VAT Newsletter

Hot topics and issues in indirect taxation

May 2022

NEWS FROM THE CJEU

City cards as multi-purpose vouchers

CJEU, ruling of 28 April 2022 – case C-637/20 – DSAB Destination Stockholm

In this case the CJEU has taken a stance on the interpretation of the Voucher Directive 2016/1065 of 27 June 2016, which has applied in the EU Member States since 1 January 2019.

The case
DSAB sells a card for tourists who visit Stockholm. This card grants the holder entry to around 60 tourist attractions such as landmarks or museums over a limited period of time and up to a certain value. In addition they gain access to around ten passenger transport services, for example sightseeing tours with DSAB's own "hop-on hop-off" buses, and boats and sightseeing tours offered by other service providers. services without VAT, as it assumed that the place of supply of these services was in Germany. Some of these supplies of services are subject to VAT at a rate of 6 to 25 per cent, while others are exempt from VAT. The holder of the card uses it as a method of payment to receive access to a service or make use of a service. In this regard they do not pay anything extra, rather the card is simply swiped using a machine developed for this purpose.

According to a contract concluded with DSAB, the supplier of the service then receives a consideration for each access or use in the amount of a percentage of the normal fee for entry or usage. The supplier of the services is not required to grant the holder of the card access to its services more than once. DSAB guarantees no minimum number of visitors. If the value limit of the card is reached, it can no longer be used by the holder.

Whether the city cards should be treated as multi-purpose vouchers in line with the Voucher Directive is disputed. The highest administrative court in Sweden submitted the issue to the CJEU for a preliminary ruling.

Ruling
The CJEU does not accept the tax authorities' claim that the city cards cannot be "vouchers" in line with Art. 30a (1) of the VAT Directive, as it is not possible for an average user,

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due to the card's limited period of validity, to make use of all of the services offered. As the Advocate General essentially stated, the definition of "voucher" in Art. 30a (1) of the VAT Directive does not show that the period of validity of the card in question, or the possibility of using all of the services offered with it, would be relevant for the classification of the card as a "voucher" in line with this provision.

Furthermore, the issuing of the city card, in light of the variety of services on offer and of the third-party operators acting as service providers cannot be classified as a "uniform service".

The city cards allow entry to different services that are subject to different rates of VAT or exempt from VAT and it is not possible to anticipate which supplies the holder of this card will choose. In this case, classification as a "single purpose voucher" in line with Art. 30a (2) of the VAT Directive can be ruled out. Consequently, this card should rather be classified as a "multi-purpose voucher" in line with Art. 30a (2) of this Directive. In this case, according to Art. 30b (2) of the VAT Directive it is only the actual supplies of services that take place when the city card is redeemed that are subject to VAT.

Please note:
Art. 30a of the VAT Directive defining vouchers and distinguishing between single-purpose and multi-purpose vouchers was implemented in Section 3 (14) and (15) UStG. In a letter dated 2 November 2020 (III C 2 - S 7100/19/10001 :002; Section 3.17 UStAE), the BMF issued a statement on the VAT treatment of single-purpose and multi-purpose vouchers. Section 3.17 (1) sentence 6 UStAE states that tickets for cinemas and museums and comparable instruments do not fall within the scope of Section 3 (13) UStG for vouchers. In this respect, taking into account the statements of the German tax authorities, it could have been questionable whether the city card actually qualifies as a voucher as an admission ticket for museums and sights. In addition, according to the statements of the German tax authorities, a multi-purpose voucher should be marked as such (section 3.17 paragraph 9 sentence 6 UStAE). Multi-purpose vouchers are more advantageous in terms of VAT than single-purpose vouchers in that they are only subject to VAT at the time of their redemption and insofar as they offer cash flow advantages or, in the event of non-redemption, there is ultimately no taxation. On the other hand, in practice with multi-purpose vouchers, there are often challenges in the correct VAT mapping in the (cash register) systems.

VAT exemption of private hospitals

CJEU, ruling of 7 April 2022 – case C-228/20 – I GmbH

In this ruling, the CJEU issued its opinion on the matter of the VAT exemption of private hospitals.

The case
I GmbH supplies hospital services within the meaning of German law and its operation is state-approved. However, it is not included in the hospital requirements plan for Lower Saxony and is not, therefore, a plan-listed hospital in line with § 108 no. 2 Social Insurance Code Volume V (SBG V). It is not a contracted hospital, since it has not concluded care supply contracts with the statutory health insurance or substitute funds, in line with § 108 no. 3, SGB V. Its revenue is therefore fundamentally not exempt from VAT in line with § 4 (14) (b) German VAT Law (UStG).

I GmbH holds the view that its supplies are exempt from VAT in accordance with Art. 132 (1) (b) of the VAT Directive. It states that it operates an approved hospital and supplies hospital and medical care in the same way as a body governed by public law. It maintains that its activities are pursued in the public interest. First, it offers a range of services comparable to that supplied by public hospitals or hospitals included in the hospital plan. Secondly, it supplies its services to anyone, whether statutorily insured, privately insured or not insured at all. Treatment costs are to a large extent borne by social security bodies, including not only statutory health insurance funds but also the German army, occupational insurance associations, the service which administers aid to public servants in the case of illness, and embassies. In the period from 2009 – 2012, approx. 33 to 40 per cent of patient days spent in hospital were patients whose expenses are covered by social security bodies.

Conversely, the tax authorities hold the view that the hospital services are subject to VAT. The Lower Saxony Lower Tax Court seised referred the case to the CJEU for a preliminary ruling.

Ruling
The CJEU interprets Art. 132 (1) (b) of the VAT Directive to mean that supplies from private hospitals are equally exempt from VAT as supplies provided by a body operated by public

law, if the supplies are comparable from a social point of view.

In making this determination, the competent authorities could take into consideration the regulatory conditions applying to services offered by public hospitals and – to the extent that these also apply to public hospitals – indicators of the hospital's performance in terms of staff, premises and equipment and the cost-efficiency of its management. This is the case if these conditions and indicators are pursued with the aim of lowering the costs of medical treatments and making high-quality treatment more accessible to the individuals.

Similarly, consideration may be given to the method of calculating fixed-rate daily fees and the fact that the services supplied by that private hospital are borne by the social security regime or under contracts concluded with public authorities, so that the cost borne by patients is similar to that borne by patients for similar services supplied by hospitals governed by public law.

Please note:
It will be interesting to see how the Lower Saxony Lower Tax Court rules following the CJEU's preliminary ruling. It is also to be hoped that the legislature could take up the CJEU ruling to expand national law on VAT exemptions for private hospitals.

NEWS FROM THE BFH

Free-of-charge heat supplies

BFH, ruling of 25 November 2021, V R 45/20

If a trader uses a biogas plant they have constructed to supply electricity for a fee that input VAT can be deducted for, while also transferring the heat created by the plant to other persons free of charge, this supply of heat is a contribution subject to VAT in line with § 3 (1b) sent. 1 no. 3 and sent. 2 UStG. The German Federal Tax Court (BFH) concluded this in its ruling of 25 November 2021.

The case
In the case under dispute a KG built a biogas plant in 2005 and 2006 that it began operating in 2006. It supplied the electricity generated by the plant for a fee and claimed an input VAT deduction on the construction costs. In two contracts concluded in March 2006 and October 2008, the KG undertook to supply heat free of charge to two GbRs. In 2009 and 2010 the KG expanded its plant and, in this respect, also claimed an input VAT deduction. The VAT treatment of the transfer of value is disputed.

Ruling
The BFH affirms a benefit-in-kind in line with § 3 (1b) sent. 1 no. 3 UStG. According to this, a supply for a fee in line with § 3 (1b) sent. 1 no. 3 UStG is set on par with every other contribution of an item free of charge, with the exception of low value and sample items for the purposes of the company. In contrast to § 3 (1b) sent. 1 no. 1 UStG, procurement for purposes outside those of the company are not relevant in this respect.

In the case under dispute, the non-payment arises due to the absence of a price agreement, which would lead to a payment on which the overall circumstances can rest. In this respect, besides the original absence of a price agreement, it must be considered that an agreement of pricing was (only) later agreed due to an objection to the free-of-charge status arising in the course of an external audit, a mere low price of 0.05 cent/kWh was agreed, amounting to only 1/80 of the market price, and that the price agreement (despite otherwise fluctuating prices for the object of the supply) was not changed over a multi-year period.

The additional requirements of § 3 (1b) sent. 1 no. 3 UStG are present. The free-of-charge transfer of the heat as an item to the two GbRs as recipients led to the KG providing a targeted pecuniary benefit for them. To the extent the BFH relies, moreover, on a "threat of an untaxed end use", this requirement is also satisfied as the heat transferred to each of the GbRs can be counted as this type of separate end use.

The entitlement to deduct input VAT in accordance with § 3 (1b) sent. 2 UStG must also be affirmed. For the question of whether the item contributed is entitled to an input VAT deduction in full or in part, in the case of items that the trader produces with their own means of production, it is decided on the basis of whether they would be entitled to deduct input VAT on the purchase of this type of plant.

No reliance on Union law for supplies in the area of sport

BFH, ruling of 21 April 2022, V R 48/20 (V R 20/17)

The BFH has ruled on the VAT treatment of supplies from sport clubs in accordance with Union law.

The case
A golf club collected membership fees. The tax

authorities did not view these membership fees as a payment for supplies subject to VAT. In addition, the golf club provided other services for a separate fee. This included the right to use the golf course, the loan of golf balls for the driving range by means of a ball dispenser, holding golf tournaments and events at which the plaintiff collected entry fees for participation, rental of caddies and the sale of golf clubs. The tax authorities view these supplies, contrary to the club and the Lower Tax Court, as being subject to VAT. The BFH submitted the issue to the CJEU for a preliminary ruling.

Ruling
The BFH ruled that the supplies in the area of green fees, ball dispensers, entry fees, caddies and sales are subject to VAT.

According to the CJEU ruling of 10 December 2020 – case C-488/18 – Golfclub Schloss Igling, Art. 132 (1) (m) of the VAT Directive has no direct effect, so that a non-profit entity cannot invoke this provision before national courts. The BFH no longer holds to the previous contradictory case law (see most recently the ruling of 20 March 2014, V R 4/13).

The golf club cannot, in the area of entry fees for event, claim a VAT exemption in line with § 4 (22) (b) UStG either. This VAT exemption fails on the basis that a golf club is not a non-profit entity. In this respect, the CJEU rules that the term non-profit organization within the meaning of Art. 132 (1) (m) of the VAT Directive is an autonomous Union law term that demands that such an entity, in the case of a dissolution of the organization, cannot distribute to its members any surpluses it has made exceeding the capital shares paid up by those members and the market value of any contributions in kind made by them. The golf club's statutes were lacking in this respect in the year under dispute. Attention must also be paid to this requirement in the case of an interpretation of § 4 (22) (b) UStG in a manner consistent with the Directive.

As a result of the total amount of the revenue received for the supplies subject to VAT the small trader provision (§ 19 (1) UStG) cannot be applied either.

Please note:
Appropriate regulations in the statutes can ensure tax exemption according to § 4 (22) (b) UStG insofar as the golf club must be a non-profit organization within the meaning of Article 132 Paragraph 1 Letter m VAT Directive.

With regard to the prohibition on extinguishment that also applies in the appeals process, the BFH did not rule on whether the golf club (in the area of membership fees) had also provided other supplies to its members, which were not taxed by the tax authorities but which could, in line with CJEU and BFH case law, by liable for VAT (CJEU ruling Kennemer Golf of 21 March 2002 – case C-174/00, and BFH ruling of 20 March 2014 - V R 4/13).

NEWS FROM THE BMF

Zero-rated intra-Community supplies of goods

BMF, guidance of 20 May 2022 – III C 3 - S 7140/19/10002 :011

The law on further fiscal support for electromobility and the amendment of other tax provisions of 12 December 2019 (Federal Law Gazette I p. 2451) changed, in particular, the material legal requirements for the existence of an intra-Community supply of goods and a corresponding zero-rating.

1. An intra-Community supply of goods also requires that the purchaser in another Member State (than the Member State in which the intra-Community supply of goods is carried out) be registered for VAT purposes.

2. Furthermore, an intra-Community supply of goods is explicitly made dependent on the purchaser using a valid VAT identification number issued to them by another Member State vis-à-vis the supplying trader.

3. The zero-rating will fail if the supplying trader does not fulfil their duty to submit an EC Sales List (recapitulative statement) (§ 18a UStG) or to the extent they submit an incorrect or incomplete statement with respect to the supply of goods in question.

BMF guidance of 9 October 2020
The BMF explicitly states that the trader does not fulfill the requirements for the zero-rating, if they do not submit the recapitulative statement correctly, completely, and on time. The determination as to whether the requirements have not been fulfilled can only ever be made retrospectively, as a recapitulative statement regarding an intra-Community supply of goods is not submitted until later, namely by the 25th day following the end of the reporting period in which the intra-Community supply took place.

§ 18a (10) UStG remains unaffected: If the trader realizes at a later date that the recapitulative statement they

have submitted is incorrect or incomplete, they are required to correct the originally submitted recapitulative statement within one month. If the trader does not correct the erroneous recapitulative statement for the reporting period in which the supply affected was carried out, according to the BMF, the zero-rating for the supply in question must be retroactively denied. A correction of errors in a recapitulative statement other than the original does not give rise to a revival of the zero-rating for the supply concerned.

BMF guidance of 20 May 2022
The BMF corrects its point of view in that the zero rating does not depend on the recapitulative statement being submitted on time or corrected on time within a month in accordance with § 18a (10) UStG.

The period standardized in § 18a (10) UStG serves exclusively to carry out a proper intra-community control procedure and any fine proceedings (§ 26a (2) No. 5 UStG).

If a recapitulative statement that has not been submitted by the deadline is submitted correctly and completely for the relevant reporting period for the first time, the substantive legal requirements for the zero rating are met for the first time at this point in time and this is to be granted if the other requirements are met. The first submission of a recapitulative statement and the correction of an incorrect recapitulative statement by the entrepreneur within the assessment period have retroactive effect for the purpose of zero rating. The retrospective granting of the zero rating in the assessment procedure does not rule out a fine procedure by the Federal Central Tax Office in accordance with § 26a (2) No. 5 UStG.

The example in section 4.1.2 (3) UStAE is changed accordingly and a second example is added.

Please note:
The principles of the BMF guidance of 20 May 2022 are to be applied for the first time to intra-community deliveries that are effected after 31 December 2019.

In addition to the clarification that the zero rating for the intra-community delivery does not depend on a timely submission of the recapitulative statement, the controversial one-month period for correcting an incorrect or incomplete recapitulative statement by the BMF letter is no longer considered relevant for the purposes of the retrospective revival of the zero rating. However, the period is still legally fixed in § 18a (10) 10 UStG, which remains unaffected for the zero rating according to § 4 No. 1b Sentence 2 UStG. In this respect, a relevant change in the law would be absolutely necessary, even if the regulation deviates from the corresponding provision in Union law. In addition, it should be noted that, in the opinion of the tax authorities, failure to observe the deadlines can still lead to a fine of up to EUR 5,000 in accordance with § 26a (2) No. 5 in conjunction with (3) UStG.

Reverse charge procedure on supplies of telecommunications services

BMF, guidance of 2 May 2022 – III C 3 - S 7279/19/10006 :004

The 2020 German Annual Tax Act expanded the VAT liability of the recipient of a supply to include telecommunications services from 1 January 2021. The recipient of the supply owes the VAT if they are a trader whose main activity in relation to the purchase of these supplies lies in providing them and whose own use is of lesser importance (so-called resellers).

Restrictions
For supplies of telecommunications services, apartment owner associations are, as the recipient of the supply, not the party liable for VAT if these supplies are passed on to the individual apartment owners as VAT-exempt supplies in line with § 4 no. 13 UStG.

Landlords are not recipients of the supply liable for VAT for supplies of telecommunications services, if these supplies are passed on to the individual renters as VAT-exempt ancillary services in line with § 4 no. 12 UStG.

This also applies if the apartment owner associations or landlords treat these types of transactions as subject to VAT in line with § 9 (1) UStG.

Implementation provisions
The principles of this BMF guidance must be applies in all open cases. In the case of supplies carried out before 1 July 2022, no objection will be raised if the parties agree to use the reverse-charge-procedure.

Please note:
The BMF has already ruled on the individual requirements for the reverse charge procedure on supplies of telecommunications services in its guidance of 23 December 2020 – III C 3 - S 7279/19/10006 :002 (see VAT Newsletter March 2021; section 13b.7b UStAE). In particular, it must be assumed that a company is a reseller, if the tax authorities, upon application or

ex officio, has issued a certificate based on the sample form USt 1 TQ to that company that is valid at the time of the purchase of telecommunications services. The validity of the certificate is limited to a maximum of three years. The certificate can only be revoked or withdrawn with future effect.

If the tax authorities have issued a certificate based on the sample form USt 1 TQ to a company, that company is also the one liable for VAT as the recipient of the supply, if it is actually not a reseller at the time of the service or if it does not use this certificate vis-à-vis telecommunications providers.

OTHER

Elimination of a VAT privilege

Since 1 January 2022, there have been significant changes in the area of agriculture and forestry, insofar as farmers and foresters had previously applied average rate taxation in accordance with § 24 UStG.

As of 1 January 2022, the Annual Tax Act 2020 introduced a restriction on the scope of application of average rate taxation. The possibility of application was limited to farmers and foresters whose total turnover according to § 19 83) UStG did not exceed EUR 600,000 in the previous calendar year.

You can read more about this in our blog post on kpmg.de.

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26 Apr – Poland: Online purchases via foreign sites taxable; VAT on invoices

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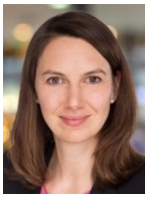

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