NEWS FROM THE CJEU

Decrease of the assessment basis due to irrecoverability

CJEU, ruling of 15 May 2014 – case C-337/13 – Almos Agrárkükereskedelmi Kft

The case was referred to the Court of Justice of the European Union (CJEU) from Hungary and ruling relates to the interpretation of the regulations for the correction of the assessment basis in Art. 90 of the VAT Directive. It is set forth in Art. 90 (1) of the VAT Directive that in case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly subject to the conditions imposed by the Member States. Any VAT already paid to the tax authorities may then be reclaimed by the supplier. Pursuant to Art. 90 (2) of the VAT Directive, the Member States may notwithstanding specify that no reclaim of already paid VAT is permissible in the case of total or partial non-payment. This is important because in general the state’s tax claim arises at the moment when the supply takes place (so-called debit principle, see Art. 63 of the VAT Directive).

The case
The Hungarian company Almos Agrárkükereskedelmi Kft (hereinafter “Almos”) sold rapeseed to Bio-Ma, another Hungarian company. The VAT incurred for the supply was paid by Almos. The rapeseed was supplied and stored, but Bio-Ma did not pay the purchase price. As a result, Bio-Ma was to return the rapeseed, however this never occurred. After Almos had taken legal steps, Bio-Ma was sentenced by a civil court to return the rapeseed or to make payment in a certain amount. In the ruling, it was held that the parties had cancelled the purchase agreement and the rapeseed was now owned by Almos. It is in dispute whether Almos is accordingly entitled to reduce the assessment basis for the taxable rapeseed supply.

The referring court stated that the Hungarian VAT law applicable at the time the refund was requested did not contain all cases stated in Art. 90 (1) of the VAT Directive and in particular did not provide for a reduction of the assessment basis in cases of cancellations, refusals and total or partial non-payments of the consideration. As a result, the question arises whether the Hungarian VAT law deprives the tax-payers of their rights granted to them in such cases pursuant to the VAT Directive in Art. 90 (1).

Ruling
According to the CJEU, the Member States may rule out a reduction of the assessment basis in the case of total or partial non-payment in accordance with Art. 90 (2) of the VAT directive by regulating the remaining cases of Art. 90 (1) of the VAT Directive. Otherwise, taxable persons may directly invoke Art. 90 (1) of the VAT Directive for a reduction of the assessment basis. The Member States may predicate the execution of this right on formal conditions, which particularly may serve as evidence that the consideration was not definitely imposed partially or fully after the transaction has taken place. Such measures may not extend the limit for the sought evidence further than necessary, which is subject to the verification by the national court.
Please note:
The conditions for changing the assessment basis are regulated in the national law by § 17 of the German VAT Law (UStG). Limitations with regard to reclams of paid VAT in cases of total or partial non-payments which are permitted by EU law are not provided by the UStG (see §17 (2) no. 1 UStG). However, this may be regulated in a different way in other EU Member States so that affected companies have to bear the VAT as a cost factor.

Within the scope of the practical application of § 17 (2) no. 1 UStG, it is often questionable at what time the claims are irrecoverable and the paid VAT may be reclaimed. According to the German Federal Tax Court (BFH) jurisdiction, this is the case when it may be objectively assumed that the supplier is not able to enforce his claim for payment (totally or partially), in law or in fact, (see the most recent BFH ruling of 24 October 2013, V R 31/12, VAT Newsletter March 2014). Whether a payment has become irrecoverable pursuant to § 17 (2) no. 1 UStG is therefore a question of the specific facts (see also Section 17.1 (5) of the German VAT Application Decrease (UStAE)). In any case, a mere non-payment despite a reminder is not sufficient.

Advocate General comments on definition of fixed establishment of service recipient

Opinion dated 15 May 2014 – case C-605/12 – Welmory sp z o.o.

This reference for a preliminary ruling from Poland concerns the place where a service for another taxable person is deemed to have been supplied. According to the basic rule in Art. 44 of the VAT Directive (cf. § 3a (2) UStG), the place of supply of a service to another business is deemed to be the place where the latter has its economic activity. However, if the service is supplied to a fixed establishment of the service recipient located in a different place, that place is regarded as the place of supply.

Questions referred

In this case, the powers to impose taxes in connection with online shopping is disputed. The business model is operated jointly in Poland by one Polish and one Cypriot company. One particular feature of this arrangement is that in order to operate the website on the basis of the cooperation agreement which it concluded with the Polish company, the Cypriot company deploys human and material resources that belong not to it but – at least in part – to the Polish company. This raises the question of whether these human and material resources represent a fixed establishment of the Cypriot company in Poland to which the Polish company, for its part, supplies its services as defined by the cooperation agreement.

Opinion

According to the Advocate General, a fixed establishment within the meaning of Art. 44, sent. 2 of the VAT Directive must be characterized by a sufficient degree of permanence and a suitable structure in terms of human and technical resources that enables the establishment to receive and use the services supplied to it there for its own needs. The establishment does not need to have its own human and technical resources for this purpose provided that third-party resources are made available to the establishment in a comparable manner to resources of its own. If the resources are provided by a third party, service contracts or rental agreements (in particular) are required that make the human and material resources available to the taxable person as if they were its own, and which therefore cannot be terminated at short notice.

Please note:
Whether a business has a fixed establishment outside of its host state determines the place of supply for services provided to the business, thereby assigning the taxation right to a specified state. The existence of a fixed establishment may, moreover, mean that a business is regarded as established in that state; as a result, for example, the regulations on the service recipient’s tax liability (known as the reverse-charge procedure, cf. Art. 192a et seq of the VAT Directive) or on the simplification of triangular transactions (cf. Arts. 141, 197 of the VAT Directive) would no longer apply. This could lead to registration obligations and to the duty to invoice foreign sales tax.

In its ruling of 30 June 2011 (V R 37/09), the BFH was called upon to decide on the place of supply for plastic surgery when the surgeon does not have his/her own practice. According to the law at that time, this question concerned the circumstances under which a service is supplied from a taxable person’s fixed establishment. In this dispute, the BFH ruled that a doctor did not have a fixed establishment in the clinics located in the Netherlands. The doctor was merely free to take her medical decisions, but not to determine the material resources, staff and premises. Under these circumstances, she did not meet the minimum requirements for a fixed establishment. The court stated that the business needs to have a right of disposal over the business resources it uses that is not merely of a temporary nature.
Advocate General’s statement on VAT groups

Opinion dated 8 May 2014 – case C-7/13 – Skandia America Corporation (US)

Skandia America Corporation, which has its registered office in the US, was an insurance group’s central purchasing company for IT services. It made these externally purchased IT services available to various companies and branches within the group. This request for a preliminary ruling concerns the Swedish tax authority’s decision to levy VAT on services supplied by Skandia America Corporation to its Swedish branch. This branch is registered in Sweden as a member of a VAT group (tax entity for consolidation purposes). In case of such a group, persons or entities established in a Member State that are legally independent and closely bound to one another by financial, economic and organizational links are regarded together as a single taxable person or entity (cf. Art. 11 of the VAT Directive). Sweden opted to apply the VAT group regulation under EU law.

Questions referred

According to the ruling of the CJEU of 23 March 2006 (case C-210/04 – FCE Bank plc), a fixed establishment in another Member State that receives services from its parent and pays the costs thereof should not be regarded as being liable for tax. The parent and the foreign branch are not different legal entities. This case essentially raises the question of whether the same principle applies if a branch in the other Member State belongs to a VAT group for tax consolidation purposes. This question could be answered in the negative if the foreign branch is no longer part of the same tax-paying entity as the parent because of its inclusion in the VAT group.

Opinion

The Advocate General holds that the regulations on VAT consolidation under EU law should be interpreted as meaning that the branch located in one Member state cannot be part of a VAT group in that Member State independently of its parent established in another Member State. The two entities may only be members of a VAT group together; otherwise, both are excluded from the group.

In both cases, the result of applying the referenced CJEU ruling of 23 March 2006 is that services between the parent and the branch are not transactions liable for VAT.

On the other hand, services supplied between the branch and its customers are liable for VAT. This also applies if the customers belong to the VAT group, but the parent and the branch are excluded from the group. However, if both are included in the VAT group, externally purchased services are also liable for VAT.

If, contrary to the Advocate General’s view expressed, the branch constitutes a part of the VAT group but that part is detached from the parent company, the VAT group would qualify as a business that receives the services from the parent and is therefore liable for VAT on the basis of the reverse charge regulations (Art. 196 of the VAT Directive).

Please note:
The Advocate General’s opinion indicates that branches of a foreign company cannot be members of a domestic VAT group in isolation. This conflicts with German practice and the view taken by the authorities (see Section 2.9 (3) sent. 5 UStAE). The CJEU’s decision and the potential consequences for German law remain to be seen.

NEWS FROM THE BFH

Withdrawal of a car with subsequent transport to a non-member country

BFH, ruling of 19 February 2014, XI R 9/13

The BFH ruling relates to the question whether a VAT-exempt export supply is constituted if a taxable person removes a car from the company to use it for non-business (private) purposes and transports (exports) it subsequently to a non-member country.

The case

In the present case, a trader was engaged in the management of his own and third-party real estate and the leasing of restaurants. He purchased a car and allocated it fully to his business assets. The trader could only apply a partial input tax deduction, because he also achieved rental income exempt from VAT. In the same year, he moved his private residence to Switzerland. Approximately three months later he withdrew the car from his company to use it for non-business (private) purposes. He estimated the assessment basis for the removal in accordance with a purchase offer made by a car dealer. Furthermore, the trader issued an invoice to himself (to his private address in Switzerland) on behalf of the German company. He did not state any VAT in the invoice. The car was transported to Switzerland on a truck. As a result of the import, the Swiss customs authorities charged VAT and automobile tax.

Ruling

According to the BFH, the place of the removal in the present case was in Germany pursuant to § 3f UStG, where the trader was operating his business. According to the German law, the withdrawal could not be a zero-rated export supply (VAT exempt with granted right to input VAT deduction), because the application of § 4 No. 1 (a) UStG for withdrawals is explicitly ruled out by § 6 (5) UStG. The withdrawal (treated as supply made for consideration) was subject to VAT also in accordance with the EU law. Although the EU law does not contain any regulation as to
the place which corresponds to § 3f UStG, the removal in the present case was to be considered as a national inactive (unmoved) supply within the meaning of Art 31 of the VAT Directive. Hence, the withdrawal was to be separated from the subsequent transport (export) to Switzerland. The BFH leaves the question open as to whether and to what extent § 3f UStG is compatible with the EU law in other cases. A zero-rated export supply within the meaning of Art. 146 (1) (a) of the VAT Directive was to be denied. Since in case of a withdrawal (here within the meaning of Art. 16 of the VAT directive) no sale is constituted, there is also no seller by whom or on whose account the item could be dispatched or transported. Therefore, no zero-rating applies for exports pursuant to Art. 146 (1) (a) of the VAT Directive for withdrawals of items to be used for private purposes of the taxpayer.

Please note:
The BFH refers for the denial of zero-rated export supplies in particular to the purpose of the taxation of the withdrawal (Art. 16 of the VAT Directive). This is to ensure the equality between a taxpayer, who withdraws an item from his company to be used for private purposes, and a common consumer, who buys an item of the same kind. A taxpayer able to deduct the VAT for the purchase of an item attributed to his company, is not to be excluded from VAT when he withdraws this item from the assets of the company to use it for private purposes or for such of his personnel. Hence, he does not enjoy any unduly granted advantages compared to the end customer, who buys the item by paying VAT.

The BFH stated expressly that it was leaving the question open as to whether the place of § 3 f UStG for supplies of goods and services free of charge is compatible with the EU law as a whole. As a result, the private use of a holiday accommodation in the EU, for example, which is usually rented on short notice, leads to a taxation of the withdrawal in Germany (§ 3 f UStG) if the other legal conditions are fulfilled, although this is not apparent from the EU law.

NEWS FROM THE BMF

Tax liability of the recipient of construction work and building cleaning services

BMF guidance of 8 May 2014 – IV D 3 – S 7279/11/10002-03

In its guidance dated 5 February 2014 (see VAT Newsletter March 2014), the German Ministry of Finance (BMF) already commented on the impact of the BFH’s ruling of 22 August 2013 V R 37/10 regarding the recipient’s tax liability. The UStAE was adjusted to the BFH ruling in respect of construction work executed after 14 February 2014. The BMF has now issued some additional comments on the impact of the BFH ruling.

The BFH ruling

The BFH holds that the regulations on the recipient’s tax liability for construction work should be interpreted restrictively. Tax liability is determined by whether the work or service supplied to the recipient for the purposes of constructing, overhauling, maintaining, modifying or removing built structures is used in turn by the recipient to provide a supply of the same type. Contrary to Section 13b.3 (2) UStAE, the determining factor is not the proportion of work or services within the meaning of § 13b (5) sent. 2 UStG in relation to the total taxable revenues generated by the recipient.

Comment of the BMF

The BMF again makes particular reference to its no-objection ruling of 5 February 2014. This deals with a case where the parties have agreed to apply the recipient’s tax liability for construction work executed prior to 15 February 2014, taking account of the administrative directives that were valid until that date. The BMF holds that no objection will be raised if they also agree to abide by this practice after 14 February 2014. This will even apply if the supplier is liable for tax on the basis of the BFH ruling. There is no need for invoices to be corrected. The BMF now clarifies that the no-objection ruling also applies to construction work by a business if execution of the work began before 15 February 2014. Moreover, and also for the purposes of input tax deductions, no objection will be raised if the parties have agreed in respect of construction work executed before 15 February 2014 to assume – on the basis of administrative directives in force until that date – that the supplier is liable for tax, even though the recipient would be liable for tax according to the BFH ruling.

Evidence from the business that the recipient is itself using the construction work supplied by the business to supply construction work may also be provided by means of a confirmation from the recipient, which could, for example, be included in the contract. If this confirmation is provided, the BMF holds that the recipient should also be liable for tax if it does not actually use the service to supply construction work; this does not apply if the supplier was aware that the confirmation was incorrect.

According to the BMF, a simplification ruling is being introduced to avoid accounting problems for businesses in connection with payments on account made before 15 February 2014 for construction work carried out after 14 February 2014. In addition, the BMF is considering the correction of an invoice for payments on account issued before 15 February 2014 if the payment is only made after 14 February 2014. Incidentally, the cases adduced as examples by the BMF show that a certificate of exemption as per § 48b EStG is only of an indicative nature and can be rebutted.
Please note:
The BMF has stated that it will issue separate guidance on the issue of protection of legitimate expectations in case any claim is made against the supplier for construction work where the recipient is not liable for tax according to the BFH ruling.

Relation of the general taxation procedure and the input tax refund procedure

BMF, guidance of 21 May 2014 – IV D 3 – S 7359/13/10002

In its guidance of 21 May 2014, the BMF comments on the relation of general taxation procedures and input tax refund procedures. The background to this is the BFH ruling of 28 August 2013, XI R 5/11 (see VAT Newsletter November 2013).

BFH ruling

The BFH ruling was issued with regard to a business established abroad that only makes transactions within Germany for which the recipient of the supplies is liable to VAT pursuant to § 13b UStG. In this case, the business residing abroad does generally not need to submit a VAT return. However, it may have to submit a VAT return for the calendar year only if it has incorrectly stated the VAT in an invoice pursuant to § 14c (1) UStG. According to the BFH, in this case it is entitled and obliged to apply all input tax deductions in this VAT return for this calendar year.

Statement of the BMF

According to the BMF, the ruling is only to be used for facts in which the following conditions are equally fulfilled:

- The business established abroad has requested the input tax refund at the German Federal Central Tax Office (BZSt) within the applicable time limit;
- The further conditions for a refund within the input tax return procedure have been fulfilled for the refund period;
- Due to mistaken assumptions, no refund of the input tax was made within the input tax return procedure; and
- No refund of the input tax within the input tax return procedure is possible anymore, because the application of the input tax refund was recalled as a result of a notice by the BZSt and the application period has lapsed or the notice of the BZSt as to the denial of the refund is formally final.

Please note:
The BFH ruling of 28 August 2013, XI R 5/11, does not contain any explicit statement that the application of this is limited to the fact that all conditions stated by the BMF are to be fulfilled. The tax authority seems rather anxious to prevent alleged abuses. Hence, the input tax refund procedure requires to apply minimum input VAT amounts (see § 61 (3) and § 61a (3) UStDV), which are not given in case of a registration. Furthermore, businesses established in a non-member country generally have to consider within the input tax refund procedure the limitations of §§ 18 (9) sent. 4 and 5 UStG with regard to reciprocity and purchase of fuel. In case of a registration, the limitations only apply accordingly, if the businesses of the non-member country as recipients of the supplies are only liable to VAT pursuant to § 13b UStG (see § 15 (4b) UStG).

IN BRIEF

Input tax deduction for prepayments if the invoice issuer has never intended to provide the supply

Finance Court Münster, ruling of 3 April 2014, 5 K 383/12 U; ref. no. of the BFH: V R 21/14

The ruling refers to the input tax deduction of an advance invoice for a combined heat and power unit to be supplied within the scope of a so-called fraudulent pyramid scheme. In the present case, the purchase price was paid in full, but the supply was not provided. According to the Finance Court Münster, § 15 (1) sent. 1 no. 1 UStG suggests that also for advance invoices only the VAT due by law may be deducted as input tax, but not incorrect or unauthorized taxes within the meaning of § 14c UStG. In the case of an advance invoice, an unauthorized VAT statement is only given if the business is unwilling or unable to provide the services stated in the advance invoice. This was the case, when the business did not intend to provide the supply from the beginning. The Finance Court Münster therefore denies the input tax deduction in the present case. However, the Finance Court did not deal with the CJEU ruling according to which the denial of the right to input tax deduction requires the invoice recipient to have known or ought to have known that the transaction was connected to fraud committed by the supplier or by another trader acting earlier in the chain of supply. If this is not the case, the tax authority may – according to the CJEU ruling of 13 March 2014 (case C-107/13 FIRIN OOD) – claim for a correction of the input tax deduction in accordance with Art. 184 to 186 MwStSystRL if the supply has not been provided (see VAT Newsletter April 2014 also for the German legal provisions). An appeal has been filed against the ruling of the Finance Court.
Results of the special VAT-audit 2013

BMF, notification of 28 April 2014

The special VAT-audits are undertaken regardless of the rotation of the general audit and without differentiation between the sizes of the businesses. According to the BMF, the special VAT-audits performed in accordance with the statistical records of the highest tax authorities of the federal states in 2013 have lead in case of VAT to a taxable gain of around EUR 1.97 billion. The results from the engagement of special VAT-auditors in general audits or in tax investigations are not included in this taxable gain. In 2013, 90,407 special VAT-audits were undertaken. On a yearly average, 1,908 special VAT-auditors were engaged and each auditor undertook on average 47 special audits. According to the BMF, this means that an average taxable gain of approx. EUR 1.03 million is reached per auditor engaged.

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