KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

June 2022

NEW LEGISLATION

Fourth Corona Tax Relief Law

Federal Law Gazette I 2022, p. 911

On 19 May 2022, the Bundestag (German Parliament) agreed on the Fourth Law on the Implementation of Tax Relief Measures to Overcome the Corona Crisis (Fourth Corona Tax Relief Law). The Bundesrat (German Federal Council) approved the law on 10 June 2022 and the law was announced in the Federal Law Gazette on 22 June 2022. In particular, the law contains extensions for the submission deadlines of tax returns for the years 2020 to 2024.

Furthermore, the deadlines for the assessment of late-filing penalties (§ 152 AO) as well as the interest-free grace period for interest on arrears and refunds in accordance with § 233a AO are extended accordingly.

The BMF guidance of 23 June 2022 – IV A 3 - S 0261/20/10001 :018 – contains the following overviews, taking into account Saturdays, Sundays and public holidays at the end of the submission deadlines:

Expiration of the tax return deadlines 2020 to 2025

Tax period	Cases without an advisor	Cases with an advisor
2020	1 November 2021[1]	31 August 2022
2021	31 October 2022[2]	31 August 2023
2022	2 October 2023	31 July 2024
2023	2 September 2024	2 June 2025
2024	31 July 2025	30 April 2026
2025	31 July 2026	1 March 2027

[1] If this day is a public holiday in the federal state to which the tax office belongs: 2 November 2021
[2] If this day is a public holiday in the federal state to which the tax office belongs: 1 November 2022

Start of interest accrual according to § 233a AO

Tax period	Start of interest
2020	1 October 2022
2021	1 October 2023
2022	1 September 2024
2023	1 July 2025
2024	1 July 2026
2025	1 April 2027

Content

NEWS FROM THE CJEU

Joint and several liability of an indirect customs representative for import VAT

CJEU, ruling of 12 May 2022 – case C-714/20 – U.I.

The CJEU has ruled on the question of the liability of an indirect customs representative as the joint and several debtor for import VAT.

The case
In two tax assessment notices issued to U. I., an Italian customs office corrected 45 and 115 import declarations, respectively, and assessed the import VAT owed on the corresponding amounts. The customs office also held the view that U. I., as an indirect customs representative of the importing company A, against which insolvency proceedings were pending, and U. C. in accordance, inter alia, with Art. 77 and 84 of the Customs Code was jointly and severally liable for the payment of these taxes along with these companies.

The customs authorities considered the letters of intent attached to the import VAT declarations to be unreliable, as they were underpinned by a fact that was not deemed to be a given, that is, that these importing companies were conventional exporters. As they had not effected any transactions that could fall under the VAT-exempt purchases contingent, under Italian law the import transactions were not exempt from VAT.

U. I. brought a suit against both of these tax assessment notices to the presenting court in order for their unlawfulness to be determined.

Ruling
The CJEU notes that according to Art. 18 (1) of the Customs Code, the indirect customs representative is acting in its own name but for the account of another entity. In submitting a "customs declaration" in line with Art. 5 (12) of the Customs Code, the representative is thus doing this in their own name but for the account of the entity that has granted them a power of representation and that they are representing, such that they are acting, in line with Art. 5 no. 15 of the Customs Code, as the "declarant".

The wording of Art. 77 (3) of the Customs Code results in both the indirect customs representative as declarant and the importer, on whose behalf they submit these declarations, being the customs debtor. Furthermore, from the context and the aims of the regulation in which this provision was inserted, it can be seen that it concerns only the customs debt and not the import VAT as well.

According to Art. 201 of the VAT Directive, in the case of an import the VAT is owed by the person or persons determined to be or recognized as the taxpayer by the Member State of import. The CJEU interprets Art. 201 of the VAT Directive to mean that the indirect customs representative cannot be made jointly and severally liable with the importer for the payment of the import VAT, if there are no national provisions in which they are explicitly and unambiguously determined to be or recognized as the person liable for this tax. The examination of this falls to the presenting Italian court.

Please note:
According to § 13a (2) German VAT Law (UStG), § 21 (2) UStG applies in Germany regarding tax liability in relation to import VAT. According to § 21 (2) UStG, the provisions for customs duties apply analogously for import VAT, except for the provisions on outward processing traffic. Based on the interpretation up to now, with a corresponding application of Art. 77 of the Customs Code, the debtor of the import VAT is the declarant. In the case of indirect representation, the person on whose behalf the customs declaration is submitted, is also liable for the customs duties (joint and several debtor; Art. 77 (3) Customs Code).

In light of the discretion granted to the Member States by Art. 201 of the VAT Directive, according to the CJEU they are free to stipulate that for the implementation of this article, the customs duties debtor owes the import VAT and, in particular, that the indirect representative is jointly and severally liable for the payment of this tax along with the person that has granted them the power of representation and who they are representing. It is therefore necessary to check whether § 21 (2) UStG constitutes a sufficient basis of authorization for the joint and several liability of indirect representatives and importers in relation to import VAT.

NEWS FROM THE BFH

Generation of VAT in the case of mediation services

BFH, ruling of 1 February 2022, V R 37/21 (V R 16/19)

This ruling concerns questions on the point in time in VAT law at which VAT arises.

The case
The plaintiff taxed her

transactions in line with agreed fees. In the year under dispute, 2012, she provided mediation services subject to VAT to a GmbH in relation to a purchase contract for a property. A fee of EUR 1,000,000 plus VAT was agreed as payment. The agreed fee was to be paid in five installments of EUR 200,000 each plus VAT. The installments were payable at an interval of one year each, and the first installment was due to be paid on 30 June 2013. To guarantee payment of all installments, the GmbH had to provide security to the plaintiff. In the subsequent years the plaintiff issued invoices showing VAT for the individual installments on each individual due date, received payment and paid VAT on that payment accordingly.

It is disputed whether the plaintiff, due to the mediation service having already been provided in 2012, must pay the VAT on the total mediation fee in the year under dispute.

Ruling
Following the application for a preliminary ruling from the CJEU (ruling of 28 October 2021 – case C-324/20 – X-Beteiligungsgesellschaft), the BFH has ruled that the payment of installments does not provide grounds for uncollectibility. According to the CJEU, the non-payment of a fee installment before its due date must not be classified as a non-payment of the fee and therefore does not reduce the basis of assessment for the tax. Thus, the assumption of uncollectibility in the case of a maturity ranging over more than two tax periods, proves to be inaccurate. The potential consequences of this in relation to so-called collateral retentions for which the BFH has affirmed uncollectibility were not being considered in this case.

A restriction of debit taxation of this type, such that the trader only needs to pay tax on claims for payment already due, is out of the question. In this respect, the CJEU considers the circumstance that the taxpayer must pre-finance the VAT that she owes to the state, for the provision of a one-off service, which is paid for in instalments, to be insignificant.

Accordingly, the Lower Tax Court's ruling must be set aside. The matter is not ripe for decision. The BFH cannot itself rule on whether in the case under dispute, the generation of VAT on the basis of a partial supply exists. The national term partial supply corresponds, as a rule at least, to the terminology in Art. 64 (1) of the VAT Directive, because an economically divisible supply is a supply with a "continuous or recurring character", as shown in the examples of vehicle rental or the provision of legal, economic and financial advice as part of a long-term commitment given in the use cases provided by the CJEU in Art. 64 (1) of the VAT Directive. These must also be considered to be partial supplies under national law.

In the case under dispute it must be taken into account that an income tax senate of the Lower Tax Court ruled, due to obtaining evidence by questioning witnesses on the evaluation of the supply in the same case, that the accompanying circumstances of the fee agreement were attributed particular importance and it must be assumed that the plaintiff merely provided "independent partial supplies". Witness B's statement supports this. Witness B, as managing director of the client, explained to the plaintiff that the total amount of EUR 1,000,000 was not paid exclusively for the mediation of the property but also for "support" throughout the entire project. The affirmation of partial supplies, provided over a period of several years, may also come into question as a result of the procedural objections in this VAT.

Please note:
According to the case law of the CJEU and BFH, an agreed instalment payment alone is not sufficient for later generation of VAT at the time the respective instalment is due. Rather, partial supplies must be added, i.e. a service with a "continuous or recurring character". - Even in the case in which the instalment payments are subject to a condition as in the CJEU judgment of 29 November 2018 – Rs. C-548/17 – baumgarten sports & more underlying facts, the VAT may arise later at the time the instalments are due. As a result, it should already be taken into account during the contract negotiations that payment in instalments can lead to pre-financing of VAT, provided that these are not linked to conditions or are associated with partial services.

Deposit on cards, charged on transfer of electronic payment cards

BFH, ruling of 26 January 2022, XI R 19/19 (XI R 12/17)

The BFH has concluded that in the case of a card deposit charged upon the transfer of electronic payment cards as part of a cashless payment system in stadiums, it is not a lump-sum (terminating as a result of the return of the card) compensation.

On the contrary, a supply subject to VAT exists which, in

accordance with § 4 (8) (d) UStG, is exempt from VAT as a transaction in the payments and bank transfers business, if the supplying trader itself carries out the transmission of funds.

The case
Company B transferred electronic payment cards, so-called e-cards, to visitors to stadiums to use for the cashless payment of food and drinks in the stadiums.

The use of the e-cards was regulated in greater detail in B's general terms and conditions (AGB). According to these, the holder of the card can use the e-card for cashless payments on the event days for which use of the e-card has been approved, within the places of operation of the affiliated that accepted it. For every payment transaction, the credit saved on the e-card is reduced by the amount used. In addition, the AGB provided the possibility for the holders of the card to redeem a potential credit on the card (in cash or as a bank deposit). According to B's directory of prices and services, the deposit for a card was EUR 2, which was deducted upon the first purchase from the up to EUR 150 that could be loaded onto the e-card upon issuance.

The stadium operators and caterers paid commissions to B which were calculated on the payments made using the e-cards or on fixed sizes, such as numbers of spectators. B offered a comprehensive service for the card payment system by providing card readers and organizing its own staff in the stadiums for the sale, topping up and return of the e-cards.

B considered the revenue realized from the card deposits in the years under dispute as exempt from VAT. On the other hand, it subjected the commission income and revenue from the sale of expired e-card to collectors to VAT.

In contrast, the tax authorities held the view that the revenue from card deposits constituted revenue from the supply of items subject to VAT at the standard rate. To the extent that e-cards were handed back in return for the deposit amount within the two-year redemption deadline, the VAT amount owed should be corrected in line with § 17 UStG. The action brought against this remained unsuccessful.

Ruling
The BFH viewed the appeal as valid. For a different hearing and decision, the case was sent to the Lower Tax Court for the contested ruling to be set aside and referral back.

While the Lower Tax Court correctly recognized that in the case of the EUR 2 card deposit, it was not a "true" compensation but rather a transaction subject to VAT in line with § 1 (1) no. 1 sent. 1 UStG, the transactions effected are not, however, independent supplies of items in line with § 3 (1) UStG.

On the contrary, through the card payment system set up to allow visitors to pay without using cash in the stadiums, supplies in line with § 3 (9) sent. 1 UStG were provided that are exempt from VAT in accordance with § 4 no. 8 (d) UStG, as transactions in the payment and bank transfer business.

However, the case is not yet ripe for decision. The Lower Tax Court has, up to now, not made any determinations that would allow evaluation of whether and to what extent the input VAT deduction availed of on the input supplies must be reduced.

Please note:
The BFH substantiated the denial of a supply of goods as follows:

In this case, the interest of the cardholder was exclusively aimed at the cashless payment (as a condition of the purchase of, for example, drinks) in the stadiums.

However, if the cardholders' interests are focused neither on the purchase of the e-card itself nor on the exchange of cash into electronic credit, but rather on the paid access to cashless payment processes in the stadiums, the Lower Tax Court's assessment that the transfer of the card is an independent supply of goods in line with § 3 (1) UStG does not reflect the cardholders' interests.

The transfer of the e-card for a card deposit and the option that opens up for cashless payments in stadiums are so closely connected that they objectively form one single inseparable economic process, the splitting up of which would be unrealistic. Accordingly there is a uniform supply, the dominant component of which lies in the option to make cashless payments in the stadiums.

NEWS FROM THE BMF

Introduction of a transaction limit for agricultural and forestry companies

BMF, guidance of 2 June 2022 – III C 2 - S 7410/19/10001 :016

The German Annual Tax Act 2009 introduced a transaction limit to § 24 UStG in the amount of EUR 600,000. This must be applied for the first time to transactions effected after 31 December 2021. To the extent

that the total transactions (§ 19 (3) UStG) for the overall company in the previous calendar year amounted to more than EUR 600,000, it is mandatory for VAT to be paid on the transactions at the standard rate. With regard to the introduction of the transaction limit, the tax authorities have particularly incorporated the following provisions into the VAT Application Decree.

New provisions in the VAT Application Decree

The examination of the transaction limit takes place on the basis of the net revenue that the company realized in the previous calendar year and on the basis of the type of taxation applied in the relevant calendar year (target or cash-based accounting). To the extent the company has applied the average rate taxation of § 24 UStG in the previous calendar year, the agreed fees must be used as the basis for the calculation of the total revenue.

In the year of the start of the commercial or professional activity, the estimated total revenue for the current calendar year must be set down. In this case, and if the commercial or professional activity is only carried out in part in the previous calendar year, the total revenue must be converted into a total annual turnover.

Specific provisions shall apply in the case of the sale of a business and the universal succession, which the BMF refers to specially.

In the year in which the commercial or professional activity begins, the estimated total revenue for the current calendar year should be used as the basis. In this case, or if the commercial or professional activity is only carried out for a portion of the previous calendar year, the total revenue must be converted to a total annual revenue.

In the case of a move to standard taxation, the interim return period is generally the calendar quarter. If the tax for the previous calendar year amounts to more than EUR 7,500, the interim return period is a calendar month. An exemption from the duty to submit interim returns in the first year following the legal change to standard taxation is out of the question.

In the case of a change to the form of taxation, a correction of the input VAT deduction in line with § 15a UStG is possible. The de minimus limits in accordance with § 44 VAT Implementing Regulation must be taken into account.

IN BRIEF

CJEU submission on input VAT deductions in the case of health resorts

BFH, resolution of 15 December 2021, XI R 30/19

To clarify the question of whether the operation of health resorts for a spa tax constitutes a commercial activity and that therefore input VAT deductions for associated input supplies must be granted, the BFH has submitted two questions to the CJEU for a preliminary ruling:

- If, as in the main proceedings, a municipality that levies a “spa tax” due to a local statute (in the amount of a certain amount per day of visit) on visitors staying in the community (spa guests) for the provision of spa facilities (for example, a spa park, spa building, pathways), is carrying out, by providing the spa facilities to the spa guests for a spa tax, a commercial activity in line with Art. 2 (1) (c) of the VAT Directive, if the spa facilities are freely accessible for everyone anyway (and therefore, for example, also for residents or others not subject to the spa tax)?
- If the answer to this question is yes: Is, under the circumstances of the main proceedings mentioned above, in examining whether the treatment of the municipality as not liable for VAT could lead to “significant distortions of competition” in line with Art. 13 (1) (2) of the VAT Directive, in terms of area the relevant market only the area of the municipality?

PREVIEW

Draft of BMF guidance on chain transactions

The BMF has sent the associations the draft of a BMF guidance on the VAT treatment of chain transactions for their comments.

The VAT treatment of chain transactions was changed by the law on further tax incentives for electromobility and the amendment of other tax regulations of 12 December 2019. This change in the law serves, among other things, to implement Article 36a of the VAT Directive. On the other hand, the change in the law serves to eliminate legal uncertainties in the allocation of transport or shipping in chain transactions that have arisen as a result of the case law of the BFH. The

BMF guidance shall apply in all open cases.

AROUND THE WORLD

TaxNewsFlash Indirect Tax
KPMG articles on indirect tax from all around the world

14 Jun – Portugal: VAT rate for elevator repairs and maintenance (CJEU judgment)

14 Jun – Czech Republic: VAT perspective on early termination of energy supplies; VAT treatment of promotional events

13 Jun – Belgium: Extension of VAT filing deadlines

13 Jun – Mexico: Electronic invoice 4.0 (CFDI 4.0) mandatory beginning 1 January 2023 (six-month extension)

7 Jun – Netherlands: Transfers of real property qualified as transfers of going concern for VAT purposes (court decisions)

2 Jun – Saudi Arabia: Penalty waiver relaunched for all taxes, including VAT and excise tax

2 Jun – Switzerland: Possible revisions of VAT law include measures affecting electronic platforms

31 May – Poland: Fixed establishment of German entity under VAT law (court decision)

23 May – Denmark: Legislative proposals regarding interest surcharges for tax corrections, including for VAT

12 May – Switzerland: VAT analysis of tokenized commodities trading

You can find this and additional articles here.

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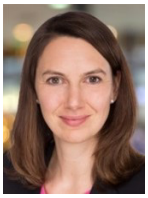

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