VAT Newsletter

Hot topics and issues in indirect taxation

March 2022

NEWS FROM THE CJEU

Input VAT deduction of a managing holding

CJEU, opinion of the Advocate General of 3 March 2022 – case C-98/21 – Tax Office R

On 23 September 2020, XI R 22/18, the German Federal Tax Court (BFH) asked the CJEU if a managing holding can deduct the input VAT on inputs if those supplies are passed on as a shareholder contribution to a subsidiary that is not entitled to deduct input VAT. We now have an opinion from Advocate General Pitruzzella.

The case
The simplified details of the case that forms the basis of this ruling are as follow: The plaintiff functioned as a managing holding and, as a result of bookkeeping and management services provided to its subsidiaries was thus generally entitled to deduct input VAT arising from incoming supplies. The subsidiaries provided (largely) VAT-exempt supplies and were therefore not entitled to deduct income VAT in this respect.

A question arose as to whether the holding was then also entitled to deduct input VAT if it contributed the inputs to the subsidiaries in return for the granting of a share in the general profits and the inputs purchased did not stand in direct and immediate connection to the holding's own transactions, but rather to the (primarily) VAT-exempt activities of the subsidiaries. The BFH submitted the case to the CJEU for a preliminary ruling.

Opinion of the Advocate General
In this case the Advocate General denies the deduction of input VAT. If the CJEU concludes differently in principle, the Advocate General shall take a position on the question of an abuse of rights.

If a managing holding is "interposed" in receiving this type of benefit of the subsidiary, such that the supplies for which the subsidiary, in the case of a direct purchase, would not be entitled to deduct input VAT, itself purchases the supplies, deposits these in the subsidiaries in return for a share in the profits and subsequently, with reference to its position as the managing holding claims the full input VAT deduction on

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those inputs, this constitutes a tax benefit, the granting of which runs contrary to what the provisions of the VAT Directive aim to achieve with the input VAT deduction. This process constitutes an abuse of rights even if it can be justified on grounds other than tax law, to the extent it is evident that in the main a tax benefit is achieved by it.

Please note:
In practice, the input tax deduction of holding companies is often questioned by the tax authorities. The judgment of the CJEU that is to be expected here is of particular importance insofar as an input tax deduction would lead to a tax advantage being achieved overall and the question of abuse of rights is therefore also being discussed. Further, Advocate General Pitruzzella touches briefly on the consequences of a VAT grouping – not present in this case. Recently, Advocate General Medina issued her opinion on the consequences of a VAT grouping (CJEU – Advocate General on VAT groups in Germany – opinion of 13 January 2022 – case C-141/20 – Tax Office Kiel; opinion of 27 January 2022 – case C-269/20 – Tax Office T; VAT Newsletter January/February 2022).

Advocate General Medina affirmed the taxability of internal transaction within a VAT group notwithstanding the VAT grouping. Advocate Pitruzzella appears to have a different view. Namely, in this case, as the VAT group is considered to be one taxpayer, the right to deduct input VAT was determined solely on the basis of the transactions effected by the group – and therefore also by the subsidiaries – for the benefit of third parties. To this end, he refers to the Commission Communication of 2 July 2009 – COM[2009] 325 final – p. 11.

Input VAT deduction in the case of repair services by a subcontractor

CJEU, ruling of 24 February 2022 – case C-605/20 – Suzlon Wind Energy Portugal

This CJEU ruling concerns the question of the extent to which the warranty repair services of a purchasing company to the company providing the warranty are subject to VAT.

The case

Suzlon Wind Energy Portugal operates in the wind energy industry in Portugal. In 2007 and 2008 it purchased a total of 21 wind turbines, each with three rotor blades, for wind parks in Portugal from Suzlon Energy India with a total value of EUR 3,879,000. These wind parks belong to third-party companies.

From September 2007 cracks appeared in some of the rotor blades, which were still under warranty, necessitating repair or exchange of the blades. At the start of 2008, Suzlon Wind Energy Portugal and Suzlon Energy India concluded a service contract for the repair and/or exchange of 63 defective rotor blades.

Between September 2007 and March 2009, Suzlon Wind Energy Portugal carried out the exchange or repair of the defective blades and other parts of the wind turbines. To do so it purchased the necessary materials and outsourced certain services to third parties as subcontractors who issued corresponding invoices for the purchases and services in question. As can be seen in its bookkeeping, it deducted VAT for all of these transactions.

In 2009 Suzlon Wind Energy Portugal issued three debit notes to Suzlon Energy India in the amount of approx. EUR 8,000,000 without showing any VAT. Whether the debit notes are based on taxable transactions of Suzlon Wind Energy Portugal is disputed. The Portuguese court dealing with the case referred the issue to the CJEU for a preliminary ruling.

Suzlon Wind Energy Portugal claims that the generation of income is not the aim if expenses that arose for it in relation to the repair or replacement of items purchased are merely passed on within the warranty period to the supplier, in this case to Suzlon Energy India. The debit notes under dispute do not constitute a consideration for a supply but rather involved the refund of costs incurred in fulfilling a task that the supplier was responsible for, as they arose from the supplier's warranty obligations for the purchased items. This was not a supply of services for a consideration but rather the mere movement of cash which did not generate additional value and therefore is not subject to VAT.

Ruling

Conversely, the CJEU holds the view that the transactions in question fundamentally satisfy the criteria set out in Art. 2 (1) (c) of the VAT Directive for a supply of services for a consideration.

This would not be the case, for example, if the company supplying the service had done so in the name and for the account of another party, by limiting itself to treating the amounts relating to the items under discussion and the

exchange and repair work as clearing transactions in line with Art. 79 (1) (c) of the VAT Directive by not deducting input VAT and giving the name of the company on the orders and invoices for the account of which these items were purchased and works carried out.

Please note:
The German tax authorities affirm (on the basis of relevant BFH case law) at least in cases in which the injured party eliminates damage caused to him/herself on behalf of the damaging party, in contrast to non-taxable damages, an exchange of services. The CJEU also assumes that in the event that the guarantor undertakes the repair of objects for which the guarantee still applies, this is an exchange of services in contrast to a transitory item. In connection with guarantee commitments, the BMF letters of 11 May, 18 June and 18 October 2021 must also be observed (cf. VAT Newsletter October 2021). According to these, a guarantee against payment basically establishes an insurance relationship, regardless of the industry, with the result of insurance tax liability and VAT exemption. An exception should be made when so-called full maintenance contracts apply. As a result, taxpayers face both increased administrative expenses (e.g. submission of insurance tax returns) and financial burdens due to non-deductible input tax amounts and non-deductible insurance tax. In this regard, a non-complaint rule applies until 31 December 2022.

NEWS FROM THE BFH

Provision of meals in a staff canteen as a supply of service

BFH, resolution of 20 October 2021, XI R 2/21

The BFH rules that a company that portions out meals in a staff canteen, hands these out on reusable crockery with reusable cutlery and also washes those dishes and cutlery when returned is providing a service. Thus, the supply is subject to the standard rate of VAT outside the scope of application of § 12 (2) no. 15 German VAT Law (UStG).

The case
In the case at hand a company operates a staff canteen at X-GmbH on the basis of a management contract. According to the contract the company was required to offer meals (plated meals and snacks). The company provided the food on reusable dishes with cutlery and also undertook the cleaning of these items upon their return. In addition, X-GmbH also provided the company with rooms in several areas “free of charge”. Whether the meals provided by the company from 2011 to 2016 are subject to the standard VAT rate of 19 per cent or the reduced VAT rate of 7 per cent is disputed.

Resolution
According to the BFH, the Lower Tax Court incorrectly assumed that the company had carried out supplies of goods. On the contrary, it had provided services, to the extent it provided meals on reusable crockery with reusable cutlery, took these items back and washed them, which were subject to the standard rate of VAT in the years under dispute.

In particular the Lower Tax Court did not take into consideration that according to CJEU and BFH case law, in the case of a party service the provision of and taking back of crockery and cutlery as well as the cleaning thereof already suffices for the application of the standard rate of VAT, as these supplies (in comparison to the mere provision of temporary infrastructure in the case of food stalls, food trucks or cinemas) demand a certain level of staffing in order to hand out the materials provided, take them back and, if applicable, clean them.

This applies for reasons of preserving the principle of neutrality for the company in question, too. In fact, in this respect, the company supplies – according to the actual determinations of the Lower Tax Court (in keeping the rooms clean including the furniture found in those rooms) – more comprehensive supporting services than a (subject to the standard rate of VAT) party service. Whether the handing out, taking back and cleaning of crockery and cutlery as part of the consumption of meals takes place in a lounge area as in this case, which in the Lower Tax Court’s view must be attributed to X-GmbH or (as in the case of a party service) takes place at a different location, which is not to be attributed to the supplying party, therefore does not give rise to a different result. Because the staff required to hand out, take back and clean the crockery and cutlery is not changed by the location of consumption.

This ruling does not contradict the CJEU statements in the cases Bog, CinemaxX and Lohmeyer - C-497/09, C-499/09 and C-501/09, as here too the CJEU focused on the fact that

largely no crockery, no furniture and no place settings were provided but rather only temporary equipment requiring only a minimal level of staffing. This is not the case for a canteen such as that in the company in this case.

Whether or not the Lower Tax Court correctly assumed that the lounge areas were not to be viewed as a supporting service of the company can accordingly, in the case under dispute, be considered as irrelevant as the question of whether the meals of the company in question were fully or partially (snacks) "standard meals" (and whether this categorization was germane in the years under dispute).

Please note:
In its decision, the BFH came to the conclusion, in deviation from the statements of the Lower Tax Court, that service elements such as the portioning, the issue and cleaning of reusable crockery and cutlery are sufficient to no longer benefit from the reduced VAT rate for sales to come from food. This shall apply equally to company canteens, party services and restaurants. The question is currently not relevant, as due to the corona pandemic, the reduced VAT rate of 7 percent will also be temporarily applied to food consumed on site up to and including 31 December 2022 (cf. VAT Newsletter January/February 2021).

Margin taxation of works of art

BFH, resolution of 20 October 2021, XI R 2/20

This CJEU submission concerns doubts arising from the application of the CJEU ruling of 29 November 2018 – case C-264/17 – Mensing on the margin taxation of works of art.

The case
This CJEU submission relates to an art dealer resident in Germany who operates art galleries in several German towns. In 2014 he purchased works of art from other Member States. The artists declared, in other EU countries, their supplies to him as intra-Community supplies exempt from VAT. The art dealer paid tax on them in Germany as intra-Community supplies and applied, as the reseller, for margin taxation of his supplies.

In the case of margin taxation, the revenue is generally measured on the basis of the amount by which the selling price exceeds the purchase price of the item, less VAT. Margin taxation is in general open to all art dealers. If the supply purchased, however, is a VAT-exempt intra-Community supply, it is not possible in accordance with § 25a (7) no. 1 UStG to opt for margin taxation. Following a submission by Münster Lower Tax Court, the CJEU ruled that this restriction does not comply with Art. 316 (1) (b) of the VAT Directive. If the art dealer invokes Union law, he cannot simultaneously claim an input VAT deduction arising from an intra-Community purchase. This follows from Art. 322 (b) of the VAT Directive, even if the German law (see § 25a (5) UStG) does not contain such a restriction.

Münster Lower Tax Court thereupon allowed the action. According to the CJEU's Mensing ruling, the margin taxation must be applied to the contested transactions and must be taken into consideration in respect of reducing the VAT relating to the intra-Community purchases as a component of the purchase price. In their appeal, the tax authorities criticizes the infringement of substantive law. In essence, they claim that the VAT for the intra-Community purchase does not reduce the margin that is subject to VAT.

Resolution
The BFH submitted the legal case to the CJEU anew for a preliminary ruling. It would like to know the following from the CJEU:

1. Do the main proceedings, in which the taxpayer relies, as a result of the CJEU's Mensing ruling, on the supply of artworks – purchased from the creator (or their legal successors) as part of a VAT-exempt intra-Community supply – falling under the margin taxation of Art. 311 et seq. of the VAT Directive: Under these circumstances, is the basis of assessment to be determined solely in accordance with Union law, so that the interpretation of a national law provision, that the VAT due on the intra-Community purchase does not belong to the basis of assessment, is not permitted by the national court of last instance?
2. If question 1 is affirmed: Is Art. 311 et seq. of the VAT Directive to be understood to mean that in the case of the application of margin taxation for supplies of artworks that were previously purchased within the Community from the creator (or their successors), the VAT arising on the intra-Community supply reduces the markup (margin) or, in this respect, is there an unintended gap in Union law that cannot be closed by

jurisprudence by means of further development of the law but rather only by the Community legislature?

Please note:
In the context of sustainability strategies, the question of whether the so-called differential taxation for resellers of movable tangible objects (which often concern the sale of used objects) should be applied is likely to play an increasingly important role. The case presented to the CJEU is specifically about the sale of works of art that were acquired by the author within the Community. Since in this case the national German provision of § 25a UStG deviates from Union law, the judgment of the CJEU is eagerly awaited.

Requirements for price discounts as a reduction in fees

BFH, ruling of 18 November 2021, V R 4/21 (V R 41/17)

This BFH ruling concerns the question of whether a company is entitled to a reduction in fees arising from the granting of a reimbursement of expenses granted to people covered by statutory health insurance (health scheme insured) in 2013.

The case
The prescription medicines were delivered by the company from the Netherlands into Germany. In doing so, the company promised a so-called reimbursement of expenses for the answering of questions on the corresponding illness as part of a so-called “medicine check”. The company offset the reimbursement of expenses for participation in the “medicine check”, in the case of those insured under statutory health schemes, who would have had to make a co-payment for the prescription drugs, with the amount of this co-payment so that nothing was paid out. In comparison, the insured who were exempt from making co-payments, could use the reimbursement of expenses to reduce the price of other items purchased from the company, for example non-prescription medicines.

The company invoiced the supply of prescription drugs for the benefit of the insured to the individual statutory health scheme. The statutory health schemes paid these supplies on the basis of social security provisions. Since 1 October 2013, the company has treated these supplies in the Netherlands as zero-rated intra-Community supplies to the statutory health schemes, while the health insurance schemes paid tax on a corresponding intra-Community purchase in Germany.

To the extent that the company offset the reimbursement of expenses that it granted in the case of zero-rated (in the Netherlands) supplies of prescription medicines against the insured’s co-payment requirement, the company claimed a reduction of the basis of assessment for those supplies subject to VAT provided to privately insured people in Germany. The tax authorities and the Lower Tax Court did not agree with this.

Ruling
The appeal before the BFH was not successful following a reference to the CJEU for a preliminary ruling (ruling of 11 March 2021 – case C-802/19 – Firma Z; VAT Newsletter March 2021).

The BFH ruled that a company cannot claim any entitlement to a tax decrease in Germany for a zero-rated intra-Community supply carried out in another Member State.

If the company grants its end customers, on the occasion of a first supply, a reimbursement of expenses for a service provided to it, which the end customer uses to purchase goods at a discount from the company as part of a second supply, the basis of assessment for the second supply is made up of the payment (reduced by the amount of the reimbursement) and amount of the reimbursement together.

NEWS FROM THE BMF

VAT measures to support those harmed by the war in Ukraine

BMF, guidance of 17 March 2022 – IV C 4 - S 2223/19/10003 :013

This BMF guidance indicates tax measures for the support of those harmed by the war in Ukraine. Below we refer to the VAT measures that will be implemented from 24 February 2022 until 31 December 2022.

In the case of the provision of items and staff for humanitarian purposes free of charge by businesses to organizations providing an essential service to deal with the consequences and aftermath for those affected by the war in Ukraine, in particular aid organizations and bodies for refugees and for providing care for the wounded as well as other public organizations, these benefits-in-kind shall not be subject to VAT on the grounds of fairness.

If a trader already intends when purchasing the supplies to use those supplies solely and directly for the purposes mentioned, on the grounds of fairness the corresponding input VAT amount must be dealt with under the other requirements of § 15 UStG. The subsequent benefit-in-kind will not be taxed in accordance with the previous paragraph on the grounds of fairness.

In line with the grounds of fairness, taxation of a benefit-in-kind and a correction of input VAT in accordance with § 15a UStG shall be abstained from if private companies make accommodation, normally intended for a use that is subject to VAT (hotel rooms, holiday cottages or similar) available free-of-charge to people who have fled Ukraine as a result of the war there. If these traders already intend to provide this type of accommodation free-of-charge when purchasing the supply of ancillary services (electricity, water or similar), as an exception, under the conditions given above and the other requirements of § 15 UStG a corresponding input VAT deduction shall also be granted on the grounds of fairness. The subsequent benefit-in-kind shall not be taxed in accordance with the previous paragraph on the grounds of fairness.

In addition, the BMF guidance goes into supplies of special organizations, for example charitable bodies, companies in the public sector and public sector companies operated as a private business.

IN BRIEF

VAT liability for swimming lessons

BFH, ruling of 16 December 2021, V R 31/21 (V R 32/18)

The BFH has amended its jurisprudence so that swimming lessons given by a swimming school are generally liable to VAT. The ruling is a decision subsequent to the CJEU ruling of 21 October 2021 – case C-373/19 – Dubrovin & Tröger – Aquatics).

A company provides mainly courses for children that are paid for by the participants or their parents. In the case of the "tadpoles" course, children from the age of four are taught the basics of breast stroke and back stroke. In the two advanced courses "seahorses" and "goldfish", the basics and techniques learned are consolidated and expanded upon. The company considered these supplies to be exempt from VAT.

The BFH disagrees. The supplies of services in question are not exempt from VAT under either national or Union law. The CJEU arrived at the decision that the term "school and university education" in line with Art. 132 (1) (i) and (j) of the VAT Directive does not encompass the swimming lessons given by a swimming school. The CJEU gives as their reason the fact that swimming lessons constitute specialist tuition provided occasionally, which does not amount, in itself, to the transfer of knowledge and skills covering a wide and diversified set of subjects or to their furthering and development which is characteristic of school or university education.

No ruling was required on the assessment of swimming lessons that the participants use or aim to use for the purposes of a subsequent career, for example as a swimming instructor.

AROUND THE WORLD

TaxNewsFlash Indirect Tax

KPMG articles on indirect tax from all around the world

4 Mar – Czech Republic: Adequate proof, VAT exemption for supplies of goods to EU customers (court decision)

23 Feb – Panama: Updated guidelines on electronic invoicing

23 Feb – UAE: Updated voluntary disclosure user guide for VAT and excise tax

22 Feb – Mexico: New guidelines for issuing electronic invoices

22 Feb – Zimbabwe: VAT and indirect tax measures in Finance Act 2021

21 Feb – Poland: VAT correction benefiting from bad-debt relief allowed (court decision)

21 Feb – Singapore: GST and other indirect tax measures in budget 2022

17 Feb – KPMG report: Benefits of shared service centers in tax processes such as indirect tax

9 Feb – Sweden: Proposals to amend measures under "chemical tax"

7 Feb – Czech Republic: Proving internet advertising expenses

You can find this and additional articles here.

EVENTS

Hybrid Annual VAT Conference 2022
on 11 May 2022

Take part in our annual conference again in 2022 and find out about current topics and challenges from representatives from the tax courts, the tax authorities and advisory practices, and use your own questions to take an active part in the live talks.

In addition to an update on the current topics in the field of VAT (e.g. invoice requirements, VAT group, settlement of supervisory board remuneration, product presentations as travel services?, delimitation of damages and remuneration, guarantee commitments, cross-border transport of goods and much more), the main topics are discussed This event lies at the interface between VAT and wage tax and related tax audit experiences as well as on import VAT issues and ensuring input tax deduction. You can also expect a panel discussion on questions relating to the zero-rating of intra-Community deliveries as well as a presentation on current developments in the field of e-invoicing & digital reporting (a look at other countries) against the background of the planned electronic reporting system in Germany according to the statements in government coalition agreement.

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

You can find more information and registration forms for all of KPMG's current events here.

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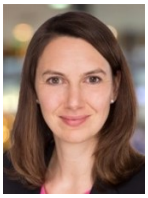

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