

# VAT Newsletter

## Hot topics and issues in indirect taxation

October 2021

### NEWS FROM THE CJEU

#### Standard rate of VAT for theme parks

*CJEU, ruling of 9 September 2021 – case C-406/20 – Phantasialand*

This ruling from the Court of Justice of the European Union (CJEU) relates to the question regarding to what extent the national legislature is free to introduce reduced VAT rates.

#### The case

Phantasialand operates a theme park in Germany. By paying an entrance fee, visitors acquire the right to use the facilities in the park. Phantasialand applied, unsuccessfully, to the tax authorities to have the admission for its theme park taxed at the reduced VAT rate in accordance with § 12 (2) no. 7 (d) German VAT Law (UStG). Subsequently Phantasialand brought a legal action to Cologne Lower Tax Court. In Phantasialand's view, if national law regulations provide for a reduced VAT rate to be used in relation to the transactions of a static fairground operator on the occasion of seasonal and temporary fairs, while the transactions of static fairground operators at issue in the main

proceedings are subject to the standard rate of VAT, this breaches the principle of fiscal neutrality.

The tax authorities contested this point of view on the basis of the German Federal Tax Court (BFH) ruling of 2 August 2018, in which the Court ruled that the different VAT treatment of supplies by fairground operators that operate a travel trade and the transactions of a comparable static amusement park as discussed in the main proceedings does not breach the principle of fiscal neutrality. The Cologne Lower Tax Court has doubts regarding this interpretation and submitted the issue to the CJEU for a preliminary ruling.

#### Ruling

The CJEU concludes that a Member State, according to Art. 98 in conjunction with Annex III no. 7 of the VAT Directive, can in general apply a reduced VAT rate for the supplies of a static fairground operator while also using the standard rate for the supplies of a static fairground operating company in the form of theme parks.

If a Member State decides to apply the reduced VAT rate

## Content

### News from the CJEU

[Standard rate of VAT for theme parks](#)

[VAT treatment on manufacturer discounts granted voluntarily](#)

### News from the BMF

[Cautions in the case of copyright infringement and unfair competition](#)

[Use of taxability of the recipient of the supply according to § 13b UStG in the case of VAT groups](#)

[Zero-rating for cross-border carriage of goods relating to items for import and export](#)

[Guarantee commitment from a motor vehicle dealer as an insurance benefit](#)

### In brief

[VAT exemption for universal mail services](#)

[Publisher's share of statutory remuneration claims and copyright rights of use](#)

### Preview

[Draft of BMF guidance on transactions in the fuel card business](#)

[Draft of BMF guidance on the VAT rate for digital media](#)

### Events

selectively to certain of the supplies of services set out in Annex III of the VAT Directive, it must nonetheless respect the principle of fiscal neutrality. This principle does not allow similar goods and services that are in competition with each other to be treated differently with regard to VAT. In answering the question of whether goods or services are similar, the view of the average consumer must first and foremost provide the foundation for the answer.

Cologne Lower Tax Court must thus examine whether the goods or services in question are interchangeable from the point of view of the average consumer. Namely, in this case the application of the different VAT rates could influence the consumer's choice, which would suggest a violation of the principle of fiscal neutrality. For this assessment it could, among other things, be significant that in the case at hand the supplies are generally available all the time, while others are only available for several days or weeks in the year. For a consumer who has the choice between visiting a theme park or a fair, the fact that the latter only takes place during a limited period of time could in fact prove to be a pivotal factor.

**Please note:**

The CJEU deals with the question of whether a national court is entitled to involve an empirical expert opinion on the view of the average consumer, or whether this point of view only represents a “theoretical perspective” that is not amenable to evidence. The CJEU holds the view that a court's own expertise renders it capable in general of determining the view of an average consumer. Union Law does not, however, forbid a

national court that is having particular difficulties in this assessment from getting an expert opinion in accordance with the national law.

**VAT treatment on manufacturer discounts granted voluntarily**

*CJEU, ruling of 6 October 2021 – C-717/19 – Boehringer Ingelheim*

Companies in the life science industry and in particular pharmaceutical companies regularly grant discounts in relation to medications sold. As a rule, these discounts are binding manufacturer discounts which must be granted in line with the German Social Insurance Code V (SGB V) and the Law on Discounts for Medicinal Products (AMRabG). In addition, however, voluntary discount agreements are concluded with, for example, health insurance schemes. These voluntary discount agreements are based on a civil contract and not on statutory requirements.

While the CJEU, in its ruling of 20 December 2017 (CJEU, ruling of 20 December 2017, C-462/16, Boehringer Ingelheim Pharma), had already ruled that discounts granted in line with § 1 AMRabG, as well as discounts in line with § 130a SGB V, reduce the basis of assessment for VAT, the recent ruling deals with voluntarily granted discounts and the question of whether, and under what circumstances, these lower the basis of assessment for the assessment of VAT.

**The case**

In its ruling of 6 October 2021 the CJEU has stated its position on the VAT treatment of

discounts granted voluntarily, as well as the requirements for a fee reduction. In the case in question, the plaintiff granted discounts to the NHIS (national health insurance scheme) on the basis of a civil contract. The NHIS itself was – similar to private health insurance companies – not directly involved in the supply chain “pharmaceutical company – wholesaler – pharmacy – private individual”. Nevertheless, due to the agreement a payment was made to the NHIS. It was disputed if these payments lowered the basis of assessment for VAT for the original supply of goods, and whether an invoice between the NHIS and the pharmaceutical company was necessary for the reduction in the basis of assessment.

**Ruling**

In its ruling, the CJEU clarifies that even voluntarily granted discounts lower the basis of assessment for VAT of a supply of goods only under certain conditions. What matters when determining the basis of assessment for VAT is in particular what the supplying trader actually receives, especially if only a part of the agreed basis of assessment is actually received.

In addition, the CJEU clarifies that while Member States may establish requirements under which a fee reduction is assumed, in this respect the achievement of the specific goal (here the avoidance of tax deficits) must always be set aside. In the case at hand, as the NHIS' demands for payments ensure the traceability and accuracy of the taxation, an invoice is not necessary, particularly against the backdrop of VAT neutrality and proportionality.

Consequently, based on the demands for payment and taking the amounts received into consideration, the basis of assessment for VAT on the original supply of goods had to be reduced on the basis of the voluntary granting of discounts.

**Please note:**

To the extent that in addition to binding discounts, voluntary discount agreements are also entered into, whether the VAT fee was already accurately determined must be examined. In this respect it is also essential to take into consideration the original supplies of goods and their VAT qualification. Besides discount agreements with German health insurance schemes, civil contracts in other EU Member States should be reviewed to see if a reduction of the basis of assessment may be carried out in this respect.

**NEWS FROM THE BMF**

**Cautions in the case of copyright infringement and unfair competition**

*BMF, guidance of 1 October 2021 – III C 2 - S 7100/19/10001 :006*

In its rulings of 21 December 2016, XI R 27/14, and of 13 February 2019, XI R 1/17, the BFH concluded in result that the company issuing a caution in the case of copyright infringement and unfair competition provides a supply subject to VAT to the party receiving the caution. The German Ministry of Finance (BMF) has picked this up and come to the following conclusions.

**Principles of the BMF guidance**

The supply of the company issuing the caution consists in

not only offering the party receiving the caution the opportunity to satisfy its demands for money in the most cost-effective manner, but also in making them aware of a legal violation and giving the necessary information – by means of a cease-and-desist declaration subject to penalty – to satisfy injunctive relief. In this way, the party receiving the warning can avoid a lawsuit. They are thereby given the opportunity to avert a legal dispute in a cost-efficient manner by submitting a cease-and-desist declaration subject to penalty.

Conversely, the damages claimed as a result of a justified caution are, being a true compensation, not subject to VAT.

The point in time of the taxable supply is the receipt of the caution by the party being cautioned. For simplicity's sake no objection will be raised if the taxpayer carries out the taxation of the warning service in the same provisional return period in which the caution is sent to the party being cautioned. If the party being cautioned disputes the infringement with detailed evidence, the company issuing the warning must correct the VAT amount in the tax period in which the caution is disputed.

The basis of assessment is the reimbursement claim. In a copyright infringement case the reimbursement of costs to be paid is measured according to the value of the subject of the injunctive relief. The fee, subject to VAT, for the supply of the company issuing the caution includes all payments received for it, i.e. also including the reimbursement of costs involved in investigating the identity of the infringer. The caution must

contain a breakdown of the payment being claimed between compensation and reimbursement. If no breakdown is provided, the full amount must be treated as reimbursement and thus as a fee.

The supply of the caution is subject to the general VAT rate of 19 per cent.

In the case of an unjustified caution, if an invoice is issued with VAT shown separately, there is an unwarranted statement of VAT in accordance with. § 14c (2) sent. 1 UStG. The company issuing the warning owes the VAT amount shown until the risk of the loss of tax revenue is eliminated.

**Please note:**

The principles of the BMF guidance must be applied in all open cases. However no objection will be raised if the parties concerned agree to consistently treat cautions issued before 1 November 2021 as not liable to VAT, i.e. including with regard to an input VAT deduction on the part of the party being cautioned.

**Use of taxability of the recipient of the supply according to § 13b UStG in the case of VAT groups**

*BMF, guidance of 27 September 2021 – III C 3 - S 7279/19/10005 :003*

If construction services are carried out by a trader resident in Germany, the recipient of the supply is liable for tax if they are a trader and themselves provide construction services, regardless of whether they use these for building work they carry out themselves (§ 13b (5) sent. 2 UStG).

The recipient of the supply must carry out or have carried out this type of construction work consistently. A trader carries out construction work consistently if at least 10 per cent of their global revenue (sum of their transactions subject to and not subject to VAT in Germany) comprises construction work (see Section 13b.3 (1) VAT Application Decree (UStAE)).

In the case of a VAT group relationship, if only a part of the VAT group (e.g. the controlling enterprise or a subordinate company) consistently carries out construction work, the controlling enterprise is liable for tax on the construction work that is carried out for this part of the VAT group. In calculating the 10 per cent threshold, only the basis of assessment for those transactions carried out by this part of the VAT group must be taken into consideration (see Section 13b.3 (7) UStAE). As a result of the BFH ruling of 23 July 2020, V R 32/19, the BMF, in its guidance of 27 September 2021, restricts this such that transactions not subject to VAT within the VAT group (of this part of the VAT group) are irrelevant.

This principle applies in general and, according to the BMF, is applicable to the tax liability of the recipient of the supply in the case of supplies of gas or electricity according to § 13b (5) sent. 3 and 4 in conjunction with (2) no. 5 (b) UStG, in the case of the cleaning of buildings and parts of buildings according to § 13b (5) sent. 5 in conjunction with (2) no. 8 UStG, and for other supplies in the area of telecommunications according to § 13b (5) sent. 6 in conjunction with (2) no. 12 UStG.

The VAT Application Decree was amended accordingly. The principles of the BMF guidance

must be applied in all open cases.

**Zero-rating for cross-border carriage of goods relating to items for import and export**  
*BMF, guidance of 27 September 2021 - III C 3 - S 7156/19/10002 :006*

According to § 4 no. 3 (a) UStG the cross-border carriage of goods relating to items for import and export is zero-rated under the requirements set out therein. The provision is based on Art. 146 (1) (e) of the VAT Directive.

**CJEU case law**

In its ruling of 29 June 2017 – case C-288/16 - L.C. – the CJEU ruled that the zero-rating contained in Art. 146 (1) (e) of the VAT Directive can only be granted if the carrier provides it directly to the sender or recipient of the items.

**Reaction from the tax authorities**

This does not comply with the previous handling by the tax authorities (see VAT Newsletter July 2017). Therefore, the BMF guidance of 6 February 2020 incorporated a restriction that aims to ensure that the zero-rating only comes into question for the supply of the main carrier but not for the supplies of the sub-carrier.

**Non-objection provision for transactions carried out before 1 January 2022**

The principles of the BMF guidance of 6 February 2020 must be used in all open cases. However, for transactions carried out before 1 January 2022 no objection will be raised if the previously applicable legal position is applied (see BMF guidance of 14 October 2020).

**BMF guidance of 27 September 2021 on issues of**

**doubt**

The following regulations will apply with effect from 1 January 2022:

*Mixed consignments*

A mixed consignment exists if a shipper or recipient commissions a main carrier with the cross-border carriage of items, that carrier in turn commissions a sub-carrier and, in addition to the transport of these items, also ships items cross-border for which the main carrier is itself the supplying trader and thus the shipper. In this case, the zero rating generally only comes into question for the cross-border transport by the sub-carrier of the items for which the main carrier is itself the shipper.

The transport supply in this type of mixed consignment must accordingly be separated into a portion subject to VAT and a zero-rated portion. However, no objection will be raised if this supply, including for the purposes of an input VAT deduction, is treated as being wholly subject to VAT.

*Obligation to provide supporting documentation*

To apply the zero rating, the trader (main carrier) must provide documentary evidence that they are providing facilitating supplies directly to the shipper or the recipient in line with § 4 no. 3 (a) (aa) UStG, for example by means of a documentary declaration of a characteristic of a shipper.

*Provision on fairness*

In cases in which it turns out that the details regarding a characteristic of the shipper were inapplicable, for the avoidance of unfairness the zero rating can nevertheless be

granted, if the trader had no knowledge, and even through exercising due commercial care could not have recognized, that the details given by the sender were inapplicable.

#### *Inapplicable details*

If cross-border carriage services or other facilitating supplies are commissioned in the name of a trader but for the account of another trader, and the shipping characteristic of the first trader was confirmed, it must be assumed that this detail is inapplicable.

#### **Guarantee commitment from a motor vehicle dealer as an insurance benefit**

*BMF, guidances of 11 May 2021, 18 June 2021, 18 October 2021, III C 3 - S 7163/19/10001 :001*

In its judgment of 14 November 2018, XI R 16/17, the BFH ruled that the paid guarantee from a motor vehicle dealer is not an dependent ancillary service to the vehicle delivery, but an independent service. With a guarantee commitment, through which the motor vehicle seller as guarantor promises a cash payment in the case of a guarantee, a service is provided based on an insurance relationship within the meaning of the VersStG, which is VAT exempt according to § 4 No. 10 letter a UStG.

With reference to the case law of the CJEU, it was also established that the service which the insurer is obliged to provide in the event of an insured event does not necessarily have to consist in the payment of a sum of money, but can also consist of

assistance, either in cash or in kind.

The BMF guidance of 11 May 2021 deals with the consequences under insurance tax law and VAT.

For clarification, the BMF guidance of 18 June 2021 points out that the tax principles for guarantee commitments apply regardless of the industry and therefore go beyond their application in the motor vehicle sector and for motor vehicle dealers.

The principles of the BMF letter of 11 May 2021 apply to guarantee commitments made after 31 December 2022. For guarantee commitments made before 1 January 2023, no objection will be made if the principles of this guidance have already been applied.

#### **IN BRIEF**

##### **VAT exemption for universal mail services**

*BMF, guidance of 28 September 2021 – III C 3 - S 7167-b/19/10003 :001*

The provision of universal mail services is exempt from VAT according to § 4 no. 11b UStG. The provision is based on Art. 132 (1) (a) of the VAT Directive.

Based on the previous administrative view, formal service of documents in line with § 33 German Postal Law does not fall under the VAT exemption of § 4 no. 11b UStG. This view violates the CJEU ruling of 16 October 2019 – cases C-4/18 and C-5/18 – Winterhoff and others, as well as subsequent BFH case law.

The VAT Application Decree has therefore been amended. Formal service of court or administrative authority documents in accordance with the procedural rules and applicable laws is now also exempt from VAT. This holds true in the case of a license issued by the German Federal Network Agency for this purpose, if the license holder undertakes to offer these services throughout the whole of the federal territory. The principles of the BMF guidance must be applied in all open cases.

##### **Publisher's share of statutory remuneration claims and copyright rights of use**

*BMF, guidance of 14 October 2021, III C 2 - S 7100/19/10001 :003*

In a guidance dated 14 October 2021, the BMF commented on the VAT treatment of the publisher's share of the income from statutory remuneration claims according to § 27 and §§ 54, 54a and 54c UrhG as well as from rights of use under copyright law.

The principles of this guidance apply in all open cases.

With regard to all statutory remuneration claims arising up to and including December 31, 2021 – also for the purposes of input tax deduction – there will be no objections if the parties involved assume taxable services by the publishers to the collecting society. The same applies to all compensation claims arising from copyright usage rights up to and including 31 December 2021.

## PREVIEW

### **Draft of BMF guidance on transactions in the fuel card business**

On 7 October 2021, the BMF sent the draft of a BMF guidance on the VAT treatment of transactions in the fuel card business to industry associations for comment.

The planned BMF guidance refers to the consequences arising from the CJEU ruling of 15 May 2019 in the case C-235/18 Vega International Car Transport und Logistik.

We will provide more information on the final BMF guidance in an upcoming edition of the VAT Newsletter.

### **Draft of BMF guidance on the VAT rate for digital media**

At the end of September 2021, the BMF sent its draft guidance on the VAT rate for digital media to industry associations, offering them the opportunity to comment thereon.

The planned BMF guidance relates to legal changes brought about through the Law on further fiscal support for electromobility and the amendment of other tax provisions of 17 December 2019. Namely, that a reduced VAT rate for digital media will be introduced in § 12 (2) no. 14 UStG with effect from 18 December 2019.

We will provide more information on the final BMF guidance in an upcoming edition of the VAT Newsletter.

## EVENTS

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

Event on 29 October 2021 and perhaps follow-up event in November 2021

This is about VAT, wage tax and social insurance law consequences of the so-called bogus self-employment as well as a description of the labor law prerequisites for avoiding bogus self-employment.

You find additional information on the event and registration form [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 find further information and the registration form for the Congress [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  
**Vivien Polok**  
T +49 211 475-6293  
vpolok@kpmg.com

**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

**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](http://www.kpmg.de)

[www.kpmg.de/socialmedia](http://www.kpmg.de/socialmedia)



The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2021 KPMG AG Wirtschaftsprüfungsgesellschaft, a corporation under German law and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved. The KPMG name and logo are trademarks used under license by the independent member firms of the KPMG global organization.