KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

November 2020

NEWS FROM THE CJEU

CJEU submission on VAT rate on woodchips

BFH, decision of 10 June 2020, V R 6/18

This appeal proceeding before the German Federal Tax Court (BFH) focuses in particular on the dispute regarding whether the supply of woodchips is subject to the reduced or the general rate of VAT.

National law
In § 12 (2) no. 1 German VAT Law (UStG) in conjunction with no. 48 of Annex 2 to the UStG, the German legislator stipulates that the VAT rate for supplies of certain types of wood, inter alia, will be reduced to 7 per cent.

In the case at hand, under national law a reduced VAT rate on the supplies of woodchips is out of the question as wood in the form of chips must be classed as sub-items 4401 21 00 or 4401 22 00 CN and are thus not covered by § 12 (2) no. 1 UStG in conjunction with no. 48 of Annex 2 to the UStG.

Union law
According to Art. 122 of the VAT Directive, Member States can apply a reduced VAT rate to supplies of firewood.

According to Art. 98 (1) of the VAT Directive, Member States can use one or two reduced VAT rates. According to Art. 98 (3) of the VAT Directive, for the application of the reduced VAT rate in line with paragraph 1, Member States can assign precise definitions of the categories concerned to categories of items on the basis of the Combined Nomenclature.

The BFH has submitted to the CJEU the question of whether supplies of different – from the point of view of an average consumer – types of firewood must nonetheless be treated the same.

In this connection, attention must also be paid to the CJEU ruling of 1 October 2020 – case C-331/19 – X – on the question of the application of the reduced VAT rate, normally used for foodstuffs, to products that are sold and used as aphrodisiacs. The VAT Directive contains neither a definition of the term “foodstuff” nor the expression “normally used as a supplement to or replacement for food(stuffs)”.

Content

Among other things, the CJEU rules that there is no reason to apply different VAT rules as these two categories of products have the same nutritional function.

Please note:
The question of whether a reduced VAT rate does not comply with the Combined Nomenclature but rather that in making the assessment, in particular the perspective of an average consumer must also be taken into consideration, could also potentially be raised in other cases. In this respect, it can be argued on the basis of this when VAT rates are questioned by the tax authorities.

Affected companies should independently check their processes for applying the correct VAT rates (if necessary, cluster their product portfolio) and consider applying for (non-binding) tariff information.

Internal company is not a taxable person

CJEU, ruling of 16 September 2020 – case C-312/19 – XT

In its ruling of 16 September 2020 – case C-312/19 – XT – the CJEU concludes that an internal company is not a taxable person due to not enjoying its own legal personality vis-à-vis third parties.

In the case at hand, XT and a business partner concluded an agreement on a joint activity in the form of a partnership with the purpose of collaborating on the construction of a residential property in Lithuania. They agreed to purchase a piece of land, whereby XT alone signed the contract. XT provided 30% of the purchase price and the business partner provided 70%. He transferred this contribution to XT. They decided that XT on its own would be recorded as the owner in the land registry. Subsequently, they agreed to build a real estate complex of five buildings. XT acted as the building contractor and also received planning permission for the construction of the buildings in its name. Similarly, the buildings were also sold in the name of XT.

Please note:
The German tax authorities also generally assume that in the case of an internal company, only the persons involved in the internal company are taxable persons insofar as they act in an entrepreneurial manner (see Section 2.1 (5) UStAE). However, in the context of tax audits, constellations are repeatedly taken up in which it is questionable in what form an external appearance of the persons involved can lead to the construction, which is conceived as an internal company, being qualified as an external company, i.e. as an entrepreneur. In this context, the current judgment can provide information.

NEWS FROM THE BFH

Reduced VAT rate for the organization of techno and house concerts

BFH, ruling of 23 July 2020, V R 17/17

The BFH has ruled that admission fees for techno and house concerts are subject to the reduced VAT rate on the basis of § 12 (2) no. 7 (a) UStG, if the musical performances constitute the actual purpose of the event and the services provided in addition are of such secondary importance that they do not affect the character of the musical performance.

The case
The plaintiff operates the techno club "X". At the weekend she organizes so-called techno and house club nights, at which up to 30 different disc jockeys (DJs) appear. The DJs play music from different recording media and change it with the help of a mixing desk and other technical tools such as computers, filters, effects processors, controllers, and synthesizers. In doing so, new sounds and pieces of music are created. Whether the admission fees are subject to the standard VAT rate (as the tax authorities say) or the reduced VAT rate (as the Lower Tax Court says) is disputed.

Ruling
The tax authorities' appeal was not successful. The Lower Tax Court ruled, without erring in law, that the admission fees for the organization of the club nights were subject to the reduced VAT rate as concerts. Instruments for the musical genres "techno" and "house" include turntables, mixing desks and CD players and similar, with which music is performed as part of a concert, if they are used to perform the piece of music and not just to play a recording.

In the case at hand, the Lower Tax Court determined that from the point of view of the average consumer, the DJs' appearances gave the club nights their particular character. The BFH did not object to this.

Please note:
In this case, the concert constituted the actual purpose of the event. Among other things, in taking an overall view of the relationship between the revenues from admissions (EUR 10 to 14, i.e. approx.

EUR 1.6 million) and catering (approx. EUR 2.7 million) did not matter. The question of what characterizes the service from the point of view of the average consumer in such a combined range of services repeatedly creates difficulties and leads to controversial discussions, especially when different VAT rates apply to the various services. This judgment can provide relevant information in this context.

Tax liability of the recipient of a supply in the case of a VAT grouping

BFH, ruling of 23 July 2020 – V R 32/19

This BFH ruling concerns the question of the tax liability of the recipient of a supply if a subordinate company obtains construction services under civil law. According to the BFH, the controlling enterprise receives the input supply so that, in relation to the reverse charge procedure, the tax group's output transactions are relevant.

The case

In the case at hand a sole trader was the majority shareholder in different corporations. This included a GmbH (limited liability company). The GmbH provided construction services to its affiliate companies in transactions exempt from VAT in line with § 4 no. 9 (a) UStG in the course of development activities. For its part, the GmbH commissioned other traders (third-party traders), where the sole trader was not a partner, to provide construction services. In this respect, the third-party traders and the GmbH assumed that the GmbH was liable for VAT.

Following several external audits, the tax authorities assumed that a VAT group in line with § 2 (2) no. 2 UStG exists between the sole trader as controlling enterprise, and the GmbH and its affiliate companies subsidiaries as subordinate companies.

In addition, the tax authorities identified the sole trader as liable for tax on the construction services received by the GmbH. However the sole trader asserted that the requirements for a tax liability of the recipient of the supply on the basis of the BFH ruling of 22 August 2013 (Federal Tax Gazette II 2014 p. 128) were not fulfilled. Crucially, that the construction services received by the GmbH as a subordinate company were used for VAT-exempt supplies of property in line with § 4 no. 9 (a) UStG.

Ruling

The BFH agreed with the sole trader. In the case of a VAT group, the controlling enterprise and not the subordinate company receives the input supplies, so that for the reverse charge procedure, the output transactions assigned to the controlling enterprise are relevant and not the VAT-exempt internal transactions of the companies in the VAT group. External transactions in this case are VAT-exempt supplies of property that must not be qualified as construction services. Therefore the reverse charge procedure is out of the question.

Please note:

Based on BFH case law, the lack of independence of the subordinate company leads to its activity being attributed to the controlling enterprise. A VAT group leads not only to the non-taxability of so-called internal transactions between the members of the VAT group; rather, the controlling enterprise must also pay tax on the transactions of the subordinate companies as output transactions. In this way, the VAT group connection has an effect not only on the internal relationships. This is the case, for example, in utilizing an input VAT deduction which conforms to the use of input supplies for output transactions of the VAT group.

In connection with the assumption of the tax debtor's function by the controlling company, please refer again to the pending CJEU submissions from V. and XI. Senate of the BFH (see VAT Newsletter July 2020). In particular, it must be examined if assessments that are not yet definitive should be procedurally kept open, to preserve the legal position of companies. If a discrete taxpayer is to be assumed, previous assessments against the controlling enterprise – to the extent permitted procedurally – must be potentially dismissed, while, if applicable, assessment that are already (partially) time-barred may arise for the tax group as a discrete taxpayer.

NEWS FROM THE BMF

VAT treatment of vouchers

BMF, guidance of 2 November 2020 – III C 2 – S 7100/19/10001 :002

In its guidance of 2 November 2020 the German Ministry of Finance issued its opinion on the VAT treatment of vouchers in accordance with the Voucher Directive and § 3 (13) to (15) UStG, and amended the UStAE accordingly.

Previous treatment
In the case of vouchers, previously VAT law differentiated between vouchers for value and vouchers for goods or items. While vouchers for value could be exchanged at the issuing retailer for any desired goods or services up to a certain named value, vouchers for goods or items referred to specifically identified goods or services. The issuing of vouchers for value was treated as merely an exchange of payment method and did not itself constitute a supply for VAT purposes. The VAT first arises when the voucher for value is redeemed and thus at the time of the execution of the specific transaction.

In the case of vouchers for goods or items, the purchase of the supply identified in the voucher already takes place when the voucher is issued. Therefore, the amount paid upon the purchase of the voucher for goods, constitutes an advance payment for the supply identified, which is subject to advance payment VAT in line with § 13 (1) no. 1(a) sent. 4 UStG.

Treatment since 1 January 2019
The law of 11 April 2018 on the prevention of VAT deficits in the case of internet trading of goods and to change additional tax provisions implemented the Voucher Directive in national law with effect from 1 January 2019.

The crucial defining characteristic lies in determining if the voucher leads to the existence of an obligation to accept it in consideration – in full or partially instead of a regular payment – of a supply of goods or the provision of other services. Like the Voucher Directive, the law allows by definition for single-purpose and multi-purpose vouchers. Those vouchers which only entitle the holder to a price reduction or refund but do not confer the right to receive such items or services are, in particular, not affected by the new rules. Similarly, stamps, travel tickets, admission tickets for cinemas and museums and comparable instruments do not fall within the scope of § 3 (14) and (15) UStG, as in these cases claims beyond the mere obligation to accept exist and they serve primarily as proof of purchase.

Change to the UStAE
The new Section 3.17 UStAE contains, inter alia, the following provisions:

- Definition and distinction of vouchers compared to other instruments
- Single-purpose vouchers and multi-use vouchers
- Vouchers in distribution chains (trading as an agent and on one's own behalf)
- Determination of the place of supply in the case of vouchers
- Basis of assessment in the case of vouchers
- Non-redemption of vouchers
- Remonetization of vouchers
- Billing in the case of vouchers

Application in terms of time
The principles of the BMF guidance apply for the first time to vouchers issued after 31 December 2018. No objection – including for the purposes of input VAT deductions – will be raised if vouchers issued after 1 January 2019 and before 2 February 2021 are not handled in accordance with the provisions of the BMF guidance by the parties.

Please note:
Companies affected should amend their VAT processes relating to vouchers appropriately by 2 February 2021 at the latest. This concerns both checking incoming invoices and also the determination of tax and invoice creation on the outgoing side.

Temporary reduction of VAT rates from 1 July 2020

BMF, guidance of 4 November 2020 – III C 2 – S 7030/20/10009 :016

Due to the Second Law to Implement Tax Relief Measures to Overcome the Corona Crisis (Second Corona Tax Relief Law) a general VAT rate of 16 per cent and a reduced VAT rate of 5 per cent apply for the period from 1 July 2020 to 31 December 2020. In its guidance of 30 June 2020 (see VAT Newsletter July 2020) the BMF already stated its position on numerous questions relating to the application of these rates and to some extent also created simplifications for practical use.

In its guidance of 4 November 2020, the BMF has now issued the following additional notes as a result of numerous questions from practice:

- Prepayment and advance payment invoices
- Issuance of a voucher for an item for which there is a binding order as well as restaurant vouchers
- Refund of deposit amounts
- Granting of annual bonuses
- Manufacturer discounts in the case of deliveries of pharmaceutical products
- Taxation of electricity, gas, water, supplies of cooling

and heating, as well as wastewater disposal
- Taxation of transport of people by rail, in scheduled services with motorized vehicles and public service trolley buses
- Special and compensation payments in the case of rental or lease agreements
- VAT rate to be applied in the case of the generation of an overall margin in line with § 25 (3) sent. 3 UStG
- VAT margin scheme in accordance with § 25a (4) UStG
- Newspaper and magazine subscriptions
- Time of supply in the case of insolvency administrators
- Scaffolding services
- Ongoing services
- Taxation of transactions in accommodation services

You can find the BMF guidance with the specific notes here.

Zero rated cross-border transports of goods relating to import and export items

BMF, guidance of 14 October 2020 – III C 3 – S 7156/19/10002 :002

According to § 4 no. 3 (a) UStG, cross-border transports of goods relating to import and export items are zero-rated under the requirements named therein. This provision is based on Art. 146 (1) (e) of the VAT Directive.

The way the tax authorities have handled this previously does not conform to the CJEU ruling of 29 June 2017 – case C-288/16 - L.C. (see VAT Newsletter July 2017). Therefore, the BMF guidance of 6 February 2020 incorporated the following restriction into Section 4.3.2 (4) UStAE: "The zero rating will in principle only be considered for the supply of the main freight carrier but not for the supply of the sub-carrier, as they do not provide the transportation services directly to the sender or the recipient but rather to the main freight carrier". Section 4.3. (8) UStAE was also amended in this regard. The principles of the BMF guidance must be applied in all pending cases.

However, for transactions carried out before 1 January 2022 (§ 4 no. 3 (a) UStG) no objection will be raised if the previously applicable legal position on Section 4.3.2 (4) UStAE is used. The original regulation on non-objections has therefore been extended again.

Qualified Confirmation of foreign VAT identification numbers on 1 January 2021

BMF, guidance of 28 October 2020 – III C 5 – S 7427-d/19/10001 :001

With its guidance of 28 October 2020, the BMF announced that the way in which qualified VAT identification number checks can be officially confirmed will be changed from 1 January 2021. Section 18e.1 UStAE, which regulates the verification of the qualified confirmation of the VAT identification number ("VAT ID number"), will be adjusted accordingly on 1 January 2020.

According to Section 18e.1 (2) sent. 1 and 2 UStAE, traders – as until now – can submit simple and qualified confirmation requests to the Federal Central Tax Office (BZSt); in the case of requests via the internet, it is possible to not only carry out an inquiry relating to one VAT identification number but also simultaneous inquiries on several VAT identification numbers.

The BMF guidance of 28 October 2020 formulated the sentences 3 to 5 as follows:

"In the case of queries on individual VAT identification numbers, proof of qualified confirmation requests carried out can be provided by means of storing the print-out or putting the findings transmitted by the BZSt into the company's system using a generally standard format or a screenshot. In carrying out simultaneous inquiries on several VAT identification numbers using the portal offered by the BZSt for this purpose, the electronic answer transmitted by the BZSt can be integrated as a dataset directly into the company's system and evaluated. In these cases the proof of a qualified inquiry carried out for a VAT identification number must be provided using the dataset received from the BZSt."

In addition, Section 18e.1 (5) UStAE was formulated as follows:

"If an inquiry is carried out by phone, the BZSt will, as a rule, provide the findings of the confirmation request in writing."

The principle of this BMF guidance will first apply to confirmation requests submitted to the BZSt after 31 December 2020. When using the interface in the context of mass queries, the data record received from the BZSt must be saved. We therefore recommend checking and adapting the current process for validating the VAT identification number.

IN BRIEF

Introduction of SAP S/4HANA – an opportunity for the tax department

Optimize processes from top to bottom within the SAP system from a tax point of view and strengthen Tax Compliance: You can find information on this in our flyer.

EVENTS

Brexit at the turn of the year
Webcast on 1 December 2020

The aim of the webcast is to discuss the current state of affairs with the participants with regard to the most important issues relating to the exit of the United Kingdom (UK). With a view to the topics of customs formalities, supply chain adjustments, origins of goods and preferences, sales tax effects in the event of changed issues / value chains and service flows, need for action from a tax compliance point of view, the participants can choose their own question trade flows with the UK for the last time before the final UK exit comes into effect and prepare for 1 January 2021.

You find the registration form for the event here.

We would like to draw your attention to the following VAT-themed event from Verlag Dr. Otto Schmidt KG in cooperation with KPMG.

This year the event will take place as a hybrid event. Participants will be able to livestream the Cologne VAT Congress.

Cologne VAT Congress 2020

on 3 and 4 December in Cologne

Topics

- New legislation 2020/2021 at a German and EU level
- VAT and bankruptcy
- Retroactive correction of invoices
- Developments arising from the German Annual Tax Act 2020
- Current BFH and CJEU case law, and selected BMF guidances

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

Practical questions and information on reducing the tax rate on 1 January 2021
Webcast on 8 December 2020

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

Contacts

KPMG AG
Wirtschaftsprüfungsgesellschaft

Head of Indirect Tax Services
Dr. Stefan Böhler
Stuttgart
T +49 711 9060-41184
sboehler@kpmg.com

Berlin
Martin Schmitz
T + 49 30 2068-4461
martinschmitz@kpmg.com

Duesseldorf
Peter Rauß
T +49 211 475-7363
prauss@kpmg.com

Frankfurt/Main
Prof. Dr. Gerhard Janott
T +49 69 9587-3330
gjanott@kpmg.com

Wendy Rodewald
T +49 69 9587-3011
wrodewald@kpmg.com

Nancy Schanda
T +49 69 9587-2330
nschanda@kpmg.com

Dr. Karsten Schuck
T +49 69 9587-2819
kschuck@kpmg.com

Hamburg
Gregor Dzieyk
T +49 40 32015-5843
gdzieyk@kpmg.com

Gabriel Kurt*
T +49 40 32015-4030
gkurt@kpmg.com

Antje Müller
T +49 40 32015-5792
amueller@kpmg.com

Cologne
Peter Schalk
T +49 221 2073-1844
pschalk@kpmg.com

Leipzig
Christian Wotjak
T +49 341-5660-701
cwotjak@kpmg.com

Munich
Dr. Erik Birkedal
T +49 89 9282-1470
ebirkedal@kpmg.com

Kathrin Feil
T +49 89 9282-1555
kfeil@kpmg.com

Claudia Hillek
T +49 89 9282-1528
chillek@kpmg.com

Mario Urso*
T +49 89 9282-1998
murso@kpmg.com

Nuremberg
Dr. Oliver Buttenhauser
T +49 911 5973-3176
obuttenhauser@kpmg.com

Stuttgart
Dr. Stefan Böhler
T +49 711 9060-41184
sboehler@kpmg.com

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.

Our homepage / LinkedIn

You can also get up-to-date information via our homepage and our LinkedIn account Indirect Tax Services.

* Trade & Customs

** Please note that KPMG International does not provide any client services.

Impressum

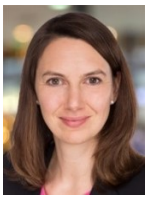
Issuer

KPMG AG
Wirtschaftsprüfungsgesellschaft
THE SQUAIRE, Am Flughafen
60549 Frankfurt/Main

Editor

Kathrin Feil (V.i.S.d.P.)
T +49 89 9282-1555
kfeil@kpmg.com

Christoph Jünger
T + 49 69 9587-2036
cjuenger@kpmg.com



VAT Newsletter and Trade & Customs News – Free Subscription

To subscribe, please register here (VAT Newsletter) and there (Trade & Customs News).

*** Responsible according to German Law (§ 7 (2) Berliner PresseG)

www.kpmg.de

www.kpmg.de/socialmedia