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VAT Newsletter

Hot topics and issues in indirect taxation

May 2023

NEWS FROM THE CJEU

Letting of operating equipment as a supply ancillary to the VAT exempt letting of a property

CJEU, ruling of 4 May 2023 – case C-516/21 – Y

Following a submission from the German Federal Tax Court (BFH), the Court of Justice of the European Union (CJEU) has ruled that the letting of operating equipment is not subject to VAT in accordance with Art. 135 (2) sent. 1 (c) of the VAT Directive, if this letting is a supply ancillary to a VAT-exempt letting or lease of a property.

The case

From 2010 to 2014, Y let, as part of a lease, a turkey-rearing shed in Germany with permanently installed equipment and machinery (operating equipment). This equipment and machinery included, inter alia, an industrial spiral conveyor belt, which served to feed turkeys, and a heating, ventilation and lighting system maintaining a temperature and brightness appropriate to the stage of growth of the turkeys, guaranteeing the rearing conditions necessary for them to reach slaughter maturity within the specified time. This operating equipment was specially adapted for the use of the building as a building for the rearing of turkeys.

According to the provisions of the lease, Y received a single payment for the provision of the rearing shed and operating equipment. Y took the view that the whole of the leasing service they supplied was exempt from VAT.

Conversely, the tax authorities took the view that the leasing of the operating equipment in question was not exempt from VAT and that the agreed single payment, 20 per cent of which related to the machinery and equipment, had to be subject to that extent to VAT in accordance with § 4 no. 12 sent. 2 German VAT Law (UStG). The tax authorities issued amended tax assessments for the years under dispute.

The Lower Tax Court upheld the action brought by Y against those assessment notices, taking the view that the supply under dispute in the case of the lease should be fully exempt from VAT. According to the court, the provision of the operating equipment in fact constituted a supply ancillary to the provision of the rearing shed and must be similarly exempt from VAT.

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The tax authorities lodged an appeal against that judgment at the BFH which submitted the case to the CJEU for a preliminary ruling.

From the reasons for the decision

According to Art. 135 (2) sent. 1 (c) of the VAT Directive, the renting of permanently installed equipment and machinery (that is, operating equipment in line with § 4 no. 12 sent. 2 UStG) is subject to VAT.

Art. 135 (2) of the VAT Directive, however, offers no provision giving rise, as presented by the German government, to the requirement to separate a single economic event into independent supplies.

In the case at hand, the case in the main proceedings concerns the leasing of a rearing shed and permanently fixed equipment in that building, which is specifically adapted for that rearing, the rental contract being concluded between the same parties and giving rise to a single remuneration. It is for the referring court to ascertain whether, as appears to be the case, those services constitute a single economic supply.

If that is the case, it follows from CJEU case-law that where there is a single economic supply consisting of a principal supply which is exempt from VAT under Art. 135 (1) (l) of the VAT Directive, consisting of the leasing or letting of immovable property, and an ancillary supply, inseparable from the principal supply, which is in principle excluded from that exemption under Art. 135 (2) sent. 1 (c) of the VAT Directive, the ancillary service must be treated in the same way as the principal supply. It is also for the referring court to determine whether the supplies making up such a single economic supply are principal or ancillary supplies.

Please note:

The question of whether different tax rates can be applied despite the existence of a single service has not yet been conclusively clarified. In addition to the apportionment requirement in Section 4 No. 12 sent. 2 UStG, there is a further apportionment requirement in Section 12 (2) No. 11 UStG. There have already been numerous proceedings in the past (cf. most recently: BFH decision of 7 March 2022 XI B 2/21, which considered it doubtful whether the German apportionment requirement is compatible with Union law) whether the legislator is actually authorized to apportion a (possibly) uniform service (hotel accommodation with breakfast and other services, cf. section 12.16 para. 8 or 12 - Business package - UStAE) by statutory order. Here, it will be interesting to see whether the BFH itself determines that the further statutory apportionment requirement is also fundamentally not in conformity with the EU and refers to the CJEU ruling of 4 May 2023 or whether it will once again refer the matter to the CJEU. If the CJEU and its clear statements are taken as a basis, no further referral would actually be required and the BFH would only have to decide the question of whether the overnight stay constitutes the main service and breakfast the ancillary service. If the German splitting rule in Section 12 (2) No. 11 UStG were to be overturned and the BFH were to regard breakfast as an ancillary service to the main service of overnight accommodation, the reduced tax rate would apply in its entirety.

In the case in dispute, according to the guidance of the ECJ, there is much to suggest that the BFH will find that the German apportionment requirement in Section 4 No. 12 sent. 2 UStG is contrary to EU law, that there is also a single service and that the main service (leasing) and the ancillary service (leasing of the operating equipment) are tax-exempt. If this is the case, in the case of similar sales with open assessments based on declarations with splits into tax-exempt and taxable sales, an examination of the corresponding effects in the individual case is recommended (VAT refund; pro rata loss of input tax deduction; net or gross price agreement, etc.).

The tax authorities have so far commented on the VAT treatment of operating equipment, in particular in Sections 4.12.10 and 4.12.11 VAT Application Decree (UStAE).

In Section 4.12.10 UStAE the authorities has so far assumed that the leasing and letting of operating equipment is subject to VAT, according to § 4 no. 12 sent. 2 UStG, even if it forms a significant component of the property.

If a trader provides an entire sports facility to another trader as the operator for the provision to a third-party (so-called subletting), the transfer of the right of use to this operator in line with Section 4.12.11 (2) UStAE must be separated into the VAT-exempt provision of an immovable property and the letting of operating equipment subject to VAT (cf. BFH ruling of 11 March 2009 – XI R 71/07, Federal Tax Gazette II 2010, 209).

It remains to be seen how the BFH will implement the CJEU ruling, and whether and to what extent the tax authorities will adapt their explanations to these

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new rulings in a BMF letter, possibly with a corresponding non-objection provision, or in the UStAE.

Charging of electric vehicles as a single complex supply

CJEU, ruling of 20 April 2023 – case C-282/22 – P.w W.

The CJEU interprets Union law to mean that a single complex supply constitutes a "supply of goods" within the meaning of Art. 14 (1) of the VAT Directive, if it encompasses

- the provision of recharging devices (including integration of the charger with the vehicle operating system),
- the supply of electricity, within duly adjusted parameters, to the batteries of the electric vehicle,
- the necessary technical support for vehicle users, and
- the provision of a special platform, website or application whereby users may reserve a particular connector and view their transaction and payment history, and of the option to use an "e-wallet" to pay the balance due for individual recharging sessions.

The case

P. w W. intends to carry out activities consisting of the installation and operation of electric vehicle charging stations which are accessible to the public. P. w W. applied to the tax authorities for a preliminary tax ruling confirming that the planned activities consisted of a "supply of services" within the meaning of the Polish VAT law. In this preliminary notice, the tax authorities considered that the supply of the electricity necessary to charge an electric vehicle must be regarded as the principal supply, while the other supplies (of services) offered by P. w W. had to be regarded as ancillary.

Following an action brought by P. w W., the Regional Administrative Court in Warsaw annulled the preliminary tax notice in its ruling of 6 June 2018. According to that court, the primary intention of users of recharging stations is to use devices enabling them to charge their vehicle quickly and efficiently. Thus, from the point of view of the user concerned, the principal supply consists of access to a recharging station and of the necessary integration of the charger with the vehicle operating system. The objective of such a transaction is not to offer electricity, but rather to provide the users concerned with the technologically advanced charging devices with which those recharging stations are equipped.

The tax authorities brought an appeal in cassation to the Upper Administrative Court against the judgment of the Regional Administrative Court in Warsaw. In support of that appeal, the tax authorities argue that with regards to the provision for a consideration of electric vehicle recharging stations, the principal supply consists of a supply of goods, namely electricity. As a result, the Upper Administrative Court submitted the case to the CJEU for a preliminary ruling.

From the reasons for the decision

Given that the marketing of goods is always accompanied by a minimal supply of services, only services other than those which necessarily accompany the marketing of those goods may be taken into account for the purpose of assessing the part played by the supply of services within the whole of a complex supply which also involves the supply of the goods

To this extent, first, the transaction consisting of the supply of electricity to the batteries of an electric vehicle constitutes a supply of goods, as it allows the user of the recharging station to consume the electricity transferred, which, according to Art. 15 (1) of the VAT Directive, is a tangible item, for the purposes of propelling their vehicle

Secondly, such a supply of electricity to the batteries of an electric vehicle requires the use of suitable charging devices, which may include a charger that will be connected to the vehicle operating system. Consequently, granting access to those devices constitutes a minimal supply of services which necessarily accompanies the supply of electricity and thus may not be taken into account for the purpose of assessing the portion of the supply of services within the whole of a complex transaction that also involves that supply of electricity

Thirdly, the technical support which may be necessary for the users concerned constitutes, for its part, not an end in itself, but a means of using, under ideal conditions, the supply of the electricity necessary to propel the electric vehicle. It thus constitutes a supply which is ancillary to that supply of electricity.

This also applies to the provision of IT applications enabling the user concerned to reserve a connector, to view their transaction history and to purchase credits for the purpose of paying for charging sessions. Such supplies offer the user certain additional practical facilities whose sole purpose is to improve the transfer of the electricity necessary to charge their vehicle and to provide an overview of previous transactions

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This leads the CJEU to conclude that the transfer of electricity fundamentally constitutes the characteristic and predominant element of a single complex supply.

Please note:
When distinguishing whether a supply of goods or services (under German law: other services) constitutes the main service in the case of a complex service, the first question that arises is always whether there is a single transaction or several services. In this case, the CJEU agreed with the referring Polish Supreme Administrative Court and assumed a single turnover (para. 32 of the CJEU ruling). As a matter of principle, the circumstances of each individual case must always be examined, as the decision of the CJEU emphatically demonstrates, because the preceding administrative court in Poland had still considered that the service was the primary factor in the complex service.

The difference between supplies of services and supplies of goods is also of importance in the case of cross-border transactions. In that case of a supply of electricity, the place of supply is determined in accordance with § 3g UStG. Normally, the customer is not a reseller within the meaning of § 3g (1) UStG (where the place of supply is at the recipient), so that in case of other clients the provision on location in line with § 3g (2) UStG must be used.

In this case, the place of the actual consumption of electricity is used. This is usually the place where the instrument measuring the customer's usage or the customer's meter is located (Section 3g.1 (5) UStAE). The special provision on location for the supply of electricity is intended to clarify that such supplies are not moving supplies. Consequently, neither a supply for export nor an intra-Community supply can exist (Section 3g.1 (6) UStAE). As a result, local VAT must be used when billing if the case is not one that falls under § 13b (2) no. UStG (reverse charge – in particular in the case of resellers).

If, in contrast, one assumes a supply of services, the provision on location in § 3a (2) UStG (receiver location principle) would potentially come into consideration for B2B transactions. Invoicing with local VAT in the case of cross-border transactions would be eliminated. Instead, the taxation would take place in the recipient country (in many cases then as a reverse-charge transaction).

Another case on the problem of charging an electric vehicle is currently pending before the CJEU (Case C-60/23, Digital Charging Solutions). Here, too, a Swedish reference for a preliminary ruling addresses the question of whether the German company Digital Charging Solutions has provided a composite service or two separate services. The special feature here is that the charging stations are not provided by the company, but by a contractual partner. Only after the company has received the invoice from the operators does it issue monthly invoices to the users separately for the supply of electricity and for access to the network service. Thus, in the Swedish proceedings, in addition to the classification of the turnover, the question arises whether one can also assume a supply of electricity in the relationship between the intermediary network company and the user, if the transactions are regulated by contracts in different sections and there is no contract between the operator and the user. The Swedish court therefore asks the CJEU whether a supply can be assumed in all sections of the transaction chain if only the user of the vehicle can decide on circumstances such as the quantity, time and place of charging and the way in which the electricity is used.

Illegally used electricity subject to VAT

CJEU, ruling of 27 April 2023 – case C-677/21 – Fluvius Antwerpen

The CJEU has ruled that the unintended supply of electricity, which led to the unlawful actions of a third party, constitutes a supply of goods for a consideration.

The case
This Belgian request for a preliminary ruling was made in proceedings between Fluvius, an electricity distribution network operator, and MX, a private individual as electricity consumer, concerning the payment of an invoice relating to an unlawful usage of electricity.

Fluvius is as a legal entity under public law responsible for the operation of the electricity or natural gas distribution network in the territory of a group of municipalities. As a distribution system operator, one of its tasks is to transport electricity to the individual plants and it is responsible for installing, commissioning and reading the meters.

In the period from 7 May 2017 to 7 August 2019, MX consumed electricity illegally. Having established this unlawful consumption, Fluvius, on the basis of a comparison of the meter readings at the place of

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consumption at the beginning and end of that period, issued an invoice. MX did not pay that invoice.

Therefore, on 22 June 2021 Fluvius brought proceedings before the Magistrate's Court Antwerp, the referring court, against MX for payment of that invoice. That court ordered MX, by an order for reference, to compensate Fluvius for the cost of "unlawfully taken energy". It expressed doubts, however, as to whether VAT is chargeable in circumstances such as those of the case before it.

In this regard, it observed that, before 1 May 2018, no legislative provision dealt explicitly with the question of whether VAT could be charged on the compensation payable by the person who unlawfully used energy. Since that date, the Energy Decree in conjunction with Energy Decision have closed this gap, since the usage of electricity on the network without the conclusion of a commercial contract and without notification to the distribution network operator may be regarded as an unlawful act, whether active or passive, associated with obtaining an unlawful advantage within the meaning of the Energy Decree. In addition, the Energy Decision lays down the modalities governing how the compensation representing the unlawfully obtained advantage be determined and providing for that compensation to include taxes, levies and VAT.

The Magistrate's Court Antwerp, however, questions whether these provisions are compatible with the VAT Directive.

From the reasons for the decision

The CJEU first ruled that Art. 2 (1) (a) of the VAT Directive in conjunction with Art. 14 (1) of that Directive must be interpreted to mean that the supply of electricity by a distribution network operator, even if it takes place unintentionally and as a result of a third party acting unlawfully, constitutes a supply of goods for a consideration, entailing the transfer of the right to dispose of tangible property.

The principle of fiscal neutrality precludes any general distinction between lawful and unlawful transaction (ruling of 10 November 2011, The Rank Group, cases C-259/10 and C-260/10).

Art. 15(1) of the VAT Directive treats electricity as tangible property. The supply of such goods within the meaning of Art. 2 (1) (a) of the VAT Directive must be effected "for a consideration", implying that there is a direct link between the supply of goods and the consideration actually received by the taxable person. In this case, the direct link between the unlawfully consumed electricity and the sum claimed in return by Fluvius is clear from the information provided by the referring court, since MX used the electricity at its residential address and Fluvius was able to establish the quantity thus used by means of a statement of the electricity consumption between 7 May 2017 and 7 August 2019 after reading the meter at that address. The amount corresponding to the cost of the electricity unlawfully consumed was thus included in the sum claimed from MX.

In the case at hand, it is apparent from the order for reference that, in the period from 7 May 2017 to 7 August 2019, that is for over two years, Fluvius supplied MX with electricity. It therefore necessarily assumed that it was supplying a customer and, at the same time, MX behaved as such towards Fluvius and acted "as an owner", that is to say, it used the electricity supplied by Fluvius. The properties of electricity mean that the usage from the distribution network coincides with the consumption of the goods and that that consumption of the goods equates not only to usage of those goods but also to disposal thereof, which is the decisive (German translation so far: outermost) characteristic of the property right. A supply of goods in circumstances such as those in the main proceedings must therefore be regarded as the transfer of the right to dispose of tangible property within the meaning of Art. 14 (1) of the VAT Directive.

Finally, the CJEU interprets Art. 9 (1) of the VAT Directive to mean that that the supply of electricity by a distribution network operator, even if unintended and the result of unlawful conduct on the part of a third party, constitutes an economic activity of that operator, insofar as it gives rise to a risk inherent in its activity as a distribution network operator.

Assuming that economic activity is carried out by a body governed by public law acting as a public authority, such an activity, referred to in Annex I to the Directive, can be regarded as being carried out on such a small scale as to be negligible within the meaning of Art. 13 (1) (3) of the VAT Directive only if it is of such minimal scale in space or time and, consequently, of such a slight economic impact that the distortions of competition likely to result are liable to be, if not zero, at the very least insignificant.

Please note:

In principle, the supplying entrepreneur must "authorize" the recipient to "de facto dispose" of the object of supply as if he were its owner. It is necessary that the recipient has acquired the power of disposal and that this economic

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position is based on a donation by the entrepreneur providing the service; this means that the substance, value and income of the object in question are transferred to the recipient of the service (BFH ruling of 4 September 2003 V R 9, 10/02, V R 9/02 and V R 10/02). Thus, until now, an exchange of services was also dependent on there being an intention to supply on the part of the party providing the service (cf. also BFH ruling of 8 September 2011 V R 43/10).

The CJEU has also confirmed this view in the case of a supply (judgment of 14 July 2005, C-435/03, para. 40). Here, it stated that the theft of goods did not constitute a "supply of goods for consideration" within the meaning of Article 2 of the Directive and therefore could not be subject to VAT as such (see also CJEU judgment of 21 November 2013, C-494/12, Dixons Retail).

With its ruling of April 2023, the CJEU now differentiates in such a "theft" of electricity and focuses on the fact that a supply for consideration also exists if a payment (obtained by court judgment) is made by the unlawfully acting party and a direct connection between the unlawfully consumed electricity and the amount demanded as consideration can be established by reading the meter.

The CJEU's more recent decision fits in with its ruling of 20 January 2022 (C-90/22), which considered inspection fees charged by a company when terms of use for a parking space were not observed as consideration for a service. The CJEU had already extended the scope of taxable transactions with this ruling, which it is now continuing in the case of theft.

NEWS FROM THE BFH

No supply of goods for decentralized consumption of electricity

BFH, ruling of 29 November 2022 – XI R 18/21

The BFH has ruled that according to § 4 (3a) Law for the Retention, Modernization, and Development of Combined Heat and Power Generation Systems (KWKG 2009) the payment of a so-called combined heat and power (CHP) surcharge for electricity that is not fed into the network but rather consumed decentrally does not lead to a supply of goods within the meaning of § 3 (1) UStG.

The case

The plaintiff operated electricity networks. CHP systems were connected to these electricity networks. In this respect, there were not just systems that fed the electricity into the plaintiff's networks but (almost) entirely systems that consumed the electricity themselves, that is, decentrally. According to § 4 KWKG, in the version of 25 October 2008 (KWKG 2009), the plaintiff was bound to buy, from each operator of a CHP system, the electricity produced by those system connected to her distribution network, and to pay for it in line with the individual charge rates. The price agreed between the parties had to be paid for the electricity bought, in addition to a surcharge. This surcharge, in accordance with § 4 (3a) KWKG 2009, also had to be paid for electricity that, due to being used decentrally, was never actually fed into a network for general consumption.

According to Section 2.5 (17) UStAE there would be a fictitious power input to the public electricity network of the entire amount of electricity produced by the CHP system and then the re-supply from the operator of the electricity network of the electricity used by the system operators themselves.

The Lower Tax Court upheld the suit. The tax authorities incorrectly assumed, with regard to the electricity decentrally used by the system operator, the existence of a supply of goods or other services by the plaintiff to the system operator. Even a supply of electricity to the plaintiff was already lacking, so that the requirements for a re-supply from the plaintiff to the system operator did not exist. Besides the physical input, there is also no question of there being a fictitious supply of goods within the meaning of a contractual input.

From the reasons for the decision

The tax authorities' appeal at the BFH was not successful. The BFH takes the view that the Lower Tax Court accurately viewed the electricity used decentrally by the system operator not as the subject of a supply of goods or other services by the plaintiff to the system operator.

The so-called direct consumption in the case of CHP systems entitled to a surcharge does not, according to the BFH, lead to a supply of goods to the operator of the electricity network (network operator). While electrical currents can form the object of a supply of goods, in the case under dispute, however, the authority to dispose of the electricity created by the system operators was not transferred to the plaintiff. As no electricity was fed into the network and then re-transferred, neither substance, value nor revenue moved from the system operator to the network operator and then back to the system operator. Contrary to the view of the tax authorities, it is also not possible to simulate a supply of electricity by the plaintiff to the system operator, which the BFH clarified.

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There is also no question of an assumption of the supply of another service in accordance with § 3 (9) UStG. It is not even clear in what such a supply such consist as the system operator does not receive, with regard to the electricity they use decentrally, any usable benefit from the plaintiff but rather has retained it.

Please note:
A comprehensible decision of the BFH, which explicitly confirms that the supply of electric power can also be the subject of a supply, but that this requires the transfer of substance, value and yield. In the case in dispute, however, the power of disposal of the electricity generated by a water association was not transferred to the plaintiff, nor could a supply fiction be assumed, as the administration had previously assumed. In practice, the BFH's decision will benefit in particular those electricity producers who are not entitled to deduct input tax, as they were previously burdened by the administration with sales taxes on fictitious supplies.

As a result of this BFH ruling, the administration will probably no longer be able to maintain Section 2.5 (17) UStAE on the fiction of supply.

Reduction of VAT rate for foodstuffs used as advertising materials

BFH, ruling of 23 February 2023, V R 38/21

This BFH ruling concerns the question of whether a VAT rate reduction can be applied in the case of edible goods used as advertising materials (foodstuffs as advertising materials). The BFH pointed out that in the (necessary) customs interpretation of Section 12 (2) No. 2 UStG in conjunction with Annex 2 to the UStG, the intended use of the goods is only relevant if it is inherent in the product according to its objective characteristics and properties, whereby customary packaging must be disregarded.

The case
In 2017 (year under dispute), a company operated a business for advertising materials. The advertising materials in its range included, for example, fruit gums, peppermint and sherbet sweets, popcorn, cookies, fortune cookies, sugar-coated chocolates, teabags, coffee and glucose cubes, each offered in small packaging. The customers could purchase customized versions of these goods as needed. The customization was carried out using a specific outer packaging as well as printing, engraving or similar. The company did not itself customize the goods. It purchased the items from its suppliers in line with its customers' wishes or got third parties to embellish them.

In its pre-notification of VAT for December 2017, the company declared supplies of foodstuffs at the reduced rate of VAT. Conversely, the tax authorities assumed that underlying the selling of foodstuffs as advertising materials is another supply in the form of an advertising service, which is subject to the standard rate of VAT. The objection and subsequent lawsuit before the Lower Tax Court remained unsuccessful. According to the Lower Tax Court's ruling, the reduced VAT rate in line with § 12 (2) no. 1 UStG does not apply, as the company did not supply items within the meaning of Annex 2 to the UStG, but rather advertising materials created from the association of the customized packaging for each individual customer.

From the reasons for the decision
An appeal to the BFH was successful. The Lower Tax Court had incorrectly denied the VAT rate reduction of § 12 (2) no. 1 in conjunction with Annex 2 to the UStG. While it had not ruled in an objectionable manner, from the point of view of legal auditing principles, that the company's transaction were supplies of goods in accordance with § 3 (1) UStG, in its ruling it did not take into account that according to the customs provisions referred to in Annex 2 to the UStG, the objective characteristics of the goods supplied must in principle be applied and to this extent "usual" packaging is precluded from consideration.

Due to a lack of Lower Tax Court findings, the case is not ready for decision. In a second legal action, the Lower Tax Court will need to determine the exact characteristics of foodstuffs as advertising materials and their packaging, which the BFH will give further notes on.

To the extent that foodstuffs as advertising materials are not covered by Annex 2 to the UStG but are foods within the meaning of Attachment III no. 1 of the VAT Directive, it is possible that a broader interpretation of Annex 2 to the UStG in compliance with the Directive, on the basis of the principle of neutrality, may come into question.

Please note:
The reduced tax rate pursuant to Section 12 (2) No. 1 and No. 2 UStG in conjunction with Annex 2 to the UStG often requires the application of customs regulations because the Annex refers to items or sub-items from the customs tariff (Combined Nomenclature). In this case, a careful examination is required to determine whether the reference to items of the

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customs tariff actually entitles the company to apply the reduced tax rate. Since the company in the dispute not only provided a service, but also supplied the sweets themselves, the reduced tax rate was - contrary to the opinion of the tax authorities - in principle eligible and the fact that the goods were not supplied for consumption, but for advertising purposes, cannot exclude the reduced tax rate. It is also clear from the BFH's decision that it appears to assume for the second instance that the (usual) packaging with the advertising imprint leads to a common classification and that there is much to suggest that the goods are likely to be subject to the reduced tax rate at the end of the second decision of the Tax Court.

MISCELLANEOUS

No earlier collection in the case of a value date before the posting of a credit note

Lower Tax Court of Berlin-Brandenburg, ruling of 17 May 2022 – 5 K 5133/21, appeal lodged, ref: BFH: V R 12/22

The Lower Tax Court of Berlin-Brandenburg has ruled that in the case of transfers to a bank account of the performing entrepreneur, the consideration within the meaning of Section 13 (1) no. 1 letter b UStG (taxation according to consideration received) has not been received at the time of crediting (date of value date) to the account, but at the time of posting to the recipient's account (2.1.2020), since prior to this time, in purely accounting terms, the money in the account has not yet accrued and is factually not available.

The case
A designer achieved sales subject to VAT. He calculated the VAT on the basis of the payments received. The tax authorities carried out a special VAT audit for the second half of 2019. The contested VAT assessment notices for 2019 were evaluated in the audit report and, inter alia, increased the transactions subject to VAT by EUR 30,442.00 (net), as these revenues were already credited, that is collected, on 31 December 2019. The booking day was 2 January 2020 with a value date of 31 January. The suit brought against this assessment was not successful.

From the reasons for the decision
According to § 13 (1) no. 1 (b) UStG, VAT arises upon the calculation of tax on the basis of collected payments – as is the case here – at the end of the pre-reporting period in which the payments were collected. The payment or partial payment is only collected when the supplying trader receives consideration that he can financially dispose of. The authority to financially dispose cannot be considered equivalent with the ultimate inflow.

In the case of transfers to a bank account of the supplying company, that company collects the payment or partial payment, according to the Lower Tax Court, not at the time it is credited (value date) to the account but rather at the point in time at which the posting is made to the recipient's account, as before this point in time, from a technical account perspective, the money has not yet discernibly flowed into the account and is de facto at least not available.

The wording of § 675t (1) sent. 1 German Civil Code (BGB) merely governs an obligation the bank has, which does not itself change the actual authority of disposal for the recipient of the payment. If, for example, the bank does not fulfill its obligation in a particular case, and only initiates a credit 14 days later, the mere obligation of the bank to credit without delay cannot change anything with respect to the lack of an actual authority of disposal. Thus, the case can be no other if the bank – as in this case – requires 2 to 3 days to process the posting. In any case, the company can only make use of the money when it has been posted to its account. This means that the designer could only avail of the credited amount on 2 January 2020 and therefore not in the period under dispute.

Please note:
In section 13.6 (1) sentence 2 UStAE, the administration comments on the time of receipt. In the case of transfers to a bank account, the time of receipt is generally the time of the credit entry. The Hessian Tax Court (ruling of October 17, 2001 -13 K 4248/97) also ruled that in the case of payment by bank transfer, the recipient acquires the economic power of disposal at the time the amount is credited to his bank account.

In the pending appeal proceedings (V R 12/22), the BFH will have to clarify whether it can follow the Tax Court's reasoning. Therefore, it depends on whether a receipt of the remuneration occurred with the value date (here: 31.12.2019) or the actual posting on the account of the entrepreneur (here: 2.1.2020). As can be seen from the data, the case has gained an additional explosiveness due to the turn of the year.

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IN BRIEF

On the VAT liability of indirect supplies for maritime shipping

Lower Tax Court of Lower Saxony, ruling of 2 February 2023 – 5 K 168/19

The Lower Tax Court of Lower Saxony holds the view that the letting of machines to a trader who uses them to unload seagoing ships without being subject to VAT, is not exempt from VAT in line with § 4 no. 2, § 8 (1) no. 5 UStG (transactions for maritime shipping), if other work can also be carried out by those machines. In addition, the satisfaction of the requirements of § 8 (3) UStG, § 18, § 13 German VAT Operating Regulation are not relevant.

FROM AROUND THE WORLD

TaxNewsFlash Indirect Tax

KPMG articles on indirect tax from around the world

You can find the following articles here.

10 May - Denmark: Proposed interest charge on VAT, tax corrections from 1 July 2023

10 May - Philippines: Guidance on application of VAT to registered export enterprise

10 May - Poland: Council of Ministers adopt mandatory e-invoicing draft law

9 May - Italy: UK VAT groups not recognized beginning 2021

5 May - Kenya: Application of VAT on digital services provided by non-residents

27 Apr - EU: VAT Committee working paper on deduction of import VAT by lessee of imported goods

25 Apr - Colombia: Updated e-invoicing regulations

25 Apr - France: E-invoicing and digital reporting pilot program beginning January 2024

24 Apr - Cyprus: Extension of deadline for VAT returns

14 Apr – Czech Republic: Compensation paid to relectricity and gas suppliers subject to VAT

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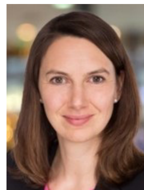

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