSS and IOSS electronically at the BZSt. This is possible from 1 April 2021 with effect from 1 July 2021 and applies equally to all EU States. A later registration is possible, however will only have effect for taxation periods after the registration. Applications can be submitted using the BZStOnline-Portal. Traders can submit their applications there to register for the special provision that applies to them. Traders already using the Mini-One-Stop-Shop special provision do not need to register anew.

Please note:
The BMF intends to issue a comprehensive BMF guidance on the changes in the Digital Package. The associations were able to make submission relating to the draft guidance in February 2021, so that an adapted version of the BMF guidance can be expected in the next few days.

IN BRIEF

Reduced VAT rate for dedicated activities of scientific and research institutions

BFH, ruling of 10 December 2020, V R 5/20

The benefit applies, according to § 12 (2) no. 8 (a) UStG, to supplies for corporations in particular that have non-profit purposes. The VAT reduction does not apply to supplies that are carried out in the course of economic activities. The term economic activities is defined § 14 German Tax Code (AO). According to § 64 AO, the tax benefit does, however, remain in place for an economic activity to the extent that it is a dedicated activity in line with §§ 65 to 68 AO.

For the assumption of a dedicated activity it is above all necessary, according to § 65 AO, that the economic activity does not compete with non-advantaged activities of the same or a similar type to any extent greater than that unavoidable for the fulfillment of the tax-advantaged activity. If, in accordance with §§ 66 to 68 AO, a dedicated activity exists, the general requirements of § 65 AO do not need to be satisfied for a dedicated activity to be assumed. If, in accordance with the principle of § 14 AO merely management of assets exists, the VAT reduction shall likewise not be ruled out (see Section 12.9 (3) UStAE).

Asset management includes only those sales of holdings that are not subject to VAT due to a lack of a commercial (economic) activity in accordance with § 1 (1) no. 1 UStG. The sale of a holding in a company to which the shareholder has previously provided supplies in return for a consideration as part of their activities therefore does not take place in the course of asset management, according to the BFH in this ruling.

Vacancy of a building

BFH, ruling of 27 October 2020, V R 20/20 (V R 61/17)

If, in the case of an item that a trader has initially used for a mixture of transactions subject to and exempt from VAT, the use for transactions subject to VAT is dropped while the trader continues to use it for VAT exempt transactions, this can lead to a correction of input VAT in accordance with § 15a UStG. In contrast, a mere vacancy without any intention to make use of it does not effect a change in the relationship, according to the BFH in its ruling following a CJEU appeal.

In this case, a GmbH operates a nursing home on a VAT exempt basis. In 2003, it set up a cafeteria in an extension, which could be accessed by visitors through an outside door and by

residents through the dining room of the nursing home. The extent to which a vacancy requires a correction of input VAT is disputed.

The Lower Tax Court assumed that operations had ceased. The intended usage had changed as the intention to use the space for catering transactions subject to VAT was dropped. The cafeteria had not stood entirely empty, but rather was used exclusively, exempt from VAT, by the residents of the home. In its appeal, the GmbH claimed that the simple non-use with no possibility for private use does not lead to a correction of input VAT. At most it is used once or twice per year for the operation of the home and its residents (meetings). Therefore a correction only comes into question for the corresponding reporting periods. The cafeteria was a failed investment.

The appeal was successful. The BFH repealed the ruling and sent the case back to the Lower Tax Court. The Lower Tax Court should examine if the rooms of the cafeteria were locked and there was only an intermittent use for events in the home, with the rest of the time being a vacancy without intention to be used. Because the scope of that type of vacancy does not provide any use for VAT exempt transactions. In this case, only a partial input VAT correction for the extent to which it was used for events is possible, and not a full correction for the entire year. In this respect, additional determinations must be made in a second judicial process.

EVENTS

Interactive live event from The Squaire in FFM: VAT 2021: Virtual Annual Conference

on 12 April 2021

The topics of the online event in which you can interactively contribute are:

- Current legislation: In particular, new regulation on intra-community distance sales from 1.7.2020
- Current case law: In particular, tax evasion on export deliveries, retroactive invoice correction, new developments in input tax deduction
- News from the financial administration: In particular, new declaration obligations with regard to § 17 UStG, incorrect showing of VAT according to § 14c UStG, quick fixes
- The digital tax audit from the point of view of the financial administration and consulting practice
- Panel discussion: The digital tax audit controversially discussed
- Transfer prices and VAT from the point of view of the financial administration and consulting practice

We are happy to have won Rainer Weymüller (judge at the Munich tax court) and Frank Bohländer, Oliver Bohländer, Thorsten Schmidt (all auditors at the Frankfurt am Main V-Höchst tax office) as external speakers. Get ready for the VAT 2021!

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

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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.

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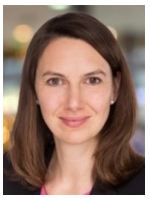

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