VAT Newsletter

Hot topics and issues in indirect taxation

July 2021

NEWS FROM THE CJEU

VAT-exempt management of special investment funds

CJEU, ruling of 17 June 2021 – case C-58/20 – K and case C-59/20 – DBKAG

The Court of Justice of the European Union (CJEU) has ruled on the scope of the term "management" for the purposes of the VAT exemption on the management of special investment funds.

The case
These joined cases deal with the question of whether the VAT exemption for the management of special investment funds can be used for services supplied to the manager of such funds.

The first case concerns. certain services for the calculation of the taxable income of unit-holders from the funds, such as tax statements.

The second case concerns the granting of user rights to software which was essential to risk management and performance measurement in return for the payment of a fee

In order for the VAT exemption for the management of special investment funds (135 (1) (g) of the VAT Directive) to apply, the service must count as "management" and this management must relate to a "special investment fund". In the case at hand the only question is whether the supplies can qualify as "management". The submitting Austrian court has doubts about the interpretation of the term "management" and whether the services can fall within its scope.

Ruling
The CJEU interprets Art. 135 (1) (g) of the VAT Directive to mean that supplies of services, such as tax-related work to ensure the taxation of shareholders' income from the fund in accordance with national law and the granting of software usage rights that serve solely to carry out calculations important for risk management and performance assessment, provided by third parties to special investment fund management companies do fall under the tax exemption provided for in this provision. This requires that they demonstrate a close connection with the management of the special investment fund and are carried out solely for the

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purposes of managing the special investment fund, even if they are not fully outsourced.

Please note:
It remains to be seen whether, and to what extent, the German tax authorities will react to the ruling. In the tax authorities' view, for example, the "creation of tax returns" is subject to VAT (cf. Section 4.8.13 (20) no. 1 VAT Application Decree (UStAE)). This now needs to be examined.

Reference must furthermore be made to the Fund Location Law, in force since 1 July 2021. This law expanded the VAT exemption in § 4 no. 8h German VAT Law (UStG). It now also covers the management of "venture capital funds". A more exact definition from the tax authorities would be welcome.

NEWS FROM THE BFH

VAT payment in the case of "0% financing"

BFH, ruling of 24 February 2021, XI R 15/19

The German Federal Tax Court (BFH) has ruled on the VAT payment of a supply of goods with "0% financing". In this case the supplying trader bears the costs for the financing of the purchase price by a bank in such a way that the bank, in the course of paying out loan amounts to the trader, retains the interest, and the customer pays the purchase price to the bank in installments. The BFH concludes that the interest retained does not reduce the payment for the trader's supply of goods to the customer, even if the trader states in the invoice to the customer that they are granting the customer a discount in the amount of the interest.

The case
A GmbH & Co. KG belongs to a corporate group and operates a retail business. As part of its sales of goods, it offers so-called "0% financing", in which the customer, despite paying in installments, only pays the same purchase price for the goods as they would have paid if paying cash on the spot. A "credit intermediary framework contract" between the parent company X and a bank forms the basis of this offer.

The bank is obliged to take on all new financing conveyed to end-users arising from sales of goods from X, whereby X acts as the credit intermediary by involving the individual stores, among others the GmbH & Co. KG. The loan agreements are concluded directly between the recipient of the loan (customer) and the bank. In the case of "0% financing", the payment of the actual proceeds of the loan is made, less a so-called subsidy, to the GmbH & Co. KG.

The GmbH & Co. KG's sales contracts with its customers with "0% financing" were concluded for the amount of a cash payment (purchase price). The GmbH & Co. KG issued the customer with an invoice for this amount, in which both the net amount and the VAT due were shown. In addition, the invoice contained a reference to the method of payment "financed purchase – 0%", whereby the amount of financing corresponded to the total amount, and the following passage:

"As a discount we are granting the interest charged on the part of the financing bank. This totals an amount of EUR… . As agreed, we will pay the amount granted as a discount directly to the financing bank. There is no entitlement to have the discount paid out in cash."

Whether the basis of assessment for the supplies that are financed by means of the special interest loans must be reduced in the amount of the individual subsidy is disputed.

Ruling
The BFH rejects this. In this case the purchase price and the (not-reduced) loan proceeds, respectively, form the basis of assessment for the taxation of the individual supplies.

Thus, the contract of sale on the supply of goods was concluded at the cash purchase amount. For this sum, the customer arranged with the bank to take out the special interest loan conveyed by the GmbH & Co. KG, with a payment made from the bank to the GmbH & Co. KG to repay the purchase price debt while reserving the agreed "subsidy".

To determine the basis of assessment for the taxation of the supply it is not relevant that the individual customer did not pay the agreed purchase price directly to the supplier, but rather through the bank. Because Art. 73 of the VAT Directive does not require the consideration for a supply to be paid directly by the recipient of the supply. The payment of the consideration can also – as in the case under dispute – take place using a bank.

The payment as a basis of assessment for the taxation of the supply to the customer, which in the case at hand corresponds to the loan proceeds, must not be reduced by the amount of the "subsidy" retained by the bank. The legal basis for the retention lies not in the legal relationship between

the GmbH & Co. KG and its customer, which forms the sole relevant relationship for the taxation, but rather in the legal relationship between the GmbH& Co. KG and the bank. That supply relationship, which must be viewed separately, cannot affect the basis of assessment for the supply of the plaintiff to the customer.

Contrary to the GmbH & Co. KG, the BFH does not interpret the CJEU ruling of 15 May 2001 – case C-34/99 – Primback to mean that a payment reduction exists if the customer is explicitly informed of the amount of the financing costs that the supplier takes on for the customer vis-à-vis the bank, and is thus also informed of the amount of the discount granted by the supplier.

Please note:
Advertising with the promise of "0% financing" is ubiquitous. In particular, car dealers, electrical stores and furniture stores often offer their products for sale with interest-free financing. For retailers, the financing possibility is interesting from a point of view of raising turnover, and banks can win new customers in this way. This BFH ruling limits the economic advantage for the suppliers.

Letting of a parking space to apartment tenants

BFH, ruling of 10 December 2020, V R 41/19

The BFH has issued its ruling on the conditions under which the letting of a parking space to the tenant of an apartment is exempt of VAT.

Legal situation
According to § 4 no. 12 sent. 1 (a) UStG a VAT exemption applies in particular to the letting and leasing of property. This is based on Art. 135 (1) (l) of the VAT Directive. According to § 4 no. 12 sent. 2 UStG the letting of spaces for the parking of vehicles is, in particular, subject to VAT. From a Union law point of view this is based on Art. 135 (2) (b) of the VAT Directive.

Case law from the CJEU and the BFH
On the question of the letting of spaces for the parking of vehicles at the same time as the rental of an apartment, the CJEU decided in its ruling Henriksen of 13 July 1989 – case C-173/88 – that the letting of spaces for the parking of vehicles cannot be removed from the exemption if it is closely connected to the VAT exempt letting of property intended for a different use, for example property intended to be used for residential or commercial purposes. In this case, both rentals constitute a single uniform economic event. This is the case if the space for the parking of vehicles and the property used for a different purpose are part of the same building complex and both of these items are let by one and the same lessor to one and the same lessee. The BFH followed this decision in its case law (BFH rulings of 30 March 2006, V R 52/05, and of 21 June 2017, V R 3/17).

Application of the principles to the case under dispute
On this basis, the case at hand, which is a case of the letting of a parking space and an apartment, deals with one uniform economic event.

A "building complex" in line with the abovementioned CJEU case law also exists in the case of a front and a rear building with a "complex between them". In addition, for a single uniform economic event to exist in the relationship between the lessor and the lessee it is not important if other (external) lessees of parking spaces have access to these without having to enter the rented building. Furthermore, ancillary services associated with the single uniform economic event do not inherently exist as a result of the main supply, and the main supply can thus also be provided without the ancillary service. It is therefore not important that the use of the apartment is also possible without letting a parking space.

Moreover the existence of a service ancillary to the main service is not prevented if the ancillary and main services are provided on different markets. The parking situation in the individual rental area is therefore just as irrelevant as the interest in renting or letting a parking space.

In the case under dispute, therefore, a single uniform economic event in line with the CJEU case law must be assumed. Both the apartment and the parking space were let between the same parties. The spatial prerequisites are also present. The letting of the parking space rounds out the letting of the apartment in the case of vehicle-owning tenants.

Please note:
The distinction between main and ancillary services is often difficult in practice, but often has significant VAT effects. In the present case, the question plays a decisive role because the assessment depends on whether the transaction is taxable or VAT exempt and thus there is an input tax deduction entitlement or correction or not.

NEWS FROM THE BMF

Business activities of supervisory board members

BMF, guidance of 8 July 2021 – III C 2 – S 7104/19/10001 :003

The German Ministry of Finance (BMF) has issued its view on the business activities of supervisory board members. The background to this is the BFH ruling of 27 November 2019, V R 23/19, V R 62/17, according to which the member of a supervisory board, contrary to previous case law, is not active as a trader if they do not bear any remuneration risk as a result of a non-variable fixed remuneration.

Abolition of previous assertions in UStAE
The BMF guidance shall strike out the following passages:

- "Similarly the activity as a supervisory board member shall be carried out independently" … (Section 2.2. (2) sent. 7 UStAE)
- "A limited partner, as a member of an advisory board, in particular to whom rights of approval and to control are transferred, works independently vis-à-vis the company …" (Section 2.2. (3) sent. 1 UStAE)

New administrative principles in UStAE
The new administrative principles shall be standardized in Section 2.2. (3a) UStAE. Whether a supervisory board member is commercially active must be examined separately for every seat.

The member of a supervisory board does not bear a remuneration risk solely on the basis that their remuneration is paid out retrospectively for several years. If the supervisory board member bears no remuneration risk, they are not therefore independently active as they are liable, under the requirements of § 116 Stock Corporation Act (AktG), for breaches of duty.

Besides special regulations and transitional provisions for the public sector, the following differentiation should be noted:

Non-variable fixed remuneration of members of a supervisory board
If the member of a supervisory board does not bear any remuneration risk due to a non-variable fixed remuneration, they are not working independently. The remuneration may consist of the payment of money and also non-cash benefits. A non-variable fixed remuneration exists particularly in the case of a lump sum expense allowance that is paid for the duration of the membership of the supervisory board. Attendance fees, which the supervisory board member receives only when they have actually participated in a meeting, as well as an expenses allowance calculated on the basis of the expenses actually incurred do not constitute a non-variable fixed remuneration.

Mixed remuneration of members of a supervisory board
If a supervisory board member's remuneration is made up of both fixed and variable elements, they are generally deemed to be working independently if the variable elements make up at least 10% of the total remuneration in a calendar year, including any expenses allowance received. Exceptions are possible in duly justified cases.

Reimbursements for travel costs are not elements of the remuneration and must therefore not be taken into consideration in the calculation of the 10% threshold.

Corresponding applicability for members of other controlling bodies.
The above principles also apply to members of committees that the supervisory body has appointed under § 107 (3) AktG, and to members of other bodies that serve not the pursuit but rather the control of the management of a legal person or association.

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

For the avoidance of transitional difficulties no objections will be raised – including for the purposes of input VAT deductions – if the previously valid rules in Section 2.2. (2) sent. 7 and (3) sent. 1 UStAE on the VAT liability is used for supplies carried out up to and including 31 December 2021. There are also special regulations for civil servants and political elected officials.

Please note:
The Supervisory Board agreements (in particular the remuneration structure) must be used to check the extent to which the VAT treatment of Supervisory Board remuneration needs to be adjusted.

VAT treatment of travel services

BMF, guidance of 24 June 2021 – III C 2 – S 7419/19/10001 :006

The Law on further fiscal support for electromobility and the amendment of other tax

provisions of 17 December 2019 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 provisions of this guidance must generally be applied to all open cases. The provisions of Section 25.3 UStAE on the creation of standalone margins must be applied to transactions after 31 December 2021. The non-objection rule for travel services carried out by companies resident in non-EU countries until 31 December 2021 (see BMF guidance of 29 March 2021) remains in place. For reasons of the protection of legitimate expectations, no objection will be raised if a trader applies the version of Section 25 UStAE valid on 1 June 2021 to transactions carried out up to 31 December 2021.

Existence of travel services
According to Section 25.1 (2) UStAE, for the existence of a travel service, it is generally necessary for the trader to provide a bundle of individual services containing at least one transport or accommodation service supply. This explicit restriction in the UStAE is new.

Elements of a travel service shall include in particular:

1. Transport to the individual destinations, transfers;
2. Accommodation;
3. Catering;
4. Support from tour guides;
5. Execution of events (e.g. city tours, sightseeing, sports and other recreational programs, outings on shore);
6. Newly added to the UStAE: admissions.

It has been made clear in the UStAE that when checking if a travel service exists, personal contributions are not to be taken into consideration. What is new in the UStAE is that an individual service shall only suffice for the application of § 25 UStG if it is an accommodation service. On the contrary, § 25 UStG is not to be applied (as was previously the case in the UStAE) to the isolated sale of opera tickets by a travel agent.

Also new in the UStAE is that the granting of admission to trade fairs, exhibitions, seminars and conferences and associated transport, catering and accommodation supplies that are offered by the organizer as a complete packages, are not travel services.

Please note:
For all companies that provide travel services, regardless of whether this is the sole purpose of the company, it must be checked whether the above-mentioned exception rule applies to the granting of entry authorizations, or whether for certain events (e.g. customer events with a supporting program, general meetings, etc.) the margin taxation is to be carried out.

Equity measures related to the July 2021 flood disaster

BMF, guidance of 23 July 2021 – III C 2 – S 7030/21/10008 :001

The storm events in July 2021 in Bavaria, North Rhine-Westphalia, Rhineland-Palatinate and Saxony led to extensive destruction and a collapse of the supply in the affected areas.

According to the BMF, considerations of equity apply in the following areas to support the management of the extraordinary storm that occurred parallel to the corona pandemic:

- Provision of living space
- Use of objects assigned to the company (capital goods) free of charge to search for and rescue flood victims, repair of flood damage
- provision of services free of charge (e.g. provision of personnel)
- Reduction of the special VAT advance payment 2021
- Donations in kind

The details and requirements of the equity measures are explained in more detail in the BMF guidance. This is available for download on the BMF website.

MISCELLANEOUS

KPMG Digital Services Tax Quick Check

Numerous countries have already introduced unilateral digital taxes that are affecting more and more industries. With a view to fulfilling compliance requirements and initiating measures at an early stage, we

would like to introduce you to our free KPMG Digital Services Tax Quick Check.

With the KPMG Digital Services Tax Quick Check you can easily get an initial overview of whether and to what extent your company could be affected by a digital tax. With the tool, you determine possible digital tax burdens in selected countries, you can easily simulate the effects on different business models and keep an eye on threshold values and possible tax payments. You can find an overview of the functionalities and our free offer on the KPMG Direct Services website for the KPMG Digital Services Tax Quick Check.

If you are interested in our offer, simply leave your contact details using the request access button and we will get in touch with you immediately. We would be happy to personally present the KPMG digital services tax quick check to you. If you are affected by digital taxes, we will analyze your situation together with you and develop solutions and strategies tailored to your company (e.g. monitoring and mapping in the ERP system).

You can find further information on the topic at Digital taxes – more relevant than you think. Current developments globally and BEPS 2.0 & digital issues.

EVENTS

Webcast Live: Training series "Cases in practice on the basics of VAT"
Part 1 on 15 September 2021,
part 2 on 22 September 2021,
part 3 on 29 September 2021

Webcast Live: VAT meets Automotive – current trends and developments
Event on 15 September 2021

Webcast Live: Consignment stocks
Event on 28 September 2021

Webcast Live: Customs, VAT and transfer pricing
Event on 6 October 2021

Webcast Live: Quick Fixes 2020 – status quo & experiences
Event on 28 October 2021

Webcast Live: Challenges relating to income tax, VAT and social insurance in the case of pseudo-self-employment
Event on 29 October 2021

You will find further information on these events and the registration forms here soon.

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International Network of KPMG

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Our homepage / LinkedIn

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* Trade & Customs

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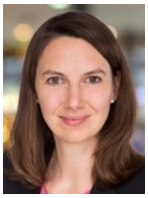

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