KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

March 2023

NEWS FROM THE CJEU

VAT treatment of platforms; service commission *CJEU, ruling of 28 February 2023 – case C-695/20 – Fenix International*

The CJEU has ruled that 9a Implementing Regulation (EU) No. 282/2011 does not infringe Union law because the limits of the implementing power granted to the Council had been respected.

The case
Fenix, a company registered for VAT purposes in the United Kingdom, operates a social media platform on the internet known as "Only Fans" (hereinafter referred to as 'the Only Fans platform'). This platform is offered to 'users' throughout the world, who are divided into 'creators' and 'fans'.

Each creator has a 'profile' to which they upload and publish content, such as photos, videos and messages. Fans can access content uploaded by the creators they wish to follow or with whom they wish to interact, by making ad hoc payments or by paying a monthly subscription. Fans can also pay 'tips' or donations for which they do not receive any supply in the form of content.

Each creator determines the amount of the monthly subscription, although Fenix sets the minimum amount payable for both subscriptions and for tips.

Fenix provides not only the Only Fans platform but also the application enabling financial transactions to be carried out. Fenix is responsible for collecting and distributing the payments made by fans, using a third-party entity as a payment services supplier. Fenix also sets the general terms and conditions for use of the Only Fans platform.

Fenix retains 20% of all sums paid to a creator to whom it invoices the corresponding amount. Fenix applies VAT at a rate of 20% to this amount, which appears on the invoices which it issues.

All payments appear on the bank statements of the fans in question as payments to the benefit of Fenix.

In April 2020 HMRC issued VAT assessment notices to Fenix and meant that Fenix must be deemed to be acting in its own name in line with Art. 9a(1) of Implementing Regulation (EU) No 282/2011. Consequently, Fenix had to pay VAT on the entire amount received from a fan, not just on the 20% of that sum which it retained as a fee.

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In July 2020, Fenix brought an action essentially questioning the validity of Art. 9a Implementing Regulation (EU) No. 282/2011, the reasoning of which was shared by the referring court from the United Kingdom

Reasons for decision
In its judgment of 28 February 2022, the CJEU held that it was not sufficient for the platform to designate another taxable person as the supplier of the services, because it could authorize the services or determine the general conditions, namely the execution and the time at which it takes place. Therefore, this is a service commission and Fenix owes VAT on the entire amount received from a fan. The presumption contained in the first subparagraph of Article 9a(1) of the VAT Regulation does not alter the presumption established in Article 28 of the VAT Directive, but is limited to making it more specific. There was therefore no doubt as to the validity of Article 9a of the VAT Regulation.

It follows from the third subparagraph of Article 9a of the VAT Directive that the presumption set out in the first subparagraph of Article 9a(1) of the VAT Directive cannot be rebutted and thus becomes irrebuttable if one of the cases referred to in the third subparagraph applies to the taxable person.

According to the CJEU, in the case of services supplied electronically via a telecommunications network, an interface or a portal such as an appstore, a taxable person involved in that supply is always presumed to be acting in his own name but on behalf of the supplier of those services, so that he himself is deemed to be the supplier of those services if he authorizes the billing of the recipient of the services, authorizes the supply of the services or determines the general conditions of the supply (three alternatives of the third subparagraph of Article 9a of the VAT Regulation).

Therefore, following the preliminary ruling, Fenix should have to subject to VAT not only the commission but the entire amount collected from the "fans".

Please note:
Due to the strict view of the CJEU on the interpretation of Art. 9a VAT Regulation, which it considers valid because the Council has not exceeded its powers, it must always be examined whether a service commission exists in the case of Internet platforms. This can already be the case if only one of the three alternatives of Art. 9a subpara. 3 VAT Regulation exists.

VAT exemption of insurance transactions

CJEU, ruling of 9 March 2023 – C-42/22 – Generali Seguros

The CJEU has ruled on the scope of application of the VAT exemption of insurance transactions.

The case
Generali Seguros is an insurance company which, in the course of its business, purchases vehicle parts from written-off motor vehicles damaged in accidents involving the persons whom it insures and subsequently sells them to third parties, without accounting for VAT on those sales.

Following an audit relating to the 2007 financial year, the Portuguese tax and customs authorities took the view that the sales of parts from written-off motor vehicles by Generali Seguros, were transfers of tangible property for consideration, subject to the payment of VAT and that they were not eligible for any exemption provided.

Generali Seguros brought a suit against this. The court appealed to has doubts as to the interpretation of the Union law that could apply and therefore submitted the case to the CJEU for a preliminary ruling.

Reasons for decision
According to Art. 135 (1) (a) of the VAT Directive, Member States exempt “insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents” from VAT.

According to the CJEU transactions from the sale of wrecked cars are therefore effected on the basis of contracts that are independent from the insurance contracts relating to these vehicles concluded by insurance companies with persons other than the insured and do not fall within the scope of an insurance relationship. That is to say, the sale of an item has nothing to do with covering a risk and the price corresponds to the value of the item at the time of the sale.

In this regard, it is irrelevant that this transaction relates to a vehicle wreck from a claim that is covered by the insurance company selling it, and that the amount due to the insured as compensation for this claim includes the purchase price of this wreck. The value of the wreck is actually made up of the residual value of the insured vehicle after an accident and thus is not, by definition, part of the damage suffered by the insured. Therefore, this price is not part of the insurance compensation itself,

as it is paid to the insured to satisfy a purchase agreement, which is independent of and can be separated from the insurance contract..

Therefore, transactions for the sale of parts from a written-off motor vehicle, such as those at issue in these proceedings, do not constitute 'insurance transactions' within the meaning of Article 135(1)(a) of the VAT Directive. Finally, it must be held that such a sale cannot be regarded as inseparably linked to the insurance contract relating to the vehicle concerned and, therefore, as having to be subject to the same tax treatment as that contract.

The transaction is also not exempt under Article 136(a) of the VAT Directive. According to this exempted are supplies of goods used solely for an activity exempted under, inter alia, Art. 135 of that directive, if those goods have not given rise to deductibility. In the context of Art. 136(a) of the VAT Directive, the term 'used' refers to the fact that, in respect of goods, they are intended for a specific use, in the case at hand, to be used for the purposes of an activity consisting of carrying out insurance transactions.

That is not the case for goods which an insurance company purchases in the event of an accident covered by it and which it does not intend to use in the course of its insurance business, but rather to sell, in an unaltered state and without having been used, to third parties.

NEWS FROM THE BFH

New submission: VAT grouping and intercompany sales

BFH, decision of 26 January 2023, V R 20/22 (V R 40/19)

The reference to the CJEU is intended to clarify whether the previous assumption of the non-taxability of so-called intercompany transactions should be maintained. This is already the second reference for a preliminary ruling in this matter.

Until now, sales between the members of a VAT group have not been subject to VAT because the tax group company is regarded as a "dependent" part of the overall company of the parent tax group parent. According to the BFH, doubts about this view arise from the fact that the CJEU considers the controlled company to be independent and that, according to its case law, the tax group may not lead to the risk of tax losses. In the opinion of the BFH, the latter could be affirmed if the controlling company receiving the service from the controlled company is not entitled to a full input tax deduction, as was the case in the specific dispute.

Decision on the VAT group in the second reference case

BFH, Judgment of January 18, 2023, XI R 29/22 (XI R 16/18).

In its follow-up ruling to the CJEU ruling of 1 December 2022, Case C-141/20 (Nord-deutsche Gesellschaft für Diakonie), the BFH continues to regard the tax liability of the VAT group parent for the sales of the VAT group resulting from Section 2 (2) No. 2 UStG as being in conformity with EU law. The conditions mentioned by the CJEU for this (enforcement of the will and no risk of tax losses) would be guaranteed, since the BFH already required the possibility of enforcement of the will and the subsidiary was liable for the turnover tax of the controlling company pursuant to Section 73 of the German Tax Code.

With regard to the criterion of the enforcement of the will, however, the BFH changes its case law on financial integration. For the existence of a fiscal unity, it is still necessary in principle that the controlling company holds the majority of the voting rights in the subsidiary. However, financial integration now also exists if the shareholder holds only 50% of the voting rights, but the necessary enforcement of the will at the controlled company is ensured by the fact that he holds a majority share in the capital of the controlled company and that he is the sole managing director of the controlled company.

Please note:
Due to the new preliminary ruling of the BFH with the decision of 26 January 2023, the temporary standstill in tax group cases is not dissolved. The BFH considered it necessary to bring the somewhat unclear formulations of the CJEU in the judgment of 1 December 2022 (C-141/20) to the attention of the CJEU once again. The outcome of the proceedings before the CJEU seems to be completely open, if one compares the different opinions on the taxability of intra-group transactions expressed by the Advocates General so far (para. 36-39 of the referral decision). It is noteworthy, however, that the BFH points out at the end of its submission that a possible ruling by the CJEU that intra-group transactions are taxable is possible with an interpretation of national law that is in conformity with the law. Since the non-taxability of internal sales under national law had followed from the previous understanding of the

term "non-independent", which had been interpreted consistently for both numbers of § 2 para. 2 UStG, the term in § 2 para. 2 no. 2 UStG would have to be interpreted in a norm-specific manner and thus independently compared to § 2 para. 2 no. 1 UStG within the meaning of Union law. Independence within the meaning of § 2 para. 2 no. 2 UStG would then lead to the fact that the controlling body would have to declare and pay tax on all turnover of the controlling companies, whereby this would also extend to internal turnover in accordance with the view of Advocate General Medina in the cases of Finanzamt T (para. 36 f.) and Norddeutsche Gesellschaft für Diakonie (para. 64 and 73).

Rental of mobile accommodation containers to employees

BFH, ruling of 29 November 2022, XI R 13/20

The BFH has confirmed that § 12 (2) no. 11 Sentence 1 UStG favors not only the renting of land and buildings permanently connected to it, but generally the renting of living and sleeping quarters by an entrepreneur for the short-term accommodation of strangers and thus also the renting of living containers to harvest workers.

The case

A farmer employs around 100 harvest helpers seasonally, to whom he rents rooms in accommodation containers. These accommodation containers were not sunk into the earth but rather stood on stone plinths and were accessible using paved pathways. The length of each tenancy as three months at the most. The tax authorities held the view that the rental was subject to the standard rate of VAT as the accommodations were not permanently affixed to the property. The Lower Tax Court allowed the lawsuit. There is no requirement that living and sleeping areas must be part of a building.

Reasons of decision

The BFH could not agree with the FA as appellant and followed the FG, according to which the provision of accommodation in residential containers for harvest workers is subject to the reduced tax rate. According to § 12 (2) no. 11 sent. 1 UStG the VAT applicable to the rental of, inter alia, living and sleeping areas that a trader holds in readiness for the short-term accommodation of third parties, shall be reduced to seven per cent. This lower VAT rate also includes the rental of living and sleeping areas in mobile accommodation containers. While the formulation of the facts of the case of VAT reduction does correspond to that contained in § 4 no. 12 sent. 2 UStG, which refers to fundamental fact in § 4 no. 12 (a) UStG and thus the rental of property, the wording of § 12 (2) no. 11 sent. 1 UStG cannot itself, however, be understood to mean that it relates solely to the rental of parcels of land. On the contrary, the provision is generally beneficial to the rental of living and sleeping areas by a trader for the short-term accommodation of third parties. Moreover, the accommodation of “third parties” taken in does also include a trader’s own staff.

This also corresponds to Union law, because the term "accommodation in hotels and similar establishments" in Annex III No. 12 to the VAT Directive (list of reduced rates) is broad enough to also cover the short-term accommodation of seasonal workers in non-fixed residential containers.

Please note:

The decision may also have significance for another area of VAT. For example, when renting out such residential containers that are only placed on stone bases, one could deny a real estate service according to § 3a para. 3 no. 1 UStG, with the consequence that the basic rule according to § 3a para. 2 UStG would then apply in the B2B area. Then it would no longer depend on the location of the containers for the place of performance, but on where the recipient of the service operates its business (registered office). As there is often no reverse charge procedure for real estate services in other countries, which means that net invoicing is not possible, taxation in accordance with Section 3a (2) of the German Turnover Tax Act (UStG) would be contrary to practice, as this necessarily triggers net invoicing in the B2B area in the EU.

NEW FROM THE BMF

Donations for technical assistance to repair infrastructure damaged in the war in Ukraine

BMF, guidance of 13 March 2023 – III C 2 - S 7500/22/10005 :005

According to the German Ministry of Finance (BMF), in the case of supplies free of charge with the direct aim of repairing infrastructure in the Ukraine damaged by the war, the levying of VAT on a benefit in kind will not arise up to 31 December 2023 for reasons of equity. This encompasses, for example, the free-of-charge provision of building materials, construction equipment, technical facilities, and staff, in each case including any transport services.

If, upon obtaining a supply, a company already intends to use the supplies solely and directly for the purposes given, the corresponding input VAT amounts under the remaining requirements of § 15 UStG must be taken into account on the grounds of equity. The resulting benefits in kind shall not be taxed on the grounds of equity.

Zero VAT rate for transactions in connection with certain photovoltaic systems

BMF, guidance of 27 February 2023 – III C 2 – S 7220/22/10002 :010

The BMF has ruled on the zero VAT rate in connection with certain photovoltaic systems.

Introduction
The Annual Tax Act 2022 inserted a new paragraph 3 to § 12 UStG. According to § 12 (3) no. 1 sent. 1 UStG, the VAT on supplies of solar module to the operator of a photovoltaic system, including components essential for the operation of a photovoltaic system and storage that serves to store electricity produced by the solar modules, is reduced to 0 per cent if the photovoltaic system is installed on or close to private apartments, or apartment and public and other building used to serve activities carried out in the public interest.

The requirement of sentence 1 are deemed to be satisfied if the photovoltaic system's installed gross output, based on the market master data registry, is not or will not exceed 30 kW (peak).

§ 12 (3) UStG entered into effect on 1 January 2023. The importation, intra-Community purchase, and installation are also subject to the zero VAT rate if the solar modules, storage, or essential components are those benefitting in line with § 12 (3) no. 1 UStG.

If an item, the purchase of which provides an entitlement to deduct input VAT, is supplied at the zero per cent VAT rate, this alone does not constitute a change to the conditions within the meaning of § 15a UStG.

Benefit in kind
The BMF discusses when benefits in kind relating to electricity and photovoltaic system exist.

Amendment of UStAE
The BMF presents the amendments to the UStAE. In particular a zero VAT rate is inserted into the following Sections of 12.18 for certain photovoltaic systems:

- (1): Supply of a photovoltaic system
- (2): Operator of a photovoltaic system
- (3) and (4): Location requirements
- (5): Simplification provision in § 12 (3) no. 1 sent. 2 UStG
- (6): Documentation of existence of requirements
- (7): Solar modules and storage
- (8) and (9): Essential components
- (10): Installation of a photovoltaic system

Provision on application
The provisions of the BMF guidance must first be applied to transactions effected after 31 December 2022.

No objection shall be raised if the provisions in Section 12.18 (1) sent. 11 and 12 are first applied from 1 April 2023. In accordance with Section 12.18 (1) sent. 11 UStAE, the zero VAT rate shall not apply to the portion of the payment applying to independent supplies of services such as, for example, maintenance work, obtaining official permits, or insuring the photovoltaic system with a liability and indemnity insurance. According to Section 12.18 (1) sent. 12 UStAE, a standard rental amount must be divided using the simplest possible method.

Please note:
With the § 12 Abs. 3 UStG a reduced tax rate of 0 (zero tax rate) has been introduced as of 1 January 2023, which should favor the acquisition of PV systems for the operators of the same. This includes solar modules, battery storage (also retrofitted), inverters, power sockets, roof mounting, energy management systems, solar cables, radio ripple control receivers, back-up boxes and equipment used for emergency power supply. Electricity consumers for the newly generated electricity (e.g. charging infrastructure, heat pump, hydrogen storage) are not included because they do not belong to the essential components of a photovoltaic system. The ancillary services for the supply of the photovoltaic system include, among others, the acceptance of the registration in the Market Master Data Register (MaStR), the provision of software for the control and monitoring of the system, the assembly of the solar modules, the cable installations, the supply and connection of the inverter or the bidirectional meter, the supply of screws and power cables, the production of the AC connection, the provision of scaffolding, the supply of fastening material or the replacement of the meter cabinet, if this is required by the grid operator or is necessary due to technical standards for the supply of the system. is required by technical standards for the operation of the photovoltaic system. However, this requires that the ancillary services are provided by the solar installer as a package solution.

Particularly in the case of the sale of components, the entrepreneur providing the services must prove that the conditions for the application of the zero tax rate are met.
It is sufficient for the proof if the purchaser declares that he is the operator of the photovoltaic system and that it is either a tax-privileged building or that the installed gross capacity of the photovoltaic system does not exceed, according to MaStR 30 kW (peak) or will not exceed this amount. A declaration by the acquirer can also be made within the framework of a contractual agreement (e.g. general terms and conditions).

Note for so-called old cases:
These are the PV systems that were purchased before 1 January 2023: As a rule, these systems were purchased with input tax deduction (option for standard taxation) and the private use of the system had to be taxed as a benefit of kind. For the old cases, the BMF has now issued an equitable regulation on the possibility of withdrawing the equipment into private assets. Such a withdrawal can actually only be considered if the asset is subsequently used exclusively for private purposes. This is where the BMF letter comes into play and allows a withdrawal at zero tax rate, because it is assumed that the existence of a battery storage or a profitability calculation can prove a (sufficient) use of at least 90%. If the PV system operator owns a battery storage system or buys it now, it is possible to transfer the system to private assets. This means that in old cases, the withdrawal must be declared to the FA as an actual act. The declaration does not apply retroactively and leads to the fact that the withdrawal must be declared as a delivery for consideration in the advance return with the zero tax rate (code 87).

The summary for old cases is therefore: the equipment can be removed at zero tax rate, which does not trigger any input tax adjustment due to the change in circumstances according to § 15a UStG, because both transactions (acquisition and removal) are taxable. However, the option for regular taxation remains, because the entrepreneur is bound to this for five calendar years. This means that the grid operator's credit notes for the electricity deliveries must continue to be invoiced with VAT and the tax must also be paid by the PV system operator.

Extension of the transitional arrangement for § 2b UStG in the Annual Tax Act 2022; temporary rule on equity for incorrectly shown VAT in accordance with § 14c UStG

BMF, guidance of 2 February 2023 - III C 2 - S 7358/19/10001 :007, BStBl. I 2023, 321

The BMF has agreed the following transitional arrangement in connection with the extension of the transitional arrangement for § 2b UStG in the Annual Tax Act 2022:

“If a legal entity under public law, which in 2023 continues to apply § 2 (3) UStG in the version valid as at 31 December 2015 for a supply carried out after 31 December 2022, outside the commercial scope of § 2 (3) UStG in the version valid as at 31 December 2015, issues an invoice showing VAT separately, the legal entity under public law shall owe this amount of VAT in line with § 14c (2) UStG. For reasons of practicability, under the other requirements of § 15, the recipient of a supply entitled to deduct input VAT shall be granted, for this type of unjustified VAT charge within the meaning of § 14c (2) UStG, the deduction of VAT only up to the maximum that would have been legally owed for this supply if the legal entity under public law were already applying § 2b UStG.

Furthermore, the determination and payment of the VAT within the meaning of § 14c (2) can be waived if it is unambiguous for the legal entity under public law issuing the invoice that the invoice cannot be used for purposes which would allow for the deduction of input VAT.

The legal entity under public law has no right to deduct input VAT in connection with incorrectly shown VAT.

This arrangement shall apply until the end of the month following publication of this BMF guidance.”

Please note:
In the case of jPöR, which had practically completed their conversion work at the end of 2022 with considerable effort in order to apply Section 2b UStG in 2023, the provision included in the JStG 2022 at very short notice is likely to have led to enormous problems in practice. In particular, if contracts had already been concluded with the tax shown. Insofar as invoices have already been written by jPöR in practice due to a lack of knowledge of the extension of the transitional regulation, because the regulation of Section 27 (22a) UStG was only included in the JStG 2022 at a very late stage, it can remain with the invoices issued until March 31, 2023 and the associated input tax deduction for the service recipient, if the jPöR wishes to continue to make use of the transitional regulation. In this respect, the BMF acknowledges that the late insertion of Section 27 (22a) UStG and the extension of the transitional provision on

Section 2b UStG may have led to an (unintentional) unauthorized disclosure of tax, which, however, is not to have any consequences and is also to allow an input tax deduction for the service recipient (not for jPöR) by way of exception until 31 March 2023. Consequently, the no objection rule applies until 31 March 2023. If it can be proven that invoices were issued to private individuals, the jPöR can also rely on the more recent case law, according to which a § 14c UStG liability is excluded in this respect because there is no threat to tax revenue (cf. CJEU ruling of 8 December 2022 - Case C-378/21 - Finanzamt Österreich).

IN BRIEF

Guarantee commitments as supplies of insurance – BMF and BZSt FAQ

Further to the BMF guidance that certain guarantee commitments be treated as VAT-exempt supplies of insurance services since 1 January 2023, a catalog of frequently asked questions and their answers has been developed by the BMF and the Federal Central Tax Office (BZSt). T It includes the following 10 questions and answers:

1. What is the key message of the BFH ruling of 14 november 2018?

2 What are the conclusions of the BMF letter of 11 May 2021?

3. Are guarantees subject to VAT?

4. Does the input tax deduction remain in connection with the guarantee services?

5. What are promises of guarantees against payment?

6. What is a full maintenance agreement?

7. What are manufacturer's warranties/manufacturer's connection warranties and how are they to be assessed for insurance tax purposes?

8. Does the application regulation of the above-mentioned BMF letters apply to manufacturer warranties?

9. Do the principles of the BMF letter only apply to the motor vehicle sector?

10. Do the tax principles on guarantees apply to supply chains?

The FAQ is neither an administrative instruction nor a BMF guidance. The information has no legal or binding effect. Decisions in specific individual cases are reserved for the competent BZSt office and competent tax authority.

Tax Transparency Law for Platforms (PStTG)

BMF guidance of 8 February 2023 –IV B 6 - S 1316/21/10019 :025

The Tax Transparency Law for Platforms (PStTG) of 20 December 2022 (Federal Law Gazette I p. 2730) should be noted, which introduced reporting obligations for the operators of digital platforms, and the cross-border, automatic exchange of information among the various tax authorities of the EU Member States. The law entered into effect on 1 January 2023.

The BMF guidance of 8 February 2023 offers support in the proper implementation of the PStTG and addresses topics relevant in practice. To this extent, it constitutes an important interface for VAT as well as presenting, from a VAT point of view, particular reporting obligations for electronic marketplaces, platforms, portals and similar.

New reference for a preliminary ruling from Sweden – charging electric vehicle at a charging station – chain transaction of supplies of goods?

The Swedish Supreme Administrative Court (SAC) has ruled that a preliminary ruling must be obtained from the CJEU in a case concerning the VAT treatment of the charging of an electric vehicle at a charging station.

The new proceedings could also answer the question arising from the CJEU ruling in the case C-235/18 Vega International regarding the treatment of the provision of fuel cards within the framework of the VAT Directive. We look forward to the results. This topic is also currently being discussed in the VAT Committee.

FROM AROUND THE WORLD

TaxNewsFlash Indirect Tax

KPMG articles on indirect tax from around the world

You can find the following articles here.

13 Mar - Czech Republic: Amendment to VAT treatment of compensation paid to electricity and gas suppliers

10 Mar - Kenya: VAT on exported services is standard rated at 16% (court decision)

3 Mar - UK: Details of “Windsor Framework” for Northern Ireland trade and VAT issues

2 Mar - UAE: Amendment to VAT executive regulations concerning e-commerce supplies

1 Mar - Hungary: Update on e-VAT system

1 Mar - Serbia: VAT refund for 2022 to foreign taxpayers

28 Feb - Saudi Arabia: Update on VAT refunds to non-residents

27 Feb - Poland: VAT exclusion for supply of undertaking or organized part thereof (CJEU judgment)

24 Feb - Singapore: Updates on GST claims for motor cars, related expenses

21 Feb - Denmark: New automatic check of reported VAT figures

EVENTS

VAT 2023 – Hybrid Annual Meeting

Event on 23 May 2023

Further information and the registration form for the event can be found here.

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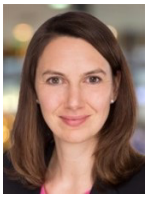

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