VAT Newsletter

Hot topics and issues in indirect taxation

April 2022

NEWS FROM THE CJEU

On the term fixed establishment

CJEU, ruling of 7 April 2022 – case C-333/20 – Berlin Chemie A. Menarini

The CJEU has ruled on the term fixed establishment in Art. 44 of the VAT Directive in conjunction with Art. 11 (1) of the Implementing Regulation (EU) No. 282/2011.

The case
Berlin Chemie AG (hereinafter "German company") is a company with its registered office in Germany. It holds 95 per cent of shares in a German GmbH (limited liability company). This is in turn the sole shareholder of the Romanian company Berlin Chemie A. Menarini SRL (hereinafter "Romanian company"). In 2011, the German company and the Romanian company entered into a marketing, regulatory, advertising and representation services contract. In this contract, the Romanian company undertook to actively promote the German company's products in Romania. The Romanian company invoiced the German company for the corresponding supplies of services without VAT, as it assumed that the place of supply of these services was in Germany.

Following a tax audit, the Romanian tax authorities determined that the supplies of services provided by the Romanian company to the German company were received by the latter in Romania, where it had a fixed establishment. The fixed establishment had technical and human resources that were sufficient to carry out regular supplies of goods or services subject to VAT. This assessment arose primarily as a result of the technical equipment and staff of the Romanian company, to which the Germany company had uninterrupted access. The court tasked with this issue referred the case to the CJEU for a preliminary ruling.

Ruling
According to CJEU case law and Art. 11 of the Implementing Regulation (EU) No. 282/2011, a fixed establishment is any establishment, with the exception of the place of establishment of a business, characterized by a sufficient degree of permanence and a

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suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.

The existence of a fixed establishment in another Member State cannot be deduced solely based on the fact that a company owns a subsidiary there. Therefore, the existence in terms of human and material resources of a suitable structure displaying a sufficient degree of permanence must be established in the light of the economic and commercial reality.

While it is not necessary for a fixed establishment that the company has its own staff or technical resources, it must however, be able to dispose of those staff and technical resources in the same way as if they were its own. For example on the basis of service and rental contracts, by means of which it is provided with these resources and which cannot be terminated at short notice.

In the case at hand, the human and technical resources considered by the Romanian tax authorities as having been provided by the Romanian company to the German company, allowing them to ascertain the existence of a fixed establishment of the German company in Romania, were also those used by the Romanian company to provide the services for the Germany company. The same resources cannot, however, be used simultaneously for the provision and the receipt of the same supplies of services.

Please note:
The judgment of the CJEU is to be welcomed insofar as it restricts the tendencies of tax administrations to assume a fixed establishment in another Member State in which an affiliated company (subsidiary) is based, to which the German-based company has certain influence possibilities. These tendencies have led to considerable uncertainty in the recent past.

NEWS FROM THE BFH

Recipient of a supply in the case of the transfer of half of a joint property

BFH, ruling of 25 November 2021, V R 44/20

The German Federal Tax Court (BFH) has ruled on the issue of who the recipient of a supply is in the case of the transfer of half of a joint property.

The case
In this case there is a dispute as to whether the tax authorities were able to make a GbR (civil law partnership) made up of Mr. and Mrs. G, a married couple, the taxpayer in line with § 13b German Tax Law (UStG). Couple G purchased from a GmbH & Co. KG (limited commercial partnership with a private limited company as the general partner) by means of notarized purchase contracts two not yet constructed apartments in a retirement and assisted living facility, each having half a share of the property, as an investment whereby a rental guarantee for 25 years was agreed. The notarized contracts each contained the following provision with regard to VAT: “The seller waives a VAT exemption in accordance with § 9 (2) UStG and notes that in line with § 13 (1) (b) UStG the recipient of the supply is liable for the VAT owed.”

As the couple did not file any VAT returns, the tax authorities estimated the VAT assessment notice issued. The tax authorities addressed the assessment notice to the couple’s home address using the designation G-GbR. An objection and a lawsuit were not successful.

Ruling
The BFH deemed Mr. & Mrs. G’s appeal to be justified, set aside the Lower Tax Court’s decision and upheld the suit.

In the BFH’s view, in the case of the transfer of half of a joint property, the respective co-owner is the recipient of the supply, so that in the case of a waiver of the VAT exemption, no VAT liability in line with § 13b UStG exists for a GbR. Therefore, the Lower Tax Court erroneously assumed that a GbR existing between the couple is, as the recipient of the supply, the party liable for VAT for the purchase of the co-ownership shares. A reinterpretation of the contested tax assessment notice as a tax assessment notice issued vis-à-vis Couple G as sole traders is out of the question.

It is not possible to determine the person liable for tax differently than set out in the purchase contract. Therefore, in the case under dispute, several supplies exist, which were provided to the respective spouses as the recipient of the supply to the extent of the co-ownership portion transferred to them, so that in reference to the individual co-ownership shares each individual spouse must be considered to be the recipient of the supply but not, however, a GbR (consisting of the spouses).

Please note:
The question of the beneficiary repeatedly leads to difficulties in the case of benefit payments by spouses. In the present case, the BFH comes to the conclusion in favor of the spouses that the regulations in the purchase contract are decisive. As a result, the spouses acquired half of the ownership of the apartments, so that the respective spouse and not a GbR consisting of the spouses is the beneficiary.

"Leasing" of virtual land in an online game

BFH, ruling of 18 November 2021, V R 38/19

The BFH has ruled that the in-game "leasing" of virtual land in an online game is not a taxable supply. Conversely, as a matter of contractual law the exchange of a game currency into legal tender (in the case under dispute via an exchange administered by the operator of the game) gives rise to a supply subject to VAT.

The case
The plaintiff challenged the levying of VAT on "leasing" he carried out of virtual land as part of the program A. Program A is an online 3D simulation of the world, operated by B (game operator), resident in the USA, on servers located there. Users can utilize their game character – so-called "avatars" – to explore and travel through the virtual reflection of the real world, which is computer generated in A, create content in it, and interact socially with the avatars of other users. In particular, the users can create details of the virtual surroundings and, within the virtual world, "sell" or "lease" these for other users for a payment of virtual C-dollars (play money).

As part of the business registered by him for an internet business with goods of all types, in the years under dispute the plaintiff purchased virtual land in the program A, subdivided it and "leased" the parcels to other users of A in return for a payment of C-dollars. C-dollars collected were in turn sold by the plaintiff using the game operator's exchange for a consideration in US dollars. He used these US dollars to pay fees to the game operator and had the rest paid out to himself.

Ruling
The BFH ruled that the in-game "leasing" of virtual land in an online game is not subject to VAT. The "transactions" effected solely through the participation in a game as part of the events of the game do not regularly give rise to a taxable supply. In-game "transactions" between people who restrict themselves to mere participation in the game, and thus to interactions with other participants in order to create their gaming experience, do not as a rule constitute participation in the – real – economic world. They do not give rise to a use in line with the common VAT law but rather merely constitute non-commercial benefits of the game world.

Conversely, in transferring C-dollars for a fee he provided a supply. The recipient of this supply was the game operator as the commissioning agent, so that the place of supply is determined in line with the provisions of the commission. That is, the place of the – notional – supply provided by the plaintiff vis-à-vis the game operator is governed by the place in which the game operator runs her company. This is not located here in Germany but rather in the USA, where the game operator is resident and also operates the services for the program A.

NEWS FROM THE BMF

Business characteristic of supervisory board members

BMF, guidance of 29 March 2022 – III C 2 - S 7104/19/10001 :005

In its guidance of 8 July 2021, the German Ministry of Finance (BMF) ruled on when the activity of a supervisory board member must be considered as having a business or non-business character. In particular, the following applies (for details see Section 2.2 (3a) VAT Application Decree (UStAE)):

- If the supervisory board member does not bear any compensation risk due to a non-variable fixed fee, they are not independently active. The compensation can take the form of both monetary payments and benefits-in-kind. A non-variable fixed compensation exists especially in the case of a lump-sum expense allowance that is paid for the duration of the membership of the supervisory board.
- Attendance fees that the supervisory board member only receives when they actually attend the meeting, as well as expenses calculated on the basis of the actual expenses incurred, are a variable compensation.
- If the supervisory board member's compensation consists of both fixed and variable components, they are fundamentally independently active, if the variable components in a calendar year amount to at least 10 per cent of the total compensation, including

expenses received. Exceptions are possible in justified cases.
- Reimbursements for travel are not a component of the compensation and are therefore not taken into consideration when determining the 10 per cent limit.

The BMF guidance of 29 March 2022 resulted in the following amendments/additions to the UStAE:

- Instead of a calendar year, the financial year of a company is relevant when checking the 10 per cent limit.
- In checking if the variable components in the company's financial year amount to at least 10 per cent of the total remuneration, inclusive of any expense allowances contained, only those components of compensation that were services for a consideration carried out in the company financial year in question shall be taken into account.
- The relevant time of performance of the general activity of the supervisory board member is the end of the company's financial year.
- If a supervisory board member receives a reimbursement of expenses and an attendance fee for their actual attendance at a supervisory board meeting, the relevant time of performance is the day of the supervisory board meeting.
- In checking the 10 per cent limit, all attendance fees for all planned meetings in a financial year of the company, regardless of the actual attendance of the supervisory board member, must be included as variable components of the compensation.
- The relevant time of performance for checking the 10 per cent limit is the start of the company's financial year; subsequent changes shall not be taken into consideration.

The provisions of the BMF guidance of 29 March 2022 must be applied in all open cases.

To prevent difficulties during the transition no objection – including for the purposes of input VAT deductions – shall be raised if the previous provisions (before 8 July 2021) on the independence of a supervisory board member are applied to supplies that were carried out in a financial year of the company that started before 1 January 2022.

In addition, for company financial years that end before 1 January 2022, no objection will be raised if the time of supply is set as the time of the general activity of a supervisory board member to attend the annual general meeting with the aim of granting a discharge.

The BMF guidance further contains special provisions on non-objections for civil servants and political appointees.

Please note:
The BMF guidance of 29 March contains important statements on questions from practice as to when the activity of a supervisory board member should be considered as business or non-business. To check the 10 per cent limit, a prognosis at the start of a financial year is especially crucial. This prognosis is of particular importance as subsequent changes shall not be taken into account. In order to largely avoid related VAT risks in the assessment of the supervisory board member as an entrepreneur, it is advisable for the company to use the self-billing procedure, since in this case a tax liability according to § 14c UStG can be avoided (BMF, guidance of 19 August 2021 – III C 2 - S 7283/19/10001 :002).

Input VAT deduction of a shareholder from investment transactions

BMF, guidance of 12 April 2022 – ref. III C 2 - S-7300 / 20 / 10001 :005

In its ruling of 11 November 2015, the BFH ruled that the right to deduct input VAT in accordance with the CJEU rulings of 29 April 2004 – case C-137/02 – Faxworld, and 1 March 2012 – case C-280/10 – Polski Trawertyn, could also exist in connection with transfers to companies. The BMF has shared its viewpoint on this issue.

Input VAT deduction
If a shareholder or pre-formation company (a civil-law partnership the object of which is to prepare the means necessary for the activities of a capital company to be formed) passes on purchased supplies in the course of its own VAT-liable business to the company, e.g. by selling the entirety of the business, the input VAT deduction from the purchased supplies will be determined in line with the general principles.

A shareholder or pre-formation company can also be entitled to the input VAT deduction on a purchased supply that the company later takes on outside of an exchange of services (for example the transfer via a shareholder who is not otherwise

commercially active). The prerequisite is that from the point of view of the (planned) company, it is an investment transaction and the intended activity of the company does not preclude input VAT deductions.

Investment transactions
The term investment transaction includes assets (purchased supplies of good or services) that the shareholder (or pre-formation company) actually transfers to the company and which are used by the company in its commercial activities. The parenthesis “investment goods” used as clarification by the BFH is, at the same time, not to be understood as limited to only encompassing economic goods, but rather also includes supplies of services to the extent that these satisfy the requirement for an investment transaction.

Due to the investment transaction, the shareholder is, as an exception, entitled to deduct input VAT on that transaction, assuming the other requirements are also satisfied. In this respect it will suffice that the characteristic of the shareholder as a trader arises as a result of this investment transaction. The same applies if the investment transaction is intended to be carried out but then is not only because a planned formation of a company falls through. Even in this case, the unsuccessful shareholder or pre-formation company can be entitled to deduct input VAT from an investment transaction.

Demarcation
A distinction must be made between an investment transaction and purchased supplies that will generally not be able to be transferred to the company but instead are used, for example, by the shareholder themselves or, while used by the company, are not actually transferred to it.

IN BRIEF

Denial of the input VAT deduction in cases of fraud

BFH, resolution of 20 October 2021, XI R 19/20

According to the BFH, the measures that can be reasonably demanded of a taxpayer in order to prevent their own participation in a foreign VAT fraud, depends in large part on the individual circumstances. These circumstances must be determined in accordance with national law provisions on proof, which may not impact the effectiveness of Union law.

While a taxpayer may not in general be required to check if the issuer of an invoice for the supply of goods for which a right to deduct input VAT shall be claimed is in possession of the items in questions, can supply them, and has satisfied their obligations with regard to the declaration and payment of VAT, if there are indications of irregularities or VAT fraud, the taxpayer can be required to look for information on another economic agent from whom they intend to purchase goods or services, in order to convince themselves of their reliability.

Public private partnerships (PPP) in federal highway construction

BMF, guidance of 30 March 2022 – III C 2 - S 7100/20/10002 :001

In the Private Financing of Highways Law (FStrPrivFinG) of 30 August 1994, the legislature created the legal framework for the construction, operation, maintenance and financing of public roads by third parties (concessionaires). In addition, the right to impose tolls for the use of transportation projects or road sections established in line with these provisions was introduced.

Besides this, the Autobahn Toll Law (ABMG) of 5 April 2002 was intended to improve transport infrastructure. To this end, private parties could be used for the construction and maintenance of public roads. The ABMG was overtaken by the expansion of the toll to federal highways and was constitutively rewritten with the provisions amended to include the charging of tolls for federal highways, along with the Toll Rate Ordinance (MautHV) as part of the Federal Highway Toll Law (BFStrMB) of 12 July 2011.

With regard to the legal configuration of the respective transportation projects a distinction must be made between:

a) the transport projects that are established and operated by private parties as part of the FStrPrivFinG (the “F-model”), and

b) highway sections that are initially established by private parties and also, in terms of traffic regulations, operated by private parties, however for which, in terms of tax law, the federal government remains the operator (the “A-model”).

The BMF guidance of 30 March 2022 deals with the VAT assessment of these F-models and A-models.

Right to direct action in the area of VAT

BMF, guidance of 12 April 2022 – III C 2 - S-7358 / 20 / 10001 :004

In case law, the legal instrument of a direct claim that exists in Union Law in the area of VAT (also called “Reemtsma case law”) has been developed. According to this, under certain circumstances a recipient of a supply can demand, directly from the tax authorities (instead of from the supplier), the reimbursement of a VAT amount unduly paid to the supplier. In this guidance, the Federal Ministry of Finance communicates its (restrictive) opinion on the possibilities for the recipient of the supply to have the VAT reimbursed as part of an equity measure.

AROUND THE WORLD

TaxNewsFlash Indirect Tax

KPMG articles on indirect tax from all around the world

6 Apr – EU: Implementing regulation on VAT and e-commerce transactions; guidance for payment service providers

1 Apr – Poland: Update on mandatory use of electronic invoices, VAT implications

31 Mar – Belgium: Temporary VAT rate reduction for supplies of electricity, gas, solar panels and heaters, face maska

29 Mar – Poland: New Structure of electronic form for VAT invoices

29 Mar – Switzerland: Reminder to claim VAT refund for 2021 before June 2022 deadline

21 Mar – UK: VAT incurred in selling shares may be recoverable (tribunal decision)

16 Mar – Italy: New rules for recovery of VAT with credit notes

16 Mar – Philippines: VAT guidance regarding export enterprises

15 Mar – Thailand: Tax relief to support trading in digital assets and investment in start-ups

11 Mar – Sweden: Proposals regarding fees for licensing of gaming software

You can find this and additional articles here.

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on 11 May 2022

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In addition to an update on the current topics in the field of VAT, the focus of this event will be on the interface between VAT and wage tax as well as on customs and import VAT issues.

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

Webcast Live: Basic knowledge of export control

on 18 May 2022

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

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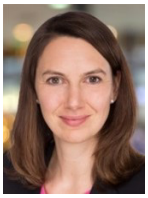

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