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MwSt.VAT Newsletter

August/September 2015

NEWS FROM THE CJEU

Requirement for minimum business use for VAT deduction purposes

Reference for a preliminary ruling (Germany), BFH, ruling of 16 June 2015, XI R 15/13; case C-400/15 – Potsdam-Mittelmark district authority

The question referred to the Court of Justice of the European Union (CJEU) by the German Federal Tax Court (BFH) was whether § 15 (1) sent. 2 of the German VAT Law (UStG) is compatible with EU law. This provision concerns the supply of goods, import or intra-Community acquisition of goods where less than 10 % of the goods are used for business purposes. In such circumstances, the goods are not deemed to have been supplied for business purposes, which precludes the deduction of input VAT.

The case

The question referred concerns the (pro rata) deduction of input tax by a district authority in respect of the purchase of machinery which was used both to provide public services (97.35 %) and to supply taxable services to third parties (2.65 %). The tax authorities refused to allow the 2.65 % deduction claimed on the grounds that the district authority had failed to use a minimum of 10 % of the purchased goods for business purposes in accordance with § 15 (1) sent. 2 UStG.

Ruling

The BFH considered the extent to which Article 1 of the Council Decision of 19 November 2004 (2004/817/EC) applied to § 15 (1) sent. 2 UStG. This decision authorizes the Federal Republic of Germany to exclude expenditure on goods and services from the right to deduct VAT when more than 90 % of the goods and services were used for the private purposes of a taxable person or of their employees, or, more generally, for "non-business" purposes.

Although it was clear that Germany was authorized to preclude the right to deduct where goods were used for the private purposes of a taxable person or of his employees, the BFH was in doubt as to whether the authorization to preclude deduction for "non-business purposes" in general also applied in circumstances in which more than 90 % of goods were used for non-commercial activities in the strict sense of the term, as was the case in the main proceedings. Pursuant to the CJEU ruling of 12 February 2009 – case C-515/07 – VNLTO (see VAT Newsletter April 2009), transactions outside the scope of the system of VAT cannot generally be considered to be carried out for "non-business" purposes.

Please note:
Potentially, the reference for a preliminary ruling does not just have implications for the deduction of input VAT by public sector bodies. In light of the VNLTO decision, the tax authorities have ruled that non-commercial activities in the strict sense include all non-business transactions that are not for purposes other than those of the business (private). Non-commercial activities in the strict sense include, for example, non-profit making activities carried on by associations for charitable purposes, public services provided by legal persons under public law, the mere act of purchasing,

Content

News from the CJEU

Requirement for minimum business use for VAT deduction purposes

News from the BFH

No evidence of an intra-Community supply of goods by providing witnesses

Proper invoice address for VAT deduction purposes

News from the BMF

Reverse charge procedure for construction services: operating facilities as built structures

Changes in the assessment basis due to a safeguard retention

Purchase commitments in leasing cases

In brief

Sale of leased items where installments under a lease have not been paid

VAT exempt insurance transactions

Supply of blood plasma for the production of pharmaceuticals

Actions for developing the labor market

Intra-Community supply of goods for supplies via a warehouse

Other

Commission calls for improved levying of VAT by the Member States

Events

The permanent establishment from the perspective of income tax and VAT

Cologne VAT Congress 2015

holding and selling shares in companies and the non-occupancy of buildings involving long-term non-use (see section 2.3 (1a) of the German VAT Application Decree (UStAE)). The minimum requirement for 10 % business use under § 15 (1) sent. 2 UStG also applies in these cases.

NEWS FROM THE BFH

No evidence of an intra-Community supply of goods by providing witnesses

BFH, ruling of 19 March 2015, V R 14/14

The BFH reached the conclusion that a witness statement cannot serve as evidence of a zero-rated intra-Community supply of goods (VAT exemption with entitlement of input VAT deduction).

The case

In the present case, the trader delivered goods to a company located in Italy. It is in dispute whether the goods actually arrived in Italy. The tax authority assumed that the supplies were subject to VAT. The Lower Tax Court denied the zero-rating for intra-Community supplies of goods, too. According to them, the trader did not provide the documentary evidence required for the collection of the goods. The evidence offered in the oral proceedings was not taken, because the witness statement of the manager of the recipient was deemed irrelevant.

Ruling

The appeal to the BFH has not been successful. The trader must prove that requirements for the zero-rating were satisfied by providing documentation and accounting records. In the present case, the trader was deemed to not have provided the documentation, because the information about the destination stated in the waybills was insufficient. Although the zero-rating should apply according to the principle of neutrality even if the taxpayer does not or not fully satisfy the requirements of the documentation and accounting evidence and the requirements of an intra-Community supply of goods are indisputably defined. However, this is exactly not the case here.

Following the principle of proportionality, there is no requirement that the supply should be zero-rated. In principle, the trader is not entitled to satisfy its burden of secure evidence of the substantive requirements in a way other than by providing documentation and records. It is generally ruled out to provide evidence by witness instead of the legally required documentation and accounting evidence. Only if the formal evidence may not or not reasonably be provided, the principle of proportionality does require other forms of evidence to be accepted. However, in the present case, there are no apparent indications. Furthermore, the zero-rating based on the protection of legitimate expectation is also ruled out in the present case (§ 6a (4) sent. 1 UStG).

Please note:
Principally, the evidence of a zero-rated intra-Community supply of goods is to be provided by documentation and accounting proof according to §§ 17a to 17c of the German VAT Operating Regulation (UStDV). According to the previous view of the tax authorities, in addition to the documentation proof set forth in § 17a UStDV, the trader shall be free to provide the documentation evidence by all adequate documentation and evidence. This presumes that the arrival of the supplied item in the other Community area is ensured plausibly and comprehensibly when the whole picture is viewed (see section 6a.2 (6) UStAE). In addition, the trader shall be entitled under certain circumstances to provide the accounting evidence in another form than pursuant to § 17c UStDV (see section 6a.7 (6) UStAE). On the other hand, the present ruling of the BFH shows how important it is to satisfy the formal evidences expressly stated in the UStDV. Otherwise, there is a risk that the zero-rating will not be accepted.

Proper invoice address for VAT deduction purposes

BFH, ruling of 22 July 2015, V R 23/14

The ruling relates to the requirement for proper invoice details and the reference to "full address" according to § 14 (4) no. 1 UStG.

The case

A limited company dealt with cars. The matter at issue was the deduction of input VAT in respect of invoices for the cars as well as the zero-rated status of intra-Community supplies of goods. The tax authorities held that approximately EUR 800.000 of input tax was non-deductible because the issuer of the invoice was a "letter box entity" which did not have a registered office at the address indicated on the invoice. An objection and appeal were lodged, both of which were rejected. The Lower Tax Court refused to allow the deduction of input VAT because the registered office address provided by the company issuing the invoice was no more than a "letter box". The occupants at the address included an accounting firm which received mail and provided accounting services to the company issuing the invoice. The company issuing the invoice did not operate its own business from the address, but rented office premises and storage space at another, which evidence suggested was where the cars, the company dealt with, were located.

Ruling
Pursuant to § 15 (1) no. 1 sent. 2 UStG, the right of input tax deduction is subject to the requirement that the business concerned is in possession of an invoice issued in accordance with §§ 14 and 14a UStG. Such invoices must, inter alia, include the full address of the supplier, as specified in § 14 (4) no. 1 UStG. The recipient claiming the input tax deduction bears the onus of proof. It is not sufficient to provide an address where there were no business activities carried on at the time that the invoice was issued, or for the recipient of the supply to use a P.O. box address (in contrast to section 14.5 (2) sentence 3 UStAE). The BFH abandoned the stance adopted in its ruling of 19 April 2007, V R 48/04, that a registered office address that is merely a "letter box" address could be sufficient. It held that a "letter box" address did not reflect the commercial reality but was a type of obfuscation. From a confidence standpoint, input tax may only be deducted as a measure to ensure equitable treatment under §§ 163 and 227 of the German Tax Code (AO) rather than as part of the procedure for determining eligibility. However, it is not possible to combine the two procedures once the tax assessment has been made, as in this case.

Please note:
Four further appeals to the BFH are currently pending on the issue of providing proper address details on invoices (V R 25/15, V R 54/14, XI R 20/14 and XI R 22/14). Appeal V R 25/15 concerning the right to deduct in respect of invoices from online trading should be noted in particular. The proceedings relate to the Cologne Tax Court ruling of 28 April 2015, 10 K 3803/13. The Cologne Tax Court held that the requirement established in case law to date for business activities to be carried on at the relevant address had now been superseded by developments in technology and changed business practices. In addition, the supplier should be clearly identifiable from the address, such that the tax authorities would be able to contact the supplier at that address. The Court held that, provided the supplier could be contacted at the postal address concerned, it was immaterial which activities were carried on at that address. It held, moreover, that the business activities requirement was far too vague.

NEWS FROM THE BMF

Reverse charge procedure for construction services: operating facilities as built structures

BMF guidance of 28 July 2015 – III C 3 – S 7279/14/10003

The German Ministry of Finance (BMF) has issued a non-application order in response to the BFH ruling of 28 August 2014, V R 7/14 (see VAT Newsletter December 2014) that operating facilities did not qualify as built structures for the purposes of § 13b UStG.

The BFH ruling
The reverse charge procedure, as it relates to construction work (§ 13b (2) no. 4 sent. 1 UStG), applies to supplies of work and other services for the purposes of constructing, maintaining, altering or removing built structures, but excluding planning and supervision services. The BFH held that for these purposes a built structure meant any erected immovable structure which is fixed to or in the ground. Operating facilities (§ 68 (2) sent. 1 no. 2 of the German Valuation Act (BewG) do not qualify as built structures.

Non-application order
Referring to the outcome of discussions with the highest tax authorities of the federal states, the BMF states that the BFH ruling should not be used apart from the specific case.

In the opinion of the tax authorities, built structures may also include operating facilities for the purposes of § 13b (2) no. 4 sent. 1 UStG. The BMF states that the phrase "supply of construction work", as used in Article 199 (1) (a) of the VAT Directive on which § 13b (2) no. 4 UStG is based, is consistent with EU law and should not be interpreted in accordance with the BewG. While it is not essential to establish a relationship with immovable property, supplies made in respect of operating facilities may also constitute "supplies of construction work" in relation to immovable property. The BMF also refers to Article 13b (d) of the VAT Directive Implementing Regulation which is due to take effect on 1 January 2017. Article 13b (d) provides that operating facilities will be deemed not to be immovable property only if they are not permanently installed or can be moved without destroying or altering the building or construction.

Please note:
The BMF explains that the non-application order emerged from the BFH ruling of 28 August 28 2014, V R 7/14 and the unclear definitions of built structures and operating facilities, which were proving unworkable in practice. For example, it is hard, if not impossible, for suppliers to tell whether equipment installed by them (e. g. an air conditioning, refrigeration or ventilation system) qualifies as a stand-alone system and is therefore deemed to be an operating facility. If, however, the installation is essential to the construction, existence, maintenance or usability of the built structure, the reverse charge procedure may apply according to the BFH ruling. The BMF does not comment on the simplified rule set forth in § 13b (5) sent. 7 UStG which can be applied in cases of doubt. According to this simplified rule the contracting parties can assume in cases of doubt that the recipient of supply is debtor of VAT provided that this does not lead to any tax losses. The simplified rule only concerns the transaction type judged by objective criteria. It is worth drawing attention to the resolution on the Tax Amendment

Act 2015 dated 24 September 2015 (see Journal 18/6094). In particular the German Parliament clarifies that still – contrary to BFH – supplies in connection with operating facilities can fall under the reverse charge procedure (13b UStG). The law requires the approval of the German Federal Council. We inform you about the different VAT amendments in the next edition of our VAT newsletter.

Changes in the assessment basis due to a safeguard retention

BMF, guidance of 3 August 2015 – III C 2 – S 7333/08/10001 :004

Generally, businesses are obliged to pay taxes on their supplies as of the end of the accounting period of the provided supplies (imputed taxation) even if the remuneration has not yet been received. The BMF has commented in the present guidance on the limitation of the duty of pre-financing with regard to the imputed tax (see BFH ruling of 24 March 2013, V R 31/12; VAT Newsletter March 2014).

Safeguard retentions of two to five years
According to the principles defined by the BFH, a business subject to imputed tax is already entitled to tax adjustment pursuant to § 17 (2) no. 1 UStG due to irrecoverability even for the accounting period in which the supplies are delivered. Irrecoverability is given if the business is not able to realize its claim for compensation due to a contractual retention for hedging warranty claims for a period of two to five year.

Change of the authorities' guidance
Section 17.1 (5) UStAE is supplemented to the extend that contractually agreed retentions for hedging the recipient's warranty claims (e.g. so-called safeguard retentions for construction defects) entitle to tax adjustment based on irrecoverability. However, this only applies insofar as the trader is not able to collect the compensation for two to five years. Moreover, the prerequisite is that the hedging of warranty claims through granting bank guarantees is demonstrably not possible for the trader.

Proof of irrecoverability
The trader must proof that the requirements for a reduction in the assessment base due to irrecoverability are satisfied. This proof must easily and properly show that specific warranty bonds sought by the trader have been applied for and denied with regard to each contract concluded.

Please note:
The principles contained in the BMF guidance are not limited to the construction industry, but shall also apply to all open cases. Insofar as other principles were assumed in previous administrative guidances, they are no longer sticked to. The irrecoverability also bears consequences for the recipient, who needs to adjust the input tax on the relevant supplies accordingly. If the outstanding payment is made later in the event of irrecoverability, the tax amount and input tax deduction of the recipient need to be re-adjusted for this later accounting period.

Purchase commitments in leasing cases

BMF, guidance of 31 August 2015 – III C 2 – S 7100/07/10031 :005

The BMF guidance relates to the VAT treatment of the purchase commitment in leasing cases. This happens when the lessee concludes a purchase agreement for a leasing item with a third party and subsequently concludes a leasing agreement with the leasing company. When entering into the purchase agreement, the leasing company is obliged to pay the purchase price and will then attain the claim to the transfer ownership of the item under civil law.

Supply relations
With regard to the question who is delivering the leasing item and who is receiving it in the event of purchase commitment, the contractual relations are to be considered at the time of the performance of the supply. The contracting parties may only change up to the delivery affecting the VAT.

Purchase commitment before execution of the supply
The delivery is made by the third party to the leasing company. This also applies in the event of transfer to the lessee. Depending on the income tax attribution of the leasing item, the subsequent leasing relationship leads to a renting service or another supply of goods.

Purchase commitment after execution of the supply
The delivery is made by the third party to the lessee. The supply is not canceled due to the purchase commitment pursuant to 17 (2) no. 3 UStG. The supply of the leasing company to the lessee is the granting of credit in such cases. However, the supply between the third party and the leasing company is not relevant with regard to VAT. A framework agreement regulating the financing between the supplier and the leasing company that applies only internally does usually not affect the VAT supply relationship.

Please note:
The BMF makes it clear that the contractual relationships at the time of the performance of the supply are decisive with regard to the question as to who is making a supply to whom. This is not only relevant for supplies in the leasing industry, but also for supplies in general. Based on this general principle, the Regional Tax Office in Hannover has commented by order of 16 June 1999

(S 7300-912-StH 542, S 7300 442 StO 354) on the treatment of agreement transfers in the case of unfulfilled work delivery contract. According to them, the work deliveries are not executed in terms of VAT before the contractor has given to the principal the right to dispose of the finished work. As a result, the contract relations that exist at the time of the completion and acceptance of the agreed work are decisive for the definition of the supplier and recipient of the work deliveries.

IN BRIEF

Sale of leased items where installments under a lease have not been paid

CJEU, ruling of 2 July 2015 – case C-209/14 – NLB Leasing d.o.o.

In response to a question referred to it by a Slovenian Court, the CJEU assessed the VAT implications of selling a leased item when the purchase installments under the lease had not been paid in full. The novel feature of this case was that the subsequent lessee initially sold the leased goods to the lessor to enable them to be leased back to the lessee (sale and lease back). The CJEU initially held that a leasing service constituted a supply of goods for VAT purposes if the ownership of the property concerned is transferred to the lessee on the expiry of that agreement (cf. Article 14 (2) (b) of the VAT Directive). A supply of goods is also deemed to exist if the essential powers attaching to ownership of that property are enjoyed by the lessee, including, in particular, the rewards and risks incidental to ownership, and the present value of the amount of the lease payments is practically identical to the market value of the property. If the lessor sells the leased goods to a third party and the installments under the lease have not been paid in full, the leasing service and the third-party supply should generally be taxed separately. Nevertheless, the CJEU noted that in theory the two transactions may form a single supply, in which case the principle of fiscal neutrality would preclude double taxation. However, the CJEU gave no indication as to whether the supply in this case was potentially a single supply, or if this was ruled out by the fact that there was more than one recipient (e.g. BFH, ruling of 18 March 2015, XI R 15/11). Moreover, in the event of partial non-payment of installments under the lease, the lessor is not entitled to reduce the taxable amount of the transaction if the lessee is (de facto) no longer liable for the payments, for example because it received a share in the proceeds of sale.

VAT exempt insurance transactions

CJEU, ruling of 16 July 2015 – case C-584/13 – Mapfre SA

The case was referred to the CJEU whose ruling relates to companies that offer a warranty to used car buyers for repairing in the event of a defective vehicle. According to the CJEU, the supplies are VAT exempt insurance transactions (see Art. 135 (1) (a) of the VAT Directive. Generally, the insurance transaction and the supply of the used car are to be considered as individual and independent supplies. Due to special circumstances, both supplies can be interconnected so closely that they may be considered as one single transaction. Subject to examination by the referring court, the subsequent circumstances speak against a single supply: In the present case, the warranty is granted by a company, which is independent from the seller of the vehicle and is not a contracting party of the purchase agreement. Therefore, this warranty cannot be considered a warranty granted by the trader. In addition, the buyer of a used vehicle may buy it without concluding a warranty agreement. The buyer has also the option to conclude a warranty agreement with another company without the seller's intermediation. After all, the company reserves the right under certain circumstances to cancel the warranty agreement, which does not affect the vehicle purchase agreement.

Supply of blood plasma for the production of pharmaceuticals

Preliminary ruling (Germany) Hessian Lower Tax Court, ruling of 24 March 2015, 1 K 1166/13; case C-412/15 – TMD

The supply of human blood is VAT exempt pursuant to Art. 132 (1) (d) of the VAT directive and § 4 no. 17 (a) UStG while input tax deduction is excluded. This applies even in the event of intra-Community supplies or exports (see CJEU ruling of 7 December 2006 – case C-240/05 – Eurodental). The Hessian Lower Tax Court asked the CJEU to confirm that the term "human blood" also includes blood plasma derived from human blood. However, the referring court doubts whether this also applies to blood plasma which is not directly intended for therapeutic purposes. Hence, in the present case, the blood plasma is exclusively intended for the production of pharmaceuticals. However, it is questionable in this case whether the abstract possibility that the plasma delivered is used for treatment purposes instead of the production of pharmaceuticals could justify the VAT exemption. Since in the Member States Austria and United Kingdom the taxation was made conditional on the intended use only without considering the abstract possibility of use, the Lower Tax Court regarded it necessary to clarify this question – among others – for reasons of competition neutrality.

Actions for developing the labor market

BFH, ruling of 22 April 2015, XI R 10/14

The BFH reached the conclusion that contributions grated by the public sector or the Federal Labor Office (Bundesagentur für Arbeit) for actions to develop the labor market

could be a consideration for a supply of the recipient. This depends on the specific content of the supported project, the underlying legal relationships with the paying, supported and participating parties and the bases of such contributions. The BFH challenges the view of the tax authority, which regards the labor-supporting services to be non-taxable, to a large extent, without giving reasons (see section 10.2 (7) UStAE). According to the BFH, based on general principles, the contributions could be also a consideration of third parties for taxable transactions of the contribution recipient. In addition, the VAT exemption needs to be examined in particular with regard to non-profit organizations.

Intra-Community supply of goods for supplies via a warehouse

Lower Tax Court of Lower Saxony, ruling of 18 June 2015, 5 K 335/14, final

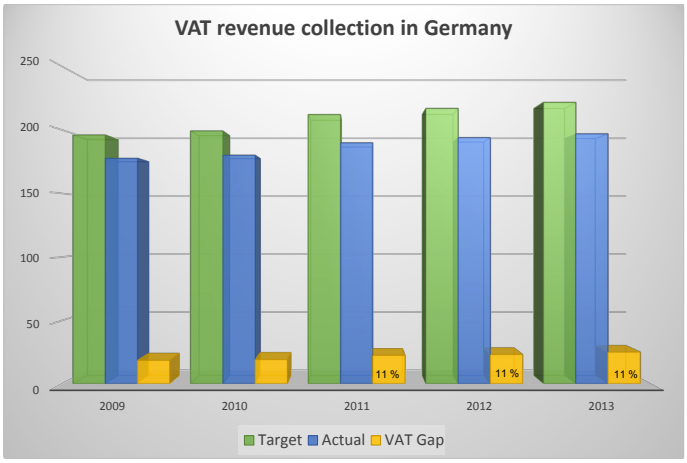
The Lower Tax Court of Lower Saxony ruled that supplies of goods from another EU Member State via a German warehouse are not necessarily subject to German VAT. The prerequisite is the existence of an unconditional purchase agreement with a specific buyer when the goods are delivered to the warehouse. The ruling contradicts the previous view of the tax authorities, which regularly assume that the obligation to register in Germany applies. According to the tax authorities, the trader realizes an intra-Community acquisition of goods pursuant to § 1a (2) sent. 1 UStG through an intra-Community movement of goods. At the time of the removal of the goods from the consignment warehouse by the buyer, the trader also carries out a taxable supply in Germany. On the other hand, according to the view of the Lower Tax Court of Lower Saxony, the VAT treatment depends on the specific design of the agreement concluded with the consignment warehouse. In the present case, the court confirms that there is an intra-Community supply from another Member State of the EU. The tax authority did not file an appeal at the BFH, although the Lower Tax Court had allowed it.

OTHER

Commission calls for improved levying of VAT by the Member States

EU Commission, press release of 4 September 2015

The Member States were not able to improve their levying of VAT during the last few years. The VAT survey data of 2013 show that the difference between the expected VAT receipts and the actually received amount (the so-called "VAT gap") did not improve compared to 2012. The loss of the VAT amount within the EU is estimated to EUR 168 billion in total (Germany's share: approx. 25 billion EUR). With regard to the 26 Member States surveyed, this equals to a loss of 15.2 % (Germany: 11 %). The reasons for this loss are fraud and tax evasion, tax avoidance, insolvency, inability to pay and miscalculations. According to the Commission, the figures indicate that all VAT levying systems within the EU still need to be reformed. The Commission asks all Member States to take the necessary actions in order to fight tax fraud and tax evasion.



EVENTS

The permanent establishment from the perspective of income tax and VAT

Business Breakfast on 13 October 2015 in Frankfurt

Further information and the registration form for the event are available here.

We would also like to point out to the following events with regard to these topics that are organized by publishing house Dr. Otto Schmidt in cooperation with KPMG.

Cologne VAT Congress 2015

3 and 4 December 2015 in Cologne

Topics

- Tax Compliance
- Input tax deduction for contributions in kind and private use of business property as well as shareholding
- Current developments in the Austrian and Swiss VAT
- News from the administration, case-law and practice
- Cross-border chain transactions
- VAT group
- VAT treatment of sales competition

Further information and the registration form for the event are available here.

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International Network of KPMG

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