KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

November 2021

NEWS FROM THE CJEU

Due date of VAT in the case of payment by installment

CJEU, ruling of 28 October 2021 – case C-324/20 – X-Beteiligungsgesellschaft

In its ruling of 28 October 2021, the Court of Justice of the European Union (CJEU) ruled on the due date of VAT owed for a supply of service paid for in several installments. The ruling was issued on foot of a submission from the German Federal Tax Court (BFH).

The case
In 2012 X provided mediation services to T for the purposes of the sale of a plot of land. A fee for this service was agreed in the amount of EUR 1 million plus VAT. This amount was to be paid in five installments. These amounts were due at yearly intervals with the first installment due in 2013. On each due date, X issued an invoice for the amount owed, received it and remitted the corresponding VAT.

The tax authorities hold the view that the supply of service was provided in 2012 and that X should have therefore remitted VAT on the total fee in that year. The BFH submitted the case to the CJEU for a preliminary ruling.

Ruling
According to Art. 63 of the VAT Directive, the chargeability of VAT occurs at the point in time at which the supply of goods is effected or the service is carried out, that is, at the point in time of the execution of the transaction in question regardless of whether the consideration owed for this transaction has already been paid. Therefore, the company that delivers goods or carries out a service owes the tax authorities the VAT even if it has not yet received payment from its customers for the transaction carried out.

If supplies of goods, which do not relate to the leasing of an item in line with Art. 14 (2) (b) of the VAT Directive, and services give rise to successive invoices or payments, according to Art. 64 (1) of the VAT Directive they are considered to be effected at the time at which the period to which these invoices or payments refer has expired.

The CJEU interprets this provision to mean that a one-time service paid for in installments does not fall within

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the scope of application of this provision.

It cannot be inferred from CJEU case law that Art. 64 (1) of the VAT Directive can even be applied in the case of a one-time supply as the cases in which the CJEU has affirmed the applicability of this provision, concerned supplies of services that were carried out during specific periods of time on the basis of contractual relationships that formed obligations of a continuous nature. This also includes the placement of a player with a football club and his remaining there (ruling of 29 November 2018– case C-548/17 – baumgarten sports & more).

Furthermore, the case of non-payment of a consideration mentioned in Art. 90 (1) of the VAT Directive does not include a payment owed in installments for the supply of a service as per the contract concluded between the parties.

Firstly, this method of payment does not change the amount of the fee that the company should receive or can in fact demand. Under these circumstances, the basis of taxation remains unchanged and the tax authorities do not raise any more VAT than the appropriate amount for the company's fee. Moreover, as a fee installment cannot be due before its payment date, such a situation cannot be held to be equivalent to a situation in which the person who receives the supply only partially settles the claim made upon them.

For the purposes of interpreting Art. 90 (1) of the VAT Directive, it is irrelevant that in certain cases a company can be forced to pre-finance the VAT owed by it to the tax authorities.

Please note:
The CJEU clarifies that the point in time when the tax arises is generally linked to the point in time when the service is rendered. Special features apply to long-term obligations that are provided during certain periods of time. The earlier judgment of the CJEU on this subject is also classified in this context (cf. ruling of 29 November 2018– case C-548/17 – baumgarten sports & more), in which it was a matter of placing a player in a football club in which the CJEU was involved came to the conclusion that the payments linked to the player's remaining in the club are decisive for the creation of VAT.

Issuing a new invoice in the input VAT refund procedure

CJEU, ruling of 21 October 2021 – case C-80/20 – Wilo Salmson

Following a submission from a Romanian court, this CJEU ruling concerns the requirement for an invoice in the input VAT refund procedure and the consequences of the cancellation and reissuance of an invoice.

The case

In 2012, the company Pompes Salmson, resident in France, purchased manufacturing equipment from the company Zollner, resident in Romania.

In the same year, Zollner issued invoices including VAT for the sale of this manufacturing equipment. On the basis of these invoices Pompes Salmson applied for a VAT input refund in Romania. The application was denied as the invoices were not correct. Subsequently, Zollner cancelled the invoices that were originally issued in 2012. In 2015 it issued new invoices for the sale of the manufacturing equipment.

In 2014 Pompes Salmson merged with the company Wilo France. After the company created by this merger, Wilo Salmson, assumed all rights and liabilities of Pompes Salmson, in 2015 it submitted in new application for a refund of input VAT on the basis of Zollner's newly issued invoices for the period August to October 2015. The Romanian authorities rejected this application as Wilo Salmson had already requested a refund for the VAT shown in these invoices.

As a result Wilo Salmson brought a legal action to the submitting court. The court has doubts about the interpretation of Union law and submitted this issue to the CJEU for a preliminary ruling.

Ruling

The CJEU clarified that in order to deduct input VAT the company must generally be in possession of a correctly issued invoice. The basic principle of neutrality requires however that an input VAT deduction be granted if the material requirements are satisfied, even if the company has not met certain formal requirements. However, the same is not true if non-compliance with the formal requirements has hindered the reliable documentation that the material requirements were satisfied. If the administration has the details necessary to determine that the company owes the VAT, it may not set out any additional conditions that may frustrate the exercising of the right to deduct input VAT.

It is only if a document is so flawed that the national tax authorities are lacking the details necessary to justify an

application for refund that such a document may be assumed to not be an “invoice” within the meaning of the VAT Directive, so that the claim for a refund could not be invoked when the company had come into possession of the document.

Furthermore, Union law prevents the rejection of an application for a refund of VAT for a certain refund period that is founded solely in the fact that the VAT claim arose in an earlier refund period, but the VAT was first invoiced in this particular period.

Finally, the CJEU ruled on the consequences if the refund claim could have been successfully invoked on the basis of the original invoices, and that the decision to reject the application for a refund had become final. It would not be permissible, according to the CJEU, if through the cancellation and re-issuance of the invoice, the company were given the opportunity – on the basis of these new invoices – to submit a new application for the refund of VAT for the same purchases relating to a later refund period. That is to say, this could allow the cut-off period and the legal remedy deadline for a challenge to the decision rejecting the application to be circumvented.

Please note:
In her final remarks, Advocate General Kokott held the view that an invoice in line with Art. 178 (a) of the VAT Directive does exist if it contains details on the supplier, recipient, object of the supply, price, and separately shown VAT. The BFH and German tax authorities’ view, which is based on this, was not addressed by the CJEU. It did not, however, explicitly reject this view. Further, it provides more fundamental standards and framework conditions. On the basis of this, it is to be hoped that this case law will have a positive effect, especially in the context of input tax refund applications, as corresponding applications are often lengthy and very formalistic in practice.

Reverse charge procedure and tax evasion

CJEU, ruling of 11 November 2021 – case. C-281/20 – Ferimet

This CJEU ruling of 11 November 2021 concerns the consequences for an input VAT deduction in the case of the reverse charge procedure, if the company receiving the supply participates in the evasion of VAT by the supplying person.

The case
In 2008, Ferimet purchased recyclable materials (old iron) in Spain. Ferimet declared that the transaction was subject to the reverse charge procedure and accordingly issued an invoice , respectively self-billed the net amount.

A tax inspection found that the invoices issued by Ferimet should be deemed to be incorrect. While there was no argument that the materials in question were supplied, the questionable transaction constituted a fictitious transaction as the actual supplier of the materials was intentionally concealed. The tax inspection therefore ruled that no input VAT deduction had to be granted for this transaction. The legal action brought against this decision was not successful.

The Spanish Supreme Court that Ferimet brought its action to suspended the proceedings and submitted a request to the CJEU for a preliminary ruling.

Ruling
The material conditions for an input VAT deduction include in particular the supplier having the status of being a trader and, that the company receiving the supply uses the goods purchased for the purposes of its transactions subject to VAT. With regard to the formal conditions, it must be noted that a company that owes VAT as part of the reverse charge procedure does not need to be in possession of an invoice issued in line with the formal requirements of the VAT Directive in order to exercise its right to deduct input VAT. It must only satisfy the formalities that the Member State in question has prescribed in order to fulfill the possibility offered by Art. 178 (f) of the VAT.

Union Law must be interpreted such that a company can fail in deducting input VAT. This is the case if the company knowingly specifies a fictitious supplier in the invoice that it has issued itself for this transaction as part of the application of the reverse charge procedure. This requires that, taking the actual circumstances into consideration, and the information provided by the company for the investigation into whether the true supplier was a company, necessary details are missing. The same applies if it can be sufficiently legally proven that the company has evaded VAT or knew or should have known that the transaction used to justify the right to deduct was involved in such an evasion.

Please note:
In relation to the burden of proof relating to the question of whether the supplier is a company, a distinction must be drawn between the establishment of a material

condition of the right to deduct input VAT on the one hand and the establishment of VAT evasion on the other.

Thus, the company must demonstrate that the supplier is a company using objective proof, unless the tax authorities have available to them the details needed to check if this material condition of the right to deduct input VAT is met.

Conversely, the tax authorities are responsible for sufficiently proving the objective circumstances that lead to the conclusion that the company has committed VAT fraud or knew or must have known that the transaction used to justify the right to deduct was involved in a fraud.

Allocation decision on company and limitation period

CJEU, ruling of 14 October 2021 – joined cases C-45/20 (E) and C-46/20 (Z)

Following a submission from the BFH, the CJEU ruled on the correct time period and documentation of a decision on allocation regarding company assets on 14 October 2021.

The cases
This referral for a preliminary ruling was issued in relation to two legal cases. The subject matter of these legal disputes is the refusal of the tax authorities to recognize the input VAT deduction claimed by E and Z, as no allocation decision that could be accepted by the tax authorities was submitted before the expiry of the statutory deadline for the annual VAT returns.

E and Z each appealed to the BFH. The BFH took the view, in line with its case law, that the appeals of E and Z were unfounded under national law, as the documentation of the decision to partially allocate E's building and Z's photovoltaic system, respectively, to the assets of the individual company was not disclosed to the competent tax authorities before the statutory deadline for the submission of the annual VAT return had expired. According to the criteria that have arisen over the course of the case law, the VAT deduction arising from these allocations would only be permissible if this disclosure had taken place within the period referred to.

The BFH wonders however if its interpretation of national law is compatible with Union law.

Ruling
As a result the BFH must – based on the case law of the CJEU – examine if the exclusion period in question in the main proceedings, which corresponds to the deadline for the submission of the annual VAT return in line with § 149 (2) German Tax Code (AO), i.e. 31 May of the year following the year in which the allocation decision was made, is proportionate with regard to the aim of respecting the principle of legal certainty.

In this regard, the BFH must take into consideration that first, national authorities have the possibility of imposing sanctions on a taxpayer who is acting negligently that impact the principle of neutrality less than the total denial of the right to deduct input VAT, such as administrative financial penalties. In addition, a deadline that expires after 31 May of a given year following the year in which the decision on allocation is reached is not, at first glance, incompatible with respecting the principle of legal certainty. Secondly, the right to deduct input VAT plays a prominent role in a joint VAT system.

Please note:
We await the BFH decision with great anticipation. It could well be that the BFH will view the (national) treatment used up to now as too restrictive. This would facilitate an opportunity to deduct input VAT in the case of commercial activities and a so-called mixed use.

NEWS FROM THE BFH

Rescission of the waiver of VAT exemption

BFH, resolution of 2 July 2021, XI R 22/19

In its resolution of 2 July 2021, the BFH gave its view on the rescission of the waiver of VAT exemption set out in § 4 no. 9 (a) German VAT Law (UStG). The BFH concludes that the waiver can be withdrawn as long as the VAT assessment for the year of the supply can still be contested or can still be amended in line with § 164 AO. § 9 (3) sent. 2 UStG in the 2004 Budgetary Law version does not regulate the waiver.

The case
On foot of a notarized property purchase agreement, B GmbH purchased real estate from A GmbH in 2009. A building in need of renovation was located on the land. In the contract A GmbH waived the exemption from VAT for supplies of property.

B GmbH wanted to renovate the property and sell it on subject to VAT. In its 2009 VAT return it listed the purchase for which it owed VAT in line § 13b UStG as

the recipient of a supply. The resulting VAT was then deducted as input VAT in line with § 15 (1) sent. 1 no. 4 UStG by B GmbH.

B GmbH used a property purchase agreement to sell a portion of the real estate with the unrenovated building in 2011 – without waiving the VAT exemption. In a notarized contract in 2012, A GmbH and B GmbH agreed to the rescission of the waiver of VAT exemption declared in the 2009 property purchase agreement.

In its VAT return for 2011, B GmbH declared a VAT exempt supply of property. It did not carry out a correction of the input VAT deduction arising from the purchase. The 2009 VAT return also remained unchanged.

As a result of an external audit, the auditor held that the rescission of the waiver of VAT exemption was not valid. The input VAT deduction carried out in 2009 must be corrected pro rata temporis in accordance with § 15a (2) UStG.

In 2015 the tax authorities issued an amending assessment notice for VAT in 2011. The review proviso for the VAT assessment for the year 2009 was cancelled.

Whether the rescission of the waiver of the VAT exemption in 2012 was valid is disputed.

Resolution
The BFG affirmed this. According to § 4 no. 9 (a) UStG, transactions that fall under the German Real Estate Transfer Tax Act are exempt from VAT. Among other things, the company can, according to § 9 (1) UStG treat this type of transaction as liable to VAT if the transaction is executed vis-à-vis another company for its company. The waiver of VAT exemption can, according to § 9 (3) sent. 2 UStG only take place in the property purchase agreement which must be notarized in line with § 311b (1) German Civil Code.

Accordingly, the wording of § 9 (3) sent. 2 UStG rules out an option for a taxation obligation in a subsequent new version of this contract even in the case that it were also notarized. The rescission of the VAT exemption can, however, take place outside of these notarized instruments. It is possible as long as the tax assessment for the year in which the supply takes place can still be contested or can still be amended in line with § 164 AO. This requirement was met in the case under dispute.

NEWS FROM THE BMF

Retention of invoices; electronic or computerized point of sale systems or cash registers

BMF, guidance of 16 November 2021 – III C 2 - S 7295/19/10001 :001

The VAT Application Decree (UStAE) was amended in Section 14b UStAE as follows: To the extent that the company issues invoices with the aid of electronic or computerized point of sale systems or cash registers, it is sufficient, with regard to the invoices issued in line with § 33 German VAT Operating Regulation, if a duplicate of the outgoing invoice (till receipt) can be reproduced from unalterable digital records. In this case, the remaining requirements of the Principles on the orderly Keeping and Retention of Books, Records, and Documents in Electronic Format, and on Access to Data must also be satisfied, in particular regarding completeness, correctness and timeliness.

The principles of this guidance must be applied to all open cases. For periods up to 31 December 2021 no objection shall be raised if the obligation to retain records contained in the previous provision in Section 14b UStAE is satisfied.

IN BRIEF

Unwarranted showing of VAT ceasing to apply

BFH, resolution of 27 July 2021, V R 43/19

This BFH resolution concerns the question of when an unwarranted showing of VAT in line with § 14c (2) UStG ceases to apply.

According to § 14c (2) sent. 3 UStG, the tax amount arising as a result of an unwarranted showing of VAT can be corrected to the extent that the risk to tax revenue is eliminated. In this respect, § 14c (2) sent. 4 UStG is designed such that an input VAT deduction is not carried out at the recipient of the invoice or the input VAT claimed is paid back to the tax authorities. An application to correct the VAT amount owed must be submitted to the tax authorities separately in writing in line with § 14c (2) sent. 5 UStG and, following their agreement, must be carried out in a corresponding application of § 17 (1) UStG for the taxation period in which the prerequisites of § 14c (2) sent. 4 UStG arose.

If the recipient of the invoice has claimed the input VAT deduction, the VAT amount

owed due to the unwarranted showing of VAT must be corrected in line with § 14c (2) UStG for the period in which the recipient of the invoice pays the input VAT back to the tax authorities. The point in time at which the application for correction is made to the tax authorities or the time of an invoice correction does not matter, according to the BFH.

EVENTS

Webcast Live: Tax reflection at the end of the year

on 2 December 2021

Topics include:

VAT Law – current developments and outlook for 2022

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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
- Current BMF guidances
- News on input VAT deductions
- New 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.

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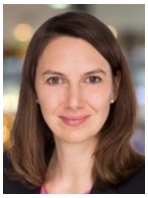

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