KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

August and September 2021

NEWS FROM THE BVERFG

From 2014, 6 per cent annual interest on tax deficiencies and tax refunds unconstitutional

BVerfG, resolution of 8 July 2021, 1 ref. 2237/14, 1 ref. 2422/17

The German Federal Constitutional Court (BVerfG) has ruled on the constitutionality of levying interest on tax deficiencies and tax refunds.

Resolution of the Federal Constitutional Court
In its resolution of 8 July 2021, the Federal Constitutional Court ruled that the levying of interest on tax deficiencies and tax refunds in § 233a German Tax Code (AO) is unconstitutional, to the extent that the calculation of interest for interest periods (not the assessment period) from 1 January 2014 is done on the basis of an interest rate of 0.5 per cent monthly. The reason is that over time this interest rate has shown itself to be evidently unrealistic.

However, the previous law may continue to be used for interest periods up to and including 2018. For interest periods from 2019, on the other hand, the provisions are not applicable. The legislature is required to draw up a new regulation, compatible with the constitution, by 31 July 2022 that will then be retroactively applicable for interest periods from 2019.

Background: Legal provision of § 233a AO
§ 233a AO regulates the accrual of interest on tax deficiencies and tax refunds. The interest relates to the period between the tax arising and being assessed (principle of full accrual of interest). The interest accrual begins after a grace period of generally 15 months. In accordance with § 238 (1) AO, interest is set at 0.5 per cent for each full month of the interest accrual period interest, and is consequently 6 per cent annually. Interest is only realized on the exhaustive list of taxes set out in § 233a AO: income tax, corporation tax, capital tax, VAT or trade tax. The Federal Constitutional Court's resolution was issued in relation to corporation tax but also applies for the other types of tax listed.

Tax authorities' approach
In the German Ministry of Finance (BMF) guidance of 2 May 2019, the tax authorities

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determined that all first-time and, if applicable, amended or corrected assessments of interest should provisionally be made with reference to the constitutionality of the interest rate. Even before that the tax authorities granted, upon application, a suspension of execution for interest periods from 1 April 2015 (see in particular BMF guidance of 14 June 2018).

By all accounts, following the Federal Constitutional Court's resolution the BMF has agreed the following procedure with the highest tax authorities in the federal states (for details, see the press release of the Lower Saxony State Tax Office dated 17 September 2021, which refers to a BMF guidance from the same day, which, however, was not yet published at the time of going to press):

For interest periods up to 31 December 2018 a final assessment shall be issued. The suspension of execution shall be ended. In this respect, appeals shall be rejected as unfounded.

The following should apply to interest periods from January 1, 2019:

- New notices to be issued, which would be accompanied by the initial setting of additional payment or reimbursement interest, are set provisionally "to zero" with regard to this interest from the outset.
- Notices that were issued prior to the decision of the BVerfG and that are not yet final will in principle still not remain final as long as they are not "touched" by any of the parties involved. Thus, the interest rates contained in the notices are still "in the world", but with the status "provisional".
- In the case of notices that were issued before the decision of the BVerfG and which (must) be changed now - for whatever reason - it depends on whether the change results in (further) additional payment for the taxpayer or whether something is to be reimbursed to him: In the event of a (further) additional payment, the tax office will temporarily set the (further) interest in this regard - as with the new assessments (see above) - "to zero". In the event of a reimbursement (due to a subsequently reduced amount of additional payment), the tax office will also reimburse the excessively paid interest. The amount of change (upwards or downwards) is therefore decisive. Or to put it the other way round: the interest in relation to the part that has not changed compared to the previous fixing will remain unaffected for the time being.

Otherwise assessments for interest on arrears referring to interest periods from 1 January 2019 have to be kept open.

Refund interest from the interest period 2019 – protection of legitimate expectation in accordance with § 176 AO

In the case of refund interest relating to the interest periods from 2019, the tax authorities must examine if, and to what extent, a change to an assessment of interest that is to the disadvantage of the taxpayer, conflicts with the protection of legitimate expectation (§ 176 (1) sent. 1 no. 1 AO). According to this principle, in the case of the annulment or amendment of a tax or interest assessment notice to the disadvantage of the taxpayer, the fact that the Federal Constitutional Court has determined the law to be invalid may not be taken into consideration. The protection of legitimate expectation also fundamentally applies to preliminary tax assessments.

Please note:
The BVerfG only had to review § 233a AO from the point of view of unconstitutionality, however not according to Union law on harmonized VAT in the EU.

It can be derived from the decisions of the CJEU in the case of Fatorie (CJEU of 6 February 2014, C-424/12), Senatex (CJEU of 15 September 2016, C-518/14), Farkas (CJEU of 26 April 2017, C-564/15) and EN.SA (CJEU of 8 May 2019, C-712/17) and the overriding considerations of Union law that in cases in which there is a rigid accrual of interest has come, regardless of possible negligence on the part of the taxpayer and regardless of whether a tax damage has actually occurred, a determination of interest according to § 233a AO could be contrary to Union law. In such cases, it should be examined whether legal remedies should be obtained or lodged or whether applications for remedial action should be made.

Similarly, the BFH ruled with judgment of 27 September 2018, VR 32/16, that an equity exemption from VAT (and thus also the avoidance of the interest consequences of § 233a AO) can be justified if two entrepreneurs start from the civil law agreements due to a common error about the correct tax assessment before the highest court clarification of a dispute without intent to abuse

or evade each other issue invoices with incorrect tax and due to the taxation of the wrongly separately reported tax amounts in an overall view, there is no risk to tax revenue.

However, if an interest charge is causally due to the fault of the taxpayer and if the tax authorities also suffered real tax damage (even if this was only temporary), the chances of taking legal action against such an assessment using the argument that it is contrary to the Union law are assessed as extremely low .

NEWS FROM THE BFH

CJEU submission on operating equipment

BFH, resolution of 26 May 2021, V R 22/20

The German Federal Tax Court (BFH) has submitted the following question to the CJEU for a preliminary ruling:

Does the tax liability for letting permanently installed equipment and machinery (operating equipment) apply

- only to the isolated (standalone) letting of this type of equipment and machinery, or also
- to the letting (lease) of such equipment that, as an ancillary service to the lease of a building between the same parties, is exempt from VAT?

The case
In the case under dispute a trader leased stable buildings for raising turkeys with permanently installed equipment and machinery. These were elements of equipment specially agreed for the contractual use as a turkey-raising barn. The equipment was used for feeding in the turkey-raising operation in order grow the animals to slaughter weight in the time allowed using an industrial feed screw. Heating and ventilation systems served to secure the required climate in the barn. Special lighting systems ensured uniform illumination to avoid harmful shady spots.

The trader assumed that in leasing the stable buildings for raising turkeys with the permanently installed equipment and machinery, their supply as a whole exempt was from VAT. To this end, one uniform fee existed that was not, according to the contractual arrangements, separated into the transfer of the barn on the one hand and the equipment and machinery on the other. Conversely, the tax authorities held the view that the standard lease fee negotiated reflected the costs arising for the trader at 20% for the equipment and was to that extent subject to VAT. An appeal was not successful

Judicial proceedings
The Lower Tax Court found in favor of the legal action brought against this. In their view, an overall supply exempt from VAT existed. It is true that the separate leasing of such equipment and machinery would be subject to VAT. However if, as in the case at hand, the transfer of such equipment and machinery involves a supply ancillary to the transfer of a barn, the lease is also exempt from VAT to the extent that it relates to the transfer of this equipment and machinery. With reference to the CJEU ruling of 16 April 2015 – case C-42/14 – Wojskowa Agencja Mieszkaniowa w Warszawie – the Lower Tax Court assumed that an overall supply exists if, from an economic point of view, a building for rent, together with accompanying supplies, objectively forms a whole. In addition, the Lower Tax Court also noted the BFH has ruled that in the case of a transfer of the fixtures it was a supply ancillary to the VAT-exempt leasing of a retirement home. Therefore the transfer of equipment and machinery is a supply ancillary to the VAT-exempt leasing. Specially agreed elements of equipment exist that served only to allow the contractually agreed usage of the turkey barn under optimum conditions. The tax authorities opposed this with their appeal.

The BFH has doubts as to how, taking Union law into account, the case under dispute should be decided and has submitted the issue to the CJEU for a preliminary ruling.

Please note:
The submission concerns the question of whether the leasing of operating equipment is VAT exempt in addition to a VAT exempt rental of real estate as an ancillary service to the rental of real estate, or whether it constitutes an independent taxable rental. In practice, the distinction between independent services or main and secondary services is often difficult and particularly relevant if, as in the case at hand, the assessment results in different VAT consequences. It is therefore to be hoped that the decision will provide further practical indications as to which criteria are decisive for the VAT classification.

VAT exemption for the operation of refugee accommodation and homeless shelters

BFH, ruling of 24 March 2021, V R 1/19

The BFH has ruled that the operation of refugee accommodation for states and municipalities by a GmbH (limited liability company) is exempt from VAT; the same applies for the operation of a municipal homeless shelter.

The case

In the case under dispute a GmbH administers a large number of accommodation facilities for refugees, emigrants and homeless people. This includes communal accommodation for refugees funded by the municipality, reception centers in different federal states, and a municipal homeless shelter. Generally the GmbH takes responsibility in particular for equipping the individual accommodation facilities, cleaning and staffing them as well as for social assistance for the people housed there. The tax authority treated the GmbH's transactions from the operation of the refugee accommodation and homeless shelters as subject to VAT. The Lower Tax Court dismissed the case.

Ruling

The appeal submitted against this was upheld by the BFH. The plaintiff was able to invoke an exemption from VAT in accordance with Art. 132 (1) (g) of the VAT Directive. According to this provision, supplies of services closely linked to welfare and social security work, inter alia, are exempt from VAT if they are effected by bodies recognized by the Member State in question as being devoted to social wellbeing.

According to the BFH, this was the case. The GmbH is in essence recognized as a body that is devoted to social wellbeing, especially as the assumption of the operation of refugee accommodation by private third parties is regulated by specific provisions in different federal states. In this respect it is irrelevant that the GmbH did not provide its services directly to the refugees and homeless people but rather to those funding the accommodation (states and municipalities). Furthermore, the operation of refugee accommodation facilities and homeless shelters is a supply of services closely linked with welfare or social security, which are also vital for the housing of refugees and homeless people, as those who are taken in are in need of economic help. They therefore belong to the admitted category of people being supported. Conversely, the asylum law function of refugee accommodation in particular, and the homeless shelters' pursued goal of danger prevention are immaterial for the exemption from VAT.

Please note:

The taxpayer has the right to choose whether to treat his transactions as taxable according to national law or to claim VAT exemption for transactions by directly referring to Union law, whichever is more favorable for him.

Besides the operation of the refugee accommodation facilities and homeless shelters, the GmbH also carries out transactions such as the transfer of shared accommodation, transactions in connection with a deportation detention center, and the operation of accommodations for ethnic German immigrants. In this regard, as the findings from the Lower Tax Court were inadequate, the BFH was not able to rule conclusively on the action and referred the case back to the Lower Tax Court.

NEWS FROM THE BMF

Stating the time or period of supply in an invoice

BMF, guidance of 9 September 2021 – III C 2 - S 7280-a/19/10004 :001

In its ruling of 1 March 2018, V R 18/17, the BMF ruled that, taking Union law guidelines into consideration, stating the calendar month as the time of supply can be the date of issue of the invoice if, it can be reasonably assumed for the individual case that the supply was effected in the month in which the invoice was issued.

According to the BMF there must be no doubt that the supply was carried out in the month in which the invoice was issued. Such doubts arise especially if the concurrence of the invoice date and the date of supply is not standard in the industry, if the invoice issuer does not issue timely invoices on a regular basis or if, in the case of the specific supply, there is any other doubt about the concurrence of the dates.

Furthermore, the BFH ruling of 15 October 2019, V R 29/19 contains statements on invoices of a person that, acting on the wishes of their backers, fakes a business run in their own name. Accordingly, even taking the "straw man case law" into consideration, this person does not become the supplier solely by issuing the invoice under their name, if they do not authorize the contracts concluded by the

backers acting as representatives with no power of agency (§ 179 German Civil Code), and if the actions of the backers can also not be attributed to that person under the principles of an ostensible or estoppel authority. Under these circumstances it is really not material whether the person appearing externally was a straw man and if in this case the straw man business was only concluded for appearances sake.

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

Please note:
This is to be distinguished from the cases in which the invoice not only contains an issue date, but also a date of supply, which is incorrect. In this case, the invoice issuer has the option of correcting the invoice, retrospectively from the date of issue of the invoice. In this way, additional payment interest according to § 233a AO can be avoided in the case of customers who are entitled to input tax deduction.

Invoicing by means of self-billing for unfulfilled supplies

BMF, guidance of 19 August 2021 – III C 2 - S 7283/19/10001 :002

According to § 14 (2) sent. 2 of the German Tax Law (UStG), an invoice can also be issued by the recipient of a supply to the extent that this has been agreed in advance (self-billing).

In its ruling of 27 November 2019, V R 23/19 (V R 62/17), the BFH ruled that a self-billed invoice, which is not issued for a trader's supply, is not equivalent to an invoice and cannot constitute a VAT liability in line with § 14c (2) UStG (unjustified stating of VAT). According to the BMF, no input VAT deduction is possible for this self-billed invoice as the supply billed has not been carried out by a trader.

If, conversely, a self-billed invoice is issued between two companies regarding a supply that was not carried out, this is a form of billing document equivalent to an invoice and can constitute a VAT liability in accordance with § 14c (2) UStG. An input VAT deduction for such a self-billed invoice is not possible.

Due to an effective objection on the part of the recipient of the self-billed invoice against the self-billed invoice issued to them, from the taxable period of the effect of the objection they no longer have any billing document. The self-biller thus no longer has any billing document and thus it is no longer possible to deduct any input VAT.

However, an effective objection to self-billing does not itself lead to the tax risk being eliminated in accordance with § 14c (2) UStG due to the different billing document concepts under § 14 und § 14c UStG. In this case too, the recipient of the self-billing document continues to owe the VAT shown in line with § 14c (2) UStG, until the tax risk has been eliminated.

Finally, the BMF mentions a measure taken on the grounds of equity for personal reasons of equity in line with §§ 163 und 227 AO, which leads to the self-biller no longer retaining the VAT deducted as input VAT in accordance with § 14c (2) UStG. According to the BMF, this does not lead to the elimination of the risk to tax receipts in accordance with § 14c (2) sent. 4 UStG.

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

Please note:
The aforementioned BFH ruling of 27 November 2019, V R 23/19 (V R 62/17), was issued for the settlement of services by a member of the Supervisory Board by means of a self-billed invoice. According to the BFH, contrary to previous jurisprudence, the member of a supervisory board does not act as an entrepreneur if he does not bear any remuneration risk due to a non-variable fixed remuneration. However, an unauthorized showing of VAT (Section 14c (2) UStG) cannot be used in the case of a self-billed invoice.

The administration took a position on the entrepreneurial status of supervisory board members with a guidance from the German Ministry of Finance of 8 July 2021 (see VAT newsletter July 2021).

Determination of the place of supply of miscellaneous service in accordance with § 3a (3) no. 5 UStG – provision on non-objection for transactions before 1 January 2022

BMF, guidance of 19 August 2021 – III C 2 - S 7117-b/20/10002 :002

According to Art. 53 of the VAT Directive the place of the supply of services to a taxpayer relating to the right of entry and associated supplies of services for events in the areas of culture, the arts, sports, science, teaching, entertainment, or similar events such as trade fairs and exhibitions, is the place at which these events actually take place.

The provision on location in Article 53 of the VAT Directive was implemented in § 3a (3) no. 5 UStG. According to Section 3a.6 (13) sent. 3 no. 3 VAT Application Decree (UStAE), the application of the provision on location in the case of events in the area of education and science requires that the event is generally accessible to the public.

This prerequisite is, according to the CJEU ruling of 13 March 2019 – case C-647/17 – Srf konsulterna – not a requirement for the application of the provision on location. Therefore the BMF guidance of 9 June 2021 amended the UStAE accordingly (see VAT Newsletter June 2021).

For supplies carried out before 1 January 2022, that are not generally accessible to the public, no objection will be raised if those involved apply Section 3a.6 (13) sent. 3 no. 3 and example 2 of the VAT Application Decree in the version valid until 8 June 2021, concurrently with the provision on location:

Example 2: The internationally active auditing company W, domiciled in Berlin, commissions the seminar provider S, domiciled in Salzburg (Austria) to hold an in-house seminar in Salzburg on current VAT law in the European Union. Only employees of W can participate in the seminar. The seminar is held in January 2011. 20 members of W's staff attend. As the seminar is not generally accessible to the public, the transaction does not fall under the admission entitlements in accordance § 3a (3) no. 5 UStG. The place of supply, according to § 3a (2) sent. 1 UStG, is the place where W is domiciled in Berlin.

In addition, the BMF guidance of 9 June 2021 inserted into Section 3a.7a UStAE the criterion that the physical presence of the recipient of the supply at the event is a necessity. Online participation will therefore be removed from the scope of application of § 3a (3) no. 5 UStG. This provision remains applicable in all open cases.

Please note:
For event services in the B2B area carried out before 1 January 2022, which are not generally accessible to the public, the tax authorities do not object if the parties involved accept as the place of supply the place where the customer runs its business (recipient location principle). The events include, for example, in-house seminars and members' meetings. Alternatively, however, the event location can also be used as the place of supply in these cases. From 1 January 2022, the event location principle will apply.

IN BRIEF

Draft of a BMF guidance on consignment stock

In August 2021, the BMF sent the associations the draft of a BMF guidance on the introduction of the consignment warehouse regulation according to § 6b UStG with the opportunity to comment by 30 August 2021 at the latest.

We will probably inform you about the final BMF guidance in the next edition of the VAT newsletter.

Questionnaire on the VAT registration of companies resident abroad

BMF, guidance of 24 August 2021 – III C 3 - S 7532/19/1002 :003

The BMF guidance introduces new sample forms for the VAT registration of companies resident abroad from the taxable period 2021. Thus, there is a questionnaire as well as insertions for corporations and companies, institutions, trading in goods over the internet, carriage of passengers, and shareholders. In addition there are also aids for filling out the questionnaire.

The sample forms will also be made available in English and French and are equally valid.

Liability for VAT when trading goods on the internet; sample forms USt 1 TK and USt 1 TL

BMF, guidance of 28 July 2021 – III C 5 – S 7420/19/10002 :014

According to § 25e (1) UStG in the version valid from 1 July 2021, the operator of an electronic interface is liable for unpaid VAT on a supply of items that does not fall under § 3 (3a) UStG, if they have assisted the supply of these items by means of an electronic interface.

Sample form USt 1 TK
According to § 25e (2) UStG the liability does not generally arise if the supplying trader has a valid VAT identification number at the time of the supply.

If the local competent tax authority has knowledge that a trader who carries out transactions subject to VAT using an electronic interface does not fulfill their VAT obligations, and other measures

taken by that trader carry no guarantee of success, in accordance with § 25e (4) UStG, the tax authority is entitled to inform the operator of the electronic interface concerned of this.

The BMF guidance of 28 July 2021 provided notification of the sample form USt 1 TK for corresponding announcements to the operators of electronic interfaces.

Sample form USt 1 TL
According to § 25e (3) UStG the operator of an electronic interface is liable for the VAT arising and not paid on supplies of goods that were assisted by the electronic interface, if the registration of the supplier as a trader has not occurred and the operator has met the applicable obligations relating to record keeping and retention in accordance with § 22f (2) UStG.

This does not apply in cases in which it can be proven that the operator of an electronic interface had knowledge of the type, quantity or amount of the transactions, or should have – on the basis of exercising due commercial care – been aware that the registration as a non-trader was unjustified.

Please note:
According to the BMF guidance of 20 April 2021 – III C 5 - S 7420/19/10002: 013 – only the activity of the supplier on the own electronic interface is to be used for the delimitation of whether it is an entrepreneurial activity authoritative.

A clear indication that the registration on an electronic interface as a non-entrepreneur was wrong, according to the BMF letter of 20 April 2021, if the turnover achieved by means of the electronic interface reaches an amount of 22,000 euros within a calendar year.

If the competent tax authority is in possession of evidence that the activity in the abovementioned cases is occurring in the course of a business, it is entitled to inform the operator of the electronic interface this in accordance with § 25e (4) UStG.

The BMF guidance of 28 July 2021 provided notification of the sample form USt 1 TL for corresponding announcements to the operators of electronic interfaces.

EVENTS

Webcast Live: Customs, VAT and transfer pricing

Event on 6 October 2021

Webcast Live: Quick Fixes 2020 – Status quo & progress reports

Event on 28 October 2021

Webcast Live: Third-party personnel deployed in a legally secure manner? Recognize and avoid risk

Event on 29 October 2021

You will shortly be able to find additional information on the events and registration forms here.

Cologne VAT Congress 2021

on 2 and 3 December 2021 in Cologne

Topics

- Examples from practice of the new legal provisions on the Digital Package since 1 July 2021
- News on input VAT deductions
- News on Holdings
- Current case law
- Intra-Community supplies of goods and intra-Community purchases under the law since 1 January 2020

You will find further information and the registration form for the Congress here.

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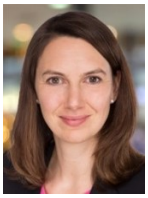

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