

VAT Newsletter

Hot topics and issues in indirect taxation

May 2021

NEWS FROM THE CJEU

VAT rate in the case of takeout transactions

CJEU, ruling of 22 April 2021 – case C-703/19 – J.K.

The CJEU (Court of Justice of the European Union) has issued its opinion in response to a submission from Poland as to whether the sale of ready-to-eat dishes and meals prepared in different ways falls into the category “restaurant and meal services” or if a supply of goods must be assumed and, consequently, whether the reduced VAT rate of 8 or 5 per cent was applicable in 2016, the year under dispute.

The case

The case at hand concerns a Polish company that sold ready-to-eat meals and food. The meals and food were prepared on site and could be served hot or cold. They were either consumed on site or taken out by customers. The products were sold in the restaurant, from external counters of the restaurant or in designated areas in shopping malls.

The company treated this type of sale as a supply of goods, in this case supplies of “prepared

meals”, to which it applied a reduced VAT rate of 5 per cent. As a result of a tax audit the tax authorities held the view, however, that the sales should be categorized as “supplies of meal services” subject to the VAT rate of 8 per cent.

Due to the complaint lodged by the company, the case was brought before the regional administrative court in Gliwice, which confirmed the tax authorities’ decision. The ruling was contested by the company and brought before the supreme administrative court which decided to refer it to the CJEU for a preliminary ruling.

Ruling

In the case of complex transactions encompassing a series of individual services and activities so closely interconnected as to objectively constitute a single inseparable economic event, according to settled CJEU case law, all circumstances under which the transaction in question is processed must be taken into consideration in determining whether that transaction must be categorized as a supply of goods or a service, in order to determine its characteristic and

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dominating components. The dominating component must be determined from the point of view of the average consumer. The overall view must include not only a quantitative but also a qualitative assessment of the individual circumstances.

The CJEU has already ruled that restaurant transactions are characterized by a range of acts, of which the supply of foodstuffs is only one. If the supply of foodstuffs is accompanied by only the provision of rudimentary facilities, which allow only a limited number of customers to consume on site, requiring only minimal use of personnel, these elements constitute merely negligible ancillary services that cannot change the predominant character of the main supply, that is, the supply of goods.

For the qualification of restaurant transactions aspects such as, inter alia, the presence of wait staff, a service consisting particularly of the transmission of orders to the kitchen, the later presentation and serving of dishes to customers at their table, closed and temperature-controlled spaces especially for eating food, or also cloakroom and toilet facilities as well as the provision of tableware, furniture and place settings, must be taken into account. Whether the consumer has decided to avail of services supporting the supply of food and drinks must also be taken into consideration. The decision reached by the consumer will be assumed depending on the type of sale of the ready-to-eat meal. If the consumer decides not to avail of the material and human resources provided by the company, then these are not significant for the consumer. Therefore, in this case it must be assumed that no supporting service is coupled with the

supply of food or drinks, and that the transaction concerned must be categorized as a supply of goods.

Please note:

The German tax authorities also assume that the sale of food as takeout constitutes a supply of goods for which the reduced VAT rate comes into question. Thus, with reference to Art. 6 (2) Implementing Regulation No. 282/2011, the sale of prepared or not prepared meals with or without transport, however without any other supporting services, always constitute a supply of goods. If, on the contrary, the customer expresses the wish to consume a meal in a restaurant, but ultimately takes it with him, the general VAT rate shall be applied (see Section 3.6 (4) VAT Application Decree (UStAE)).

NEWS FROM THE BMF

Rights of joint use of third-party facilities for consumption

BMF, guidance of 22 April 2021 – III C 2 – S 7210/19/10002 :005

The German Ministry of Finance (BMF) has expanded its administrative guidance on the demarcation between supplies of food subject to the reduced VAT rate and restaurant services subject to the general VAT rate to include the German Federal Tax Court (BFH) ruling of 3 August 2017, V R 15/17.

Principles according to Section 3.6 UStAE

The sale of food is a provision of service if the service portion predominates qualitatively. This must be judged on the basis of an overall view of the circumstances of the individual case. In this respect, elements of

service that are necessary for the sale of foodstuffs shall continue to be overlooked for the purposes of the review to be carried out. In particular, the provision of infrastructure supporting the catering is not necessarily connected to the sale of food and thus, in the context of an overall point of view, must be considered to be an element of service that is detrimental to a determination as a supply of goods.

The provision of infrastructure must only be taken into consideration if it is provided to the customer by the trader providing the food as part of an integrated service, and the supplier intends that infrastructure to solely facilitate the provision of foodstuffs. Elements of service provided by third parties must generally not be taken into consideration. The prerequisite for non-consideration is that the third party acts directly vis-à-vis the consuming customers. Therefore, in the individual case – if applicable with regard to agreements concluded – it must be examined to what extent elements of service provided by a third party must apparently be attributed to the trader selling the food. If the third party supplies to this trader and they in turn supply to the customer, it is an element of service of the trader selling the food and must be taken into consideration as part of the overall view.

Consideration of the BFH ruling of 3 August 2017, V R 15/17

The sentence “the prerequisite for a non-consideration is that the third party acts directly vis-à-vis the consuming customers” will be stricken out by this BMF guidance. Instead it will now read: “Something different applies, however, if the third

party by its nature grants to the supplier a joint right of use for their service elements (for example facilities for consumption, such as tables) in the form of a possibility to avail or dispose of such elements (cf. BFH ruling of 3 August 2017, V R 15/17). The circumstances of the individual case in question shall always prevail.”

In the case of so-called pretzel runners, who sell pretzels in beer tents at the Oktoberfest, in its ruling of 3 August 2017, V R 15/17 the BFH ruled that the beer tent operator's facilities for consumption (the tables and benches typically used in a beer tent) cannot be attributed to the pretzel runners. The BFH assumes in the first place the principle that a third party's facilities for consumption are not to be taken into consideration. In this case, the beer tent operator has, furthermore, their own commercial use for the facilities for consumption. Therefore it cannot be assumed that the pretzel runners have been granted a joint right of use or the possibility to avail or dispose of the beer tent furniture.

The provisions of the BMF guidance must be applied to all open cases.

Please note:

[In comparison to the pretzel runner, the owner of a grill stall with sales of food in a beer garden provides services subject to the standard VAT rate if, due to the lease agreement with the operator of the beer garden, they are entitled to make the beer garden infrastructure available to their customers. In this case, the lease agreement forms the basis on which the beer garden infrastructure \(which serves solely the purposes of the consumption of food and drink\) is made available to the owner of](#)

[the grill stall, so that for their part they can surrender the use of it to their customers \(BFH, resolution of 24 July 2017, XI B 37/17\).](#)

IN BRIEF

VAT treatment of supplies from exchanges and other trading platforms for financial products

BMF, guidance of 3 May 2021 – III C 3 – S 7160/20/10003 :001

The BMF has taken a position on the VAT treatment of supplies from exchanges and other trading platforms for financial products. Following general explanations, the BMF mention the following services from exchanges:

- Supplies of an exchange as a central contracting party (central counterparty – CCP) in securities trading (spot market) or derivatives trading (futures trading)
- Exchange operators as liquidators and technical suppliers in exchange business (processing of matching / clearing / settlement)
- Exchange operators as technical suppliers of IT exchange programs

The principles of the BMF guidance are also transferable to transactions on other trading platforms for financial products. If, for example, the operator of a trading platform for virtual currencies provides their website to market participants as a technical marketplace for buying or trading, for example, bitcoin, a VAT exemption in accordance with § 4 no. 8 German VAT Law (UStG) also comes into question.

The principles of the BMF guidance must be applied to all open cases.

In this respect, the possibility of an option in accordance with § 9 UStG, including with retroactive effect, must be noted, for which the BMF gives further details for IT services performed by an exchange operator before 1 July 2021.

Draft of the revised VAT Application Decree in relation to § 25 UStG

BMF website, information of 21 April 2021

The Law on further fiscal support for electromobility and the amendment of other tax provisions amended § 25 UStG as follows.

- Application of the special regulation to the B2B area as well (with effect from 18 December 2019),
- Repeal of the generation of an overall margin (with effect from 1 January 2022).

The tax authorities have used the changes to the law as an opportunity to comprehensively revise the VAT Application Decree. The revised edition of the VAT Decree in relation to § 25 UStG was sent to industry organizations and interested parties, who now have the opportunity to submit comments.

The revised edition of the VAT Application Decree also takes into consideration the amended administrative view on tour operators resident in non-EU countries. The BMF guidance of 29 January 2021 determined that in the case of travel services from companies resident in non-EU countries and with no fixed establishment in the territory of

the Union, § 25 UStG cannot be applied.

For reasons of the protection of legitimate expectations, no objection will be raised if the special provision of § 25 UStG is applied for travel services carried out up to 31 December 2021 by companies resident in non-EU countries and with no fixed establishment in the territory of the Union (see BMF guidance of 29 March 2021; [VAT Newsletter March 2021](#)).

The revised version of the VAT Application Decree clarifies that for the application of § 25 UStG only fixed establishments that participate directly in the sale can be taken into consideration.

EVENTS

Please note that the language of the subsequent two events is German.

Webcast Live: Training Series – Fundamentals and Practical Cases of VAT

With our three-part training series on VAT, you can easily and effectively refresh your basic VAT knowledge, bring it up to date or familiarize yourself with the basics of VAT for the first time. We will complete our basic courses in June with three advanced courses in autumn. For this purpose, we will specifically explain and consolidate the knowledge imparted with practical examples.

Webcast part 1 on 9 June 2021 on the topic:

Basic principles of VAT

Webcast part 2 on 16 June 2021 on the topic:

VAT in international goods transactions

Webcast part 3 on 23 June 2021 on the topic:

Supply of services, invoicing, input tax deduction

You can find further information about the events and the registration form [here](#).

Webcast Live: VAT digital package: first practical experience

Webcast on 25 June 2021

You can find further information about the events and the registration form shortly [here](#).

Webcast Live: New Chinese Export Control Law – What does it mean for companies outside China?

Webcast on 18 June 2021

You can find further information about the events and the registration form [here](#).

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* Trade & Customs

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