KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

November 2022 / January 2023

NEW LEGISLATION

A modern VAT system for the EU: Fighting VAT fraud through digitalization

European Commission, Press release of 8 December 2022

The European Commission has proposed a series of measures to modernize the EU's VAT system. The system should be simplified for companies and also become more resilient to fraud. This shall be achieved above all by means of more powerful digitalization, for example using electronic invoicing. The EU lost VAT revenue in the amount of EUR 93 billion in 2020 – based on conservative estimates a quarter of that is as a result of VAT fraud within the EU. In 2020 German lost tax revenues in the amount of more than EUR 11 billion. You can read further details on the website of the European Commission.

German Annual Tax Act 2022

Federal Gazette, announcement of 20 December 2022 (BGBL. I 2022 p. 2294)

On 2 December 2022, the Bundestag agreed on the German Annual Tax Law 2022 in the version recommended by the Finance Committee. Following approval by the Bundesrat, the law was finally published in the Federal Law Gazette on 20 December 2020.

We shared details on the VAT-related changes, which were already contained in the government draft, in the VAT Newsletter August/September 2022.

One significant change to the government draft is the extension of the optional transitional provisions relating to the VAT liability of legal entities under public law (§ 2b German VAT Law (UStG)) for an additional two years. up to and including 2024 (§ 27 (22), (22a) UStG).

NEWS FROM THE CJEU

VAT grouping in Germany

CJEU, ruling of 1 Dezember 2022 – Rs. C-141/20 – Norddeutsche Gesellschaft für Diakonie mbH; ruling of 1 Dezember 2022 – Rs. C-269/20 – Finanzamt T

The Court of Justice of the European Union (CJEU) had to rule whether the German regulations on fiscal entities for VAT purposes are compatible with EU law. The answer is essentially yes. However, it is still unclear in

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particular whether transactions within a VAT group (intra-group sales) will be subject to VAT moving ahead.

Background
Time and again over the last few years, the CJEU has had to deal with German provisions on tax groups for VAT purposes. In accordance with section 2(2) no. 2 sentence 1 of the UStG, a consolidated group for VAT purposes is when a legal entity (or a partnership under certain conditions in line with EU law interpretation), in light of the overall actual circumstances, is financially, economically and organisationally integrated into the undertaking of the controlling company.

The legal consequence of this is that the controlling company and its controlled subsidiaries are combined into a single trader and its intragroup sales are not subject to VAT, even if the associated companies remain legally independent in other respects. The VAT group is therefore solely represented by its controlling company. German law differs from that of other Member States is that the VAT group is “a ‘fiction’ created for VAT purposes” that owes VAT to the tax office as an independent taxpayer.

Advocate General Medina was of the opinion that the German regulations were contrary to the law of the European Union for several reasons. Had this been the case, as the German Federal Fiscal Court set out in its order for reference, the German state would have faced billions in lost tax revenue. Also – contrary to the valid German legal situation – the Advocate General felt that sales within a VAT group should alwaysbe subject to VAT.

Controlling company vs. VAT group
According to the statements that are almost identical in both judgements, it is compatible with EU law that a Member State designates not the VAT group itself but a member of that group, namely its controlling company, as a single taxable person for VAT purposes. It also says that the EU Directive should not be interpreted restrictively. There is no risk of tax losses because the controlling company has to report the VAT for the entire group and the controlled subsidiaries are liable for this. The current German opinion has therefore been confirmed.

Integration – Financial integration and superordination
Elsewhere, the CJEU contradicts the current opinion of German case law and the tax authority. For “financial integration” to exist, German case law and the tax authority assume that the controlling company must possess a majority of voting rights in the controlled subsidiary. The CJEU refutes this (C-141/20). The controlling company does not need to have a majority of voting rights in addition to a majority shareholding. However, it is still necessary that the controlling company is in a position to impose its will on the controlled subsidiaries. In practice, the question is whether this must be ensured, for example, by measures developed for organisational integration or whether the CJEU’s judgement should be interpreted as meaning that an additional criterion should not be necessary. Furthermore, citing its previous case law, the CJEU emphasized that restricting fiscal unity to cases of superordination and subordination is not permitted, hence the German opinion on this is not compatible with EU law.

Classification by categorisation – Independence of the controlled subsidiary – Intra-group sales
It is still unclear how the German Federal Fiscal Court intends to interpret and implement a further statement by the CJEU. The German Federal Fiscal Court had asked whether national lawmakers are permitted to classify, by categorisation, a legal entity as non-independent, where that entity is integrated, in financial, economic and organisational terms, into the controlling company of a VAT group. The CJEU refutes this (C-141/20). This essentially allows two interpretations:

The effects of fiscal unity could be limited to combining and sending the VAT returns for the controlling company and the controlled subsidiary together. Despite being integrated into a VAT group, controlled subsidiaries would still be non-independent – in terms of their business enterprise – and would perform/receive services subject to VAT within the group in the event of intra-group sales. This would be diametrically opposed to the current German understanding and would have farreaching consequences, not just for companies with a limited entitlement to input tax deduction (banks and financial service providers, public sector, etc.).

In particular, an argument against this interpretation is that, referring to instructions from the EU Commission and its previous case law, the CJEU states elsewhere that “by setting up a VAT group […] a number of closely bound taxable persons merge in order to form a new single taxable person for VAT purposes”, therefore “the closely linked entity or entities […] cannot be treated as a taxable person or persons”. It follows that “treatment as a single taxable person […] precludes members of the VAT group from continuing to

submit VAT declarations separately and from continuing to be identified, within and outside their group, as individual taxable persons, since the single taxable person alone is authorised to submit such declarations" (C-141/20, no. 45 et seq.; C-269/20, no. 39 et seq.).

However, the CJEU can also be interpreted as meaning that "close links" are not enough to assume the non-independence of the group member by categorisation, and that instead an individual examination of the requirements for a VAT group is essential. This would be in line with the current opinion of German case law and the tax authority.

Benefits in kind for the controlling company's non economic activities
In Case C-269/20, the CJEU denies the taxation of a benefit in kind if a controlled subsidiary performs a service for the non-economic activity of the controlling company (activity performed in an official capacity). Here, too, the CJEU did not take the opportunity to comment on the treatment of intragroup sales.

Please note:
It is eagerly awaited how the BFH will implement the statements of the CJEU in its subsequent rulings.
The German rules on VAT groups are compatible with EU law in principle, but urgently require reform. This issue, which has been discussed for years, would help in practice to achieve more legal certainty on the requirements for integration – the CJEU has now created even more uncertainty regarding financial integration. Presumably the most important aspect for companies is the potential taxability of intra-group sales. With regard to the now conceivable organizational affiliation of affiliated companies and the consideration of non-economic areas in the VAT group, there may be design possibilities.

Vouchers for staff
CJEU, ruling of 17 November 2022 – Case C-607/20 – GE Aircraft Engine Services

The CJEU interprets Art. 26 (1) (b) of the VAT Directive on the taxation of a benefit-in-kind to mean that it is not applicable to the provision of services that consist of a company providing shopping vouchers free of charge to its staff, as part of a program set up by them to recognize and reward those members of staff who are most deserving and have performed the best.

Ruling
In the case at hand, the issuing of shopping vouchers does not occur on the basis of an employee's private needs as they are not guaranteed to be allocated vouchers. The right to suggest the allocation of vouchers lies with the other company employees and takes place on the basis of purely work-related criteria, as well as only if it is assumed that the members of staff nominated deserve a particular premium.

In addition, there is no question that handing out the shopping vouchers in question by GEAES takes place without payment or any consideration whatsoever on the part of the employee benefiting, and the costs are borne by GEAES directly. This provision of services does however provide an advantage to the company in the form of the prospect of increasing its profits due to greater motivation and therefore increased performance by its employees. Consequently, the personal benefit arising for the employee appears to be subordinate compared to the company's needs.

Please note:
The CJEU ruling offers design possibilities when issuing vouchers to employees which avoid a VAT burden in the form of taxation of benefit in kind.

NEWS FROM THE BFH

Qualification as a company in the case of sales via eBay
BFH, ruling of 12 May, V R 19/20

In this ruling the BFH has taken a position on the qualification as a company in the case of sales via eBay.

The case
In this case the plaintiff purchased items from house clearances from 2009 to 2013 and offered them for sale in the form of auctions on the internet auction platform eBay. To this end she created four accounts on eBay and opened two current accounts. In 2009 the plaintiff sold goods via eBay at 577 auctions, in 2010 at 1,057 auctions, in 2011 at 628 auctions, in 2012 at 554 auctions and in 2013 at 260 auctions. She did not submit any tax returns. A tax investigation by the tax authorities found revenue in the amount of EUR 40,000 (2009), EUR 70,000 (2010), EUR 90,000 (2011 and also in 2012) and EUR 80,000 (2013)

The tax authorities issued corresponding income tax and trade tax assessment notices in which it estimated the business outgoings and input VAT in the amount of 30 per cent of revenue. In the VAT assessment notices for the years under dispute the tax authorities levied VAT in the amount of 19 per cent of the revenues ascertained. The tax authorities did not recognize input

VAT amounts. Following unsuccessful preliminary proceedings, the plaintiff filed a suit. The suit was partially successful. An estimate of business outgoings in the case of the determination of income and trade tax of 60 per cent of the net revenues was justified. Apart from this, the Lower Tax Court dismissed the case.

Ruling
The BFH viewed the appeal as reasonable and referred the case back to the Lower Tax Court. The basis of assessment, in accordance with § 10 (1) sent. 1 UStG is the fee. According to § 10 (1) sent. 2 UStG (old version), a fee is everything which the person receiving the supply uses in order to obtain the supply, less the VAT. Therefore, the VAT to be assessed in the disputed assessment notices should have been calculated on the so-called (gross) income. The Lower Tax Court must take this into account it its revised ruling.

Ultimately, the Lower Tax Court ruled correctly that the disputed supplies of the plaintiff were subject to VAT. The Lower Tax Court's appraisal, treating the sales as a sustainable activity within the meaning of § 2 (1) UStG cannot be objected to from an appeal law perspective.

With regard to the requirements for sustainability for sales via eBay, the BFH, to prevent repetition, referred to its ruling of 26 April 2012, V R 2/11. Accordingly, the Lower Tax Court explicitly referred to and took into account an overall picture of the circumstances and generally accepted views that the plaintiff had sustainably carried out her sales activities over many years, as even the quantity of sales was considerable. Furthermore, the Lower Tax Court had also taken into consideration that the scope of this activity required a business organization. She had to purchase packaging materials, pack goods, pay shipping and produce digital pictures of the items on offer. The Lower Tax Court assessed these facts without violating the laws of reasoning and without neglecting essential circumstances to the effect that an intensive and long-term sales activity using tried and tested distribution measures (eBay platform) exists that must therefore be determined to be sustainable within the meaning of § 2 (1) UStG. It does not matter whether the plaintiff chose to access it using a private or commercial log-in, as the characteristics of a commercial activity are not subject to any choice of options.

The case is not ready for a decision as a determination on the differential taxation in accordance with § 25a UStG has not yet been made. To the extent that this is not intended to come into consideration, the Lower Tax Court must still make determinations on input VAT deductions and the VAT rate. The requirements of the small trader provision (§ 19 UStG) do not exist in the case under dispute.

Requirements for a transfer of use for a fee

BFH, ruling of 22 June 2022, XI R 35/19

In this resolution the BFH has ruled on the requirements for a transfer of use for a fee.

The case
A municipality maintained a swimming pool on one of its properties. In 2005, due to tight budgetary constraints, the municipality leased the swimming pool to a club. In addition, the municipal supervisory authority stipulated that the municipality would in future not be permitted to exceed an amount of EUR 75,000 per year to cover any shortfall in the operation of swimming pools.

The interest on the lease was EUR 1 annually. In the business leasing agreement, the municipality undertook to pay a subsidy to the club in the amount of EUR 75,000 per year, which would serve to support the club in the public interest and was not intended to constitute an equivalent to a supply subject to VAT.

As the municipality considered renovating the swimming pool in 2015, its representatives held a meeting with representatives of the tax authorities regarding the possibility of an input VAT deduction on the input supplies expected in this regard. In this meeting, the tax authorities presented the view that the lease, on the grounds of the amount of the lease and the subsidy, was ultimately free of charge, so that this lease did not mean the municipality was commercially active and was therefore not entitled to deduct input VAT.

Consequently, the lease agreement was replaced by a new lease agreement with effect from 1 October 2015. The interest on the lease from then on was EUR 10,000 per year, plus VAT in the amount of EUR 1,900. For the final quarter of 2015, interest on the lease in the amount of EUR 2,973.81 (gross) was due. The new lease agreement no longer contained an agreement on a subsidy.

Alongside the lease, the parties to the contract concluded a separate subsidy agreement. In this, the municipality undertook to pay a subsidy in the amount of EUR 90,000 to the club annually.

The tax authorities refused the deduction of input VAT. An

objection and legal suit were not successful.

Resolution
The municipality's appeal to the BFH was not successful. The Lower Tax Court ruled, in a manner that does not give rise to objections on the basis of appeal law, that the input VAT amounts claimed on the input supplies for the swimming pool are not deductible.

An interpretation of § 15 (1) sent. 1 no. 1 UStG in compliance with the Directive requires that the company intends to use the supplies for its company and thus for its economic activities for the provision of supplies for a consideration.

To determine whether a supply of services is carried out for a consideration, thereby also leading to the existence of an economic activity, all circumstances under which the activity is carried out must be examined. In doing so, the circumstances under which the person in question provides the supply of service and the circumstances under which such a supply of service is normally provided must be compared. A so-called asymmetry between the costs arising for the supplier and the amount received for the service can, as part of the overall consideration required, lead to a determination that the necessary connection between the amount paid and the provision of the service is lacking (cf. CJEU ruling of 12 May 2016 – case C-520/1 – Gemeente Borsele).

For the period from 1 January 2015 to 30 September 2015 the agreed interest on the lease of EUR 1 indicates that the price agreement is merely intended to serve as a symbolic price agreement, without the character of a fee, in order to facilitate the club's operational management and to open up the input VAT deduction to the municipality. No actual equivalent value exists. The municipality therefore also did not provide its supply in circumstance under which such a supply of services would normally be provided.

To the extent the period from 1 October 2015 to 31 December 2015 is concerned, it must be taken into account that at the same time the lease was increased in the lease agreement, the municipality's subsidy to the club was increased in a separate subsidy agreement. The burden of the obligation to pay an increased rent entered into in the lease agreement was compensated for from the outset by a contrasting agreement by the parties to the contract in the subsidy agreement; as a result the agreements concerned cancelled each other out in the long run leading to no economic change to situation before the contract changes.

Please note:
In examining if an economic activity exists, according to the BFH and the CJEU, all circumstances must be examined under which the activity is carried out. In the process, the circumstances under which the parties concerned provided the services and the circumstances under which these types of services are normally provided must be compared. In this connection, all contractual agreements between the parties must be taken into consideration.

Sale of vouchers for leisure experiences before 1 January 2019

BFH, ruling of 15 March 2022, V R 35/20

In this ruling the BFH deals with the VAT treatment of the sale of vouchers. The ruling concerns the legal situation before 1 January 2019, the implementation of the Voucher Directive (EU) 2016/1065 of 27 June 2016 in national law.

The case
A company operated an internet portal from 2008. On this site it presented various leisure experiences that could be booked and used. In each case, this required the purchase of a voucher. The vouchers were sold by the company in its own name and for its own account via the internet portal.

On the one hand, vouchers could be purchased for a specifically chosen experience (voucher for an experience); in this case the amount paid for the voucher was already enough to avail of the chosen experience. On the other hand, vouchers could be purchased for a set amount of money with the possibility of choosing a specific experience (voucher for a value) at a later date.

The company treated the payments for those purchasing vouchers in the years under dispute not as considerations for a transaction subject to VAT but rather only the commission invoiced to the organizers of experiences and the shipment of the vouchers, separately paid for by the purchasers of the vouchers. The tax authorities held the contrary view that the company had already provided supplies subject to VAT when selling the vouchers.

An objection and legal suit at the Lower Tax Court were not

successful. The Lower Tax Court assumed that overall, in operating their internet portal the company provides a supply subject to VAT to the purchasers of the vouchers for a consideration.

Ruling
The BFH considered the company's appeal to be justified. This led to the annulment of the preliminary ruling and a referral of the case back to the Lower Tax Court for a different treatment and ruling.

The BFH concluded the following: If a company sells vouchers for particular leisure experiences via its internet portal, it is either carrying out the supply promised by the voucher itself or is acting as an intermediary with respect to this supply. The Lower Tax Court, on the other hand, incorrectly assumed that the company's supply existed in the operation of its internet portal in accordance with § 1 (1) no. 1 sent. 1 UStG. Additional determinations must be made by the Lower Tax Court for the final ruling, in particular on the relationships. With regard to the vouchers for experiences, a difference must be made between acting in its own name or in the name of a third party. In this regard, the BFH particularly mentioned the requirements of an intermediary supply. If the voucher is only issued for a specific amount of money (voucher for money), at the time of the voucher being issued there was no direct connection between the payment made by the purchaser of the voucher and a specific supply.

NEWS FROM THE BMF

Allocation of input VAT amounts in accordance with § 15 (4) UStG

BMF, guidance of 18 November 2022 – III C 2 - S 7306/19/10002 :002

If a company uses an item that is supplied, imported or acquired as an intra-Community purchase, or any other supply, both in the case of transactions that confer a right to deduct input VAT and also transactions which preclude the deduction of input VAT in accordance with § 15 (2) and (3) UStG, it must divide the input VAT amounts into deductible and non-deductible portions. According to Union law a transaction key taking the entirety of transactions effected by the company into account must generally be used for this allocation.

Appropriate allocation key
However, Member States may derogate from this principle. The German legislature made use of this option in § 15 (4) sent. 3 UStG by giving precedence to "other economic allocations" above an allocation by transaction.

The input VAT allocation must be carried out using an appropriate allocation key. If, in addition to a total sales key, other allocation keys could be considered, a different allocation key must be used if it gives a more precise result. If, in addition to a total sales key, there are several potential other more precise allocation keys available, it is not necessary to use the most precise method. The choice of the more precise method to be used in these cases is left up to the company; however, the tax authorities can examine it to check if it is appropriate.

Consideration of BFH case law
According to the BFH ruling of 16 November 2016, V R 1/15, products produced by a thermal power station (electricity and heat) are not comparable despite the same kWh calculation. Therefore, allocating input VAT on the basis of the supplies produced in kWh is not appropriate. Instead, they must be allocated in relation to the market price of the amount of electricity and heat (as an object-specific transaction key) produced.

According to the BFH ruling of 23 October 2019, XI R 18/17, the estimation of the non-deductible portion of the input VAT using a selective staffing key (the so-called Philipowski method) should not be considered to be appropriate. The use of this type of staffing key does not lead to more precise results as it does not take into consideration that all members of staff have contributed to achieving the company's performance.

Amendment of UStAE
The German Ministry of Finance (BMF) has amended the VAT Application Decree (UStAE) in line with the BFH case law above. The principles of the BMF guidance must be applied in all open cases. No objection shall be raised if a company invokes the previous rules on the extraction of heat in Section 2.5 (20) UStAE for supplies acquired up to 31 December 2022.

Please note:
In an additional guidance of 20 October 2022 (III C 2 - S 7306/19/10001 :003), the BMF ruled on the allocation of input VAT in accordance with § 15 (4) UStG in the case of mixed-use buildings. The statements above also apply for the "appropriate allocation key". In the case of mixed-use properties, it must in particular be differentiated if the input VAT amounts arise from input supplies for the use, conservation and maintenance, or from the production/acquisition of a mixed-use building. The BMF goes into detail on taking certain non-objection provisions for transactions before the publication of the BMF guidance.

Sample forms for the proof of registration as a company – (USt 1 TN)

BMF, guidance of 18 November 2022 – III C 3 - S 7359/20/10007 :001

In this guidance the BMF has announced a sample form for the proof of registration as a company – (USt 1 TN).

The sample form concerns companies resident in the Federal Republic of Germany that require a confirmation of their status as a company for a refund of input VAT amounts in a non-EU country or confirmation of their VAT status for the purposes of registering for VAT abroad.

In these cases, the competent tax authorities issue a certificate on request. For this certificate, the sample form USt 1 TN must be used. This replaces the sample form announced in the BMF guidance of 5 November 2019.

The changes take into account the inclusion of the date of the company's VAT registration, as this date is required by some non-EU countries in order to check if the VAT registration existed during the refund period in question.

To the extent the certificate is intended to be used in a procedure for the refund of VAT in a non-EU country, the certificate may only be given to companies that are entitled to deduct input VAT. It is not permitted to be issued if the company only carries out transactions exempt from VAT that preclude the deduction of input VAT, or to which taxation in line with § 19 (1) or § 24 (1) UStG applies.

If the proof of registration as a company is required by foreign authorities to be provided on forms prescribed by the individual foreign state, there are no issues in confirming the registration as a company on these forms, if they correspond substantively to the regulatory content of the sample form USt 1 TN.

Reduced taxation of gas supplies via the natural gas network and heat via a heating grid

BMF, guidance of 25 October 2022 – III C 2 - S 7030/22/10016 :005

The law to temporarily lower the VAT rate on supplies of gas via the natural gas network lowered the rate of VAT for supplies of gas via the natural gas network and for supplies of heat via the heating grid from 19 per cent to 7 per cent for the period from 1 October 2022 to 31 March 2024. This change entered into effect on 1 October 2022.

The reduced VAT rate applies in particular to supplies of gas via the natural gas network. It is not important how the gas is generated. Supplies of gas transported by the supplying trader by tanker to the recipient of the supply for the production of heat are also included. The reduced VAT is also levied on the feed of gas into the natural gas network. The table in the BMF's FAQ of 14 November 2022 provides an overview of the preferential gas deliveries.

The prerequisite is that the supply of gas takes place in the period of the temporary reduction of VAT rate. In this respect, the respective period in which the readings are taken is relevant which means that in individual cases when these were actually taken must be checked. For the supplying company in addition the prepayments made during the meter reading period lead to the VAT occurring at the end of the reporting period in which they are received. In this respect constellations must also be taken into consideration in which for example commercial spaces are sublet and supplies of gas are also carried out, as the supply of gas is, in the view of the tax authorities, not an ancillary service independent of the lease.

Other independent supplies that are not part of a supply of gas are conversely subject to the standard VAT rate. However, laying a gas supply to a house is also covered by the reduced VAT rate so that ancillary services especially must be reviewed carefully for the applicable VAT rate.

Simplification provisions

In relation to the application of the VAT rate, the tax authorities envisage different simplifications. These simplifications relate in particular to the question of the meter reading period and thus the question of which supplies the reduced VAT rate will be applied to. Furthermore, the simplifications relate inter alia to the collection of payments, the issuing of final invoices, changes to the basis of assessment and the input VAT amount to be deducted by the recipient of the supply (19 per cent, even if the applicable VAT rate is 7 per cent). It is however a requirement that the supplying company did in fact pay the VAT shown.

Occurrence of VAT in the case of partial services

BMF, guidance of 14 December 2022 – III C 2 - S 7270/19/10001 :003

According to § 13 (1) no. 1 (a) sent. 1 UStG, for supplies of goods and supplies in the case of taxation on receipts, VAT arises when the advance notice reporting period in which the supplies were carried out ends. This also applies, according to § 13 (1) no.

1 (a) sent. 2 UStG, for partial supplies. These exist if, for specific parts, an agreement is separately concluded for a financially separable supply (§ 13 (1) no. 1 (a) sent. 3 UStG).

In its ruling of 1 February 2022, V R 37/21 (V R 16/19), the BFH ruled that VAT arising in accordance with § 13 (1) no. (1) (a) sent. 1 UStG is not limited to entitlements to payments which are already due. A partial supply in line with § 13 (1) no. 1 (a) sent. 3 UStG requires a supply with a continuous or repeating character. The national term partial supply corresponds, at least as a general rule, to the terminology in Art. 64 (1) of the VAT Directive. No partial supply exists if the supply in question is a one-time supply on the basis of payment installments.

This deals with the doubt regarding the appropriate implementation of Art. 64 (1) of the VAT Directive using the national term partial supply, which previously arose as a result of the CJEU ruling of 29 November 2018 – case C-548/17 – baumgarten sports & more.

Moreover, in the ruling of 1 February 2002 mentioned above, the BFH ruled that the agreement of payment in installments does not give grounds for uncollectability within the meaning of § 17 (2) no. 1 UStG.

The BMF amended the UStAE accordingly to incorporate the BFH jurisprudence.

VAT rate for transactions in silver coins

BMF, guidance of 23 November 2022 – III C 2 – S 7246/19/10001 :003

According to § 12 (2) no. 12 UStG the reduced VAT rate applies, inter alia, to the import of the items listed in No. 54 of Appendix 2. This includes in particular collectors' items of numismatic value, i.e. coins and medals made of precious metals, if the basis of assessment for the transactions in these items amounts to more than 250 per cent of the underlying net weight of the calculated metal value without VAT.

The German VAT Law does not provide for the application of VAT at the reduced rate for coins that are not collectors' items. The practical application of the (simplification) provisions in the BMF guidance of 5 August 2004 led, according to the BMF, to the reduced VAT rate being used even though the legal requirements for it were not satisfied. Therefore, the (simplification) provisions given in that guidance can no longer be used, according to BMF guidance of 27 September 2022.

In the BMF guidance of 23 November 2022, a non-objection provision was introduced. The provisions of the BMF guidance of 27 September 2022 will continue to apply in all open cases. For the avoidance of bureaucracy and for reasons of administrative economy, however, no objection will be raised if the trader applies the reduced VAT rate to the import of silver coins under the conditions set out in the BMF guidance of 5 August 2004 in the version valid up to 26 September 2022, if the silver coins were imported up to and including 30 November 2022 and, in particular, were not listed in Appendix 1 to ref. 174 of this BMF guidance.

Furthermore, no objection will be raised if the trader treats the silver coins as "collectors' items" within the meaning of No. 54 of Appendix 2 UStG, with no further examination required, if they supplied the silver coins before or on 31 December 2022 and they were not listed in Appendix 1 to ref. 174 of the BMF guidance of 5 August 2004 in the version applicable until 26 September 2022.

Reminder: Rules on non-objection in the case of granting guarantees ended on 31 December 2022

BMF, guidance of 11 May 2021, 18 June 2021, 18 October 2021, III C 3 - S 7163/19/10001 :001

In its ruling of 14 November 2018, XI R 16/17, the BFH ruled that a car-dealer's provision of a guarantee for payment does not constitute an ancillary supply dependent on the supply of a vehicle but rather is a self-contained supply. In providing the guarantee, through which the car-dealer promises to provide a monetary payment in the case of a guarantee claim, a supply exists on the basis of an insurance relationship in line with the Insurance Tax Act, which is exempt from VAT in accordance with § 4 no.10 (a)UStG.

With reference to CJEU case law, it was also determined that the supply for which the insurer is liable in the case of a guarantee claim must not necessarily consist in the payment of a monetary amount, but rather can also exist in the case of assistance services, whether through the payment of money or provision of benefits-in-kind.

The BMF guidance of 11 May 2021 goes into the legal insurance and VAT related consequences.

For clarification, the BMF guidance of 18 June 2021 notes that the tax principles on the provision of guarantees must be able to be applied across sectors and therefore reaches beyond usage in the automotive sector and for car-dealers.

The principles of the BMF guidance of 11 May 2021 must be applied to guarantees submitted after 31 December 2022. For guarantees submitted before 1 January 2023, no objection shall be raised if the principles of this guidance are already applied. The non-objection provision for guarantees to the end of 2022 was not extended by the BMF.

Please note:
The unclear definitions and the high level of complexity at the interface between insurance tax and VAT lead to legal uncertainties for the guarantor and the guarantee recipient. In addition, the topic has been postponed again and again due to some non-objection regulations, but it is now mandatory to implement it from 1 January 2023. Guarantee/warranty extensions, product guarantees and maintenance contracts in both B2B and B2C cases as well as in domestic and cross-border constellations may be affected. Please note that the new regulation applies not only to the automotive industry, but to many different industries and products (household appliances, computer hardware, machines, systems, electronic items, etc.). In addition to an insurance law analysis, there are a number of VAT effects (adjustments to invoicing and verification as well as in the ERP system, input tax deduction restrictions for spare parts, etc.).

IN BRIEF

Missing reference to "tax liability of the recipient of the supply" in the case of triangular transactions

*CJEU, ruling of 8 December 2022 – case C-247/21 – Luxury Trust Automobil Gmb*H

Following a submission from the Austrian Higher Administrative Court on the impacts of a missing reference to the "tax liability of the recipient of the supply" in the case of triangular transactions, the CJEU has ruled on the issue.

The CJEU interprets Union law to mean that the final purchaser in a triangular transaction was not effectively determined to be the one liable for VAT, if the invoices issued by the intermediate purchaser did not contain the information "tax liability of the recipient of the supply" in line with Art. 226 no. 11a of the VAT Directive.

Furthermore, Art. 226 no. 11a of the VAT Directive must be interpreted such that leaving out the "tax liability of the recipient of the supply" information required on an invoice by this provision cannot be corrected by a later amendment to the effect that this invoice concerns an intra-Community triangular transaction and that the tax liability transfers to the recipient of the supply of goods.

Please note:
In practice, the correct VAT mapping of chain transactions still poses major challenges for companies. This applies all the more as current developments mean that some supply chains have to be changed over at short notice. The application of the intra-community triangular simplification plays an important role here in order to avoid the VAT registration of the company in the middle of the chain in the Member State of destination. However, the applicability of the simplification rule for the intra-community triangular transaction is linked to high formal requirements. The CJEU states that the simplification is not applicable if the invoice of the company in the middle of the chain does not contain any reference to the tax liability of the last entrepreneur.

Invoices showing too much VAT

CJEU, ruling of 8 December 2022 – case C-378/21 – Finanzamt Österreich

Following a submission from the Austrian Federal Tax Court, the CJEU has ruled on the interpretation of Art. 203 of the VAT Directive.

This reference for a preliminary ruling concerns a legal dispute between P GmbH and the Austrian tax authorities due to the rejection by the tax authorities of an application for the correction of a VAT return by P. The correction was desired as P had given a VAT amount in their invoices that was calculated on the basis of an incorrect VAT rate (20 instead of 13 per cent). P's customers were exclusively end-users who have no right to deduct input VAT. A correction of invoices vis-à-vis this group of people was de facto not possible.

The CJEU concludes that a company that has carried out a provision of services and shown a VAT amount in its invoice that is calculated on the basis of an incorrect VAT rate, does not owe the incorrectly invoiced portion of VAT if there is no risk to the tax revenue, as the provision of services were provided solely to an end-user who is not entitled to deduct input VAT. A correction of

the invoice is therefore not required.

Please note:
This judgment of the CJEU is of very high relevance in practice. So far, case law and the German tax authorities have required an effective invoice correction in cases of incorrect and unauthorized tax identification in accordance with § 14c UStG in order to be able to recover the incorrectly or unauthorized VAT. So far, this has applied regardless of whether the invoice recipient is an entrepreneur who is entitled to input tax deduction or, for example, a private individual. In the case of private individuals in particular, however, an invoice correction is practically impossible in bulk business. Since there is no risk to tax revenue in this case, the CJEU says that an invoice correction is irrelevant.

Refusal of input VAT deduction due to tax evasion of the original seller

CJEU, ruling of 24 November 2022 – case C-596/21 – A/FA M

Following a submission from the Nuremberg Lower Tax Court, the CJEU has ruled on the impacts of an input VAT deduction due to tax evasion on the part of the original seller.

Art. 167 and 168 of the VAT Directive must be interpreted – in light of the principle of the prohibition of fraud – such that the second purchaser of an item can be denied the deduction of input VAT because they had or should have had knowledge of VAT evasion carried out by the original purchaser upon the first sale, even though the first seller also knew about this evasion.

Furthermore, Art. 167 and 168 of the VAT Directive must be interpreted – in light of the principle of the prohibition of fraud – such that the second purchaser of an item, for which a fraudulent transaction was effected at a previous level of the chain, that only, however, affected a portion of the VAT that the state is entitled to levy, must be fully denied the right to deduct input VAT if they knew or should have known that the purchase was connected to an evasion of VAT.

Transactions of a foreign secondary lottery

BFH, ruling of 3 August 2022, XI R 36/19

If the recipient of a supply provided by electronic means is the final consumer, the supply is normally carried out in the place where the final consumer is resident.

The case under dispute concerns a company under British law with the legal form of a Limited company that is resident in Great Britain. This company possesses a British gambling license and organizes a so-called secondary lottery. In this type of lottery betting, the plaintiff offered wagers on the draws of various terrestrial lottery draws (so-called primary lotteries). The player received a chance to win, similar to participating in a primary lottery, if they bet on numbers that came up in the corresponding primary lottery.

The BFH denied the provision of an electronic supply in this case. A supply carried out using electronic means, essentially automated and only carried out with minimal human involvement, does not exist if, in the case of wagers on a secondary lottery, the results of the game are not entered into the system autonomously using computer system but rather are manually entered by human staff. Therefore, the Limited company provided the supply at its place of business abroad (§ 3a (1) sent. 1 UStG).

Reduced VAT rate for restaurant and catering services

BMF, guidance of 21 November 2022– III C 2 - S-7030 / 20 / 10006 :006

In the Eighth Law on Changes to Consumer Laws of 24 October 2022, the legislature has extended the application of the reduced VAT rate at seven per cent to the provision of restaurant and catering supplies of services, with the exception of drinks, beyond the deadline of 31 December 2022 to 31 December 2023.

Therefore, the tax authorities have decided to extend time limit for the administrative regulations contained in the BMF guidance of 2 July 2022.

Input VAT adjustment in line with § 15a UStG in the case of input VAT balancing

BMF, guidance of 22 November 2022 – III C 2 - S 7316/19/10003 :002

In its ruling of 1 February 2022 – V R 33/18, the BFH ruled that the adjustment of input VAT in line with § 15a (1) UStG assumes there is an original input VAT deduction.

As well as the cases decided by the BFH on the transfer of tax debt in line with § 13b UStG and a corresponding input VAT deduction in line with § 15 (1) sent. 1 no. 4 UStG, according to the tax authorities, the principles also apply for other cases of

possible input VAT balancing, for example an intra-Community purchase in accordance with § 1a UStG with a corresponding input VAT deduction in accordance with § 15 (1) sent. 1 no. 3 UStG. The principles of the BMF guidance must be applied in all open cases.

Extension of legal non-profit and VAT law measures to support assistance for those affected by the Corona crisis

BMF, guidance of 12 December 2022 – IV C 4 - S 2223/19/10003 :006

To support assistance for those affected by the Corona crisis, the BMF has already initiated a series of tax reliefs in the past. For example, the BMF guidance of 3 December 2021 (see VAT Newsletter December 2021) dealt with the application of the VAT exemption in accordance with § 4 no.18 UStG. In particular, in its guidance of 12 December 2022, the BMF extended the previous VAT law related measures anew, that is until 31 December 2023.

Taxation of travels services from companies resident outside the EU

BMF, guidance of 1 December 2021 – III C 2 - S 7419/19/10002 :004

In the BMF guidance of 29 January 2021 it was agreed that § 25 UStG cannot be applied to travel services from companies resident outside the EU and with no permanent establishment within the Community's territory.

For reasons of legitimate expectation, no objection will be raised if the special provisions of § 25 UStG are applied to travel services carried out by 31 December 2020 by companies resident outside the EU and with no permanent establishment within the Community's territory.

This non-objection provision has been repeatedly extended for another year. Now, according to the BMF guidance of 1 December 2022, the non-objection provision has been extended for a further year up to 31 December 2023.

FROM AROUND THE WORLD

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

You can find the following articles here.

18 Jan – China: Draft VAT law

17 Jan - Czech Republic: Referral to CJEU of issue relating to VAT exemption for supplies of goods to another member state when recipient is unknown

19 Dec - KPMG report: VAT in the digital age

13 Dec - Czech Republic: Application of VAT to fuel cards

8 Dec - Poland: Draft legislation making e-invoicing mandatory effective 1 January 2024

17 Nov - Lithuania: New legislation for VAT deduction on purchased electric cars

16 Nov - Denmark: DAC7 guidance

15 Nov - Netherlands: VAT recovery based on bank's "actual use method" (Supreme Court decision)

10 Nov - Czech Republic: Penalty for filing VAT ledger statement for incorrect taxable period struck down (Supreme Administrative Court decision)

9 Nov - Poland: Cashback discounts do not reduce output tax; correcting invoice does not reduce taxable base (administrative court decisions)

9 Nov - Poland: Draft legislation guidelines of reporting obligations for digital platform operators (DAC7)

1 Nov - Poland: New draft bill to implement EU single-use plastics directive

31 Oct - Spain: Report on compulsory electronic invoicing for traders and professionals

20 Oct - Hungary: Availability of online cash register data via online invoice system

20 Oct - Hungary: Reconsideration of electronic VAT system to ma-chine-to-machine concept

EVENTS

VAT 2023 – Hybrid Annual Meeting

Event on 23 May 2023

Webcast Live: Trade Compliance: ESG in the context of export control, customs and excise duties

Event on 22 March 2023

Webcast Live: Customs & Trade: The update at the stat of the year

Event on 2 February 2023

Further information and the registration forms for the events can be found here.

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International Network of KPMG
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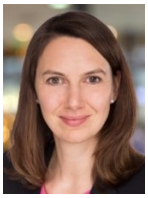

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