KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

July 2023

LEGISLATION

Growth opportunities law

Draft bill (Processing status: 14 July 2023)

A draft bill for a law to strengthen opportunities for growth, investment and innovation as well as tax simplification and tax fairness (growth opportunities law) from the German Ministry of Finance is now with the associations. In particular, the draft contains the following VAT-related changes:

Obligatory use of electronic invoices (§ 14 (1)-(3) Draft German VAT Law (UStG-E))

- Introduction of obligatory e-invoicing now in advance of the planned reporting system; no consent of the recipient of the invoice
- Limited to supplies between domestic companies
- Definition of e-invoice to be issued in a structured electronic format;
- Entry into force on 1 January 2025 with a transitional provision covered in Section 27 (39) UStG-E, according to which in 2025, in addition to the new structured invoice, the previous other invoices (including on paper or a PDF file attached in an e-mail) can still be used. EDI (Electronic Data Interchange) invoices can then continue to be issued with the consent of the service recipient in a period from 1 January 2025 to 31 December 2027.

Simplification of taxation process inter alia for small businesses (§§ 18, 19 UStG-E)

- Fundamentally no transmission of advance VAT notifications and annual VAT declarations in the case that use is made of the small business provisions in accordance with § 19 (1) German VAT Law (UStG) – Exception: cases of § 18 (4a) UStG
- Raising the threshold value for an exemption from the obligation to submit quarterly advance VAT notifications / pre-payments (previously EUR1,000) to EUR 2,000
- Declaration to the tax authorities of the waiving of the small business provisions up to the end of the second calendar year following the tax period; withdrawal of the waiver declaration only with effect from the start of the following calendar year
- First implementation of the changed §§ 18, 19 UStG in the tax period 2023 (§ 27 (38) UStG-E)

Content

Expansion of cash accounting (§ 20 UStG-E)

- Increase in the limit for cash accounting (possibility of calculating VAT on the basis of fees received rather than fee agreed) from the current EUR 600,000 to EUR 800,000 Euro
- Enters into effect on 1 January 2024

Expansion of the simplification provisions on VAT liability of the recipient of the supply (§ 13b (5) sent. 8 UStG-E)

- Simplification provision (under which the recipient of the supply is considered to be the one liable for VAT if the supplying trader and recipient of the supplies have used a reversal of the VAT liability although objectively not applicable) can also be used for transactions according to § 13b (2) no. 6 UStG for the transfer of emissions certificates in accordance with § 3 no. 2 Law on National Certificate Trading for Fossil Fuel Emissions
- Enters into effect on 1 January 2024

VAT rate of 7 per cent on dedicated special-purpose operations (§ 12 (2) no. 8 (a) UStG-E)

- Sentence 3 amended: The examination under VAT law of the relevance to competition shall only take place in the case of services provided by special-purpose entities pursuant to Sections 66 to 68 AO (not pursuant to Section 65 AO: contrary to BFH of 26 August 2021- V R 5/19);
- Sentence 4 new: Beneficiary benefits also exist if the persons covered by the respective non-profit purpose are either recipients of the benefit or, as e.g. in the case of inclusive businesses, assist in the provision of the benefit (contrary to BFH of July 23, 2019 - XI R 2/17);
- Enters into effect on the day following promulgation of the law

VAT exemption for care work and support services provided to people with special physical, mental or emotional needs (§ 4 no. 16 UStG-E)

- All those working as guardians ad litem shall be recognized as advantaged organizations
- Enters into effect on1 January 2024

E-Invoicing: Council implementing resolution to authorize Germany to introduce special measures

Council Implementing Resolution (EU) 2023/1551 of 25 July 2023

In order for the mandatory electronic invoice for domestic B2B transactions to be introduced on January 1, 2025, Germany needs an authorization from the Council of Ministers under Art. 395 of the VAT Directive.

According to Article 218 of the VAT Directive, the Member States must accept as invoices all documents or communications existing on paper or electronically. Germany would therefore like to deviate from the VAT Directive article mentioned so that the German tax authorities will be able to solely accept electronic documents as invoices.

Furthermore, according to Article 232 of the VAT Directive, the use of electronic invoices requires the consent of the recipient of the invoice. The introduction of an obligation to issue electronic invoices in Germany therefore requires a derogation from this article so that the issuer of a paperless invoice no longer needs to obtain consent from the recipient of the invoice.

The planned special measures require approval of all Member States to become effective (i.e. unanimous Council resolution).

In response to Germany's application, on 23 June 2023 the Commission proposed accepting the exceptional measures. The meeting of the Council was held on 19 July 2023. The Council Implementing Resolution (EU) 2023/1551 is of 25 July 2023.

According to Germany, the use of electronic invoices is already common practice in many areas of the economy. In the area of public procurement Germany has transposed Directive 2014/55/EU of the European Parliament and the Council of 16 April 2014 on the electronic issuing of invoices in the case of public contracts, which introduced an obligation for public contracting authorities to accept electronic invoices from their suppliers/service providers, into national law. Electronic invoicing in the area of public procurement has been mandatory in Germany since November 2020. Several states have followed suit with further state regulations in the area of public procurement, including Mecklenburg-Western Pomerania on 1 April 2023, which has enacted a comparable regulation to the federal government.

Germany therefore claims that, for many companies, the introduction of mandatory issuing of electronic invoices for VAT purposes would not be accompanied by a significant financial burden. By abolishing paper invoices, long-term savings can be achieved, arising in particular from the elimination of costs for issuing, sending and storing invoices in hard copy. On the recipient side,

costs will also be avoided for the processing of hard copy invoices.

Inform now: VAT podcast on electronic invoicing

Are you familiar with our VAT podcast "VAT to go"? Kathrin Feil, Partner at KPMG, and Rainer Weymüller, until recently Presiding Judge at the Munich Tax Court and since March 2023 Of Counsel at KPMG, keep you up to date on the most important developments around VAT. In this episode, they talk about e-invoicing due to national and European VAT regulations - listen in now on Spotify and SoundCloud.

EVENTS

2023 KPMG E-invoicing & Digital Reporting Forum

Berlin, 14 September 2023

More information including registration can be found here.

The number of participants is limited.

NEWS FROM THE CJEU

Fixed establishment for VAT purposes

CJEU, ruling of 29 June 2023 – case C-232/22 – Cabot Plastics Belgium

This ruling concerns the interpretation of Art. 44 of the VAT Directive and Art. 11 of the Implementing Regulation (EU) Nr. 282/2011.

The case

Cabot Switzerland GmbH (in the following: Cabot Switzerland) is a company under Swiss law. The place of its economic activities is Switzerland. It is registered for VAT purposes in Belgium as the seller of carbon-based products.

As the most important operating company of the Cabot group for the “European, Middle East and Africa” region, Cabot Switzerland concluded a tolling contract with Cabot Plastics. While this company does belong to the same group, it is legally independent of Cabot Switzerland.

As agreed in the tolling contract, Cabot Plastics uses its own equipment exclusively to process, for the benefit and under the direction of Cabot Switzerland, raw materials into products used in the manufacture of plastics. The services provided by Cabot Plastics to Cabot Switzerland constitute almost all of its turnover.

Cabot Plastics also provides a series of additional services to Cabot Switzerland. Among other things Cabot Plastics provides logistical support, contributing to the business of the recipient, which gives rise to taxable supplies.

Whether Cabot Switzerland has a fixed establishment in Belgium within the meaning of the VAT law is disputed, so that the location of the supplies of services which Cabot Plastics provided from 2014 to 2016 for this company is Belgium and these supplies are subject to VAT there. Cabot Plastics received an adjusted assessment notice, with which it disagreed.

Cabot Plastics claims that the place of supply of the services which it invoiced to Cabot Switzerland was not Belgium, but Switzerland, where Cabot Switzerland has established its place of business.

The Belgian court dealing with the case has doubts as to the interpretation of Union law and submitted the issues to the CJEU for a preliminary ruling.

From the reasons for the decision

The CJEU holds the view that – although the human and technical resources in question do not belong to Cabot Switzerland but rather Cabot plastics – this in itself does not preclude the possibility of Cabot Switzerland having a fixed establishment in Belgium. For the existence of such a fixed establishment it is, however, necessary that Cabot Switzerland has direct and ongoing access to these resources as if they were its own. This could be done by means of a service agreement or a rental agreement by which this equipment is (exclusively) made available to him and which may not be terminated at short notice. Such a contract also does not have the consequence that the equipment of the service provider becomes the equipment of his customer.

Subsequently, the CJEU repeats its earlier principle that the same human and technical resources must not be used for both the provision and receipt of services.

Finally, the CJEU concludes that a non-EU recipient (here: Cabot

Switzerland) does not have a fixed establishment in the Member State of its supplier of services (here: Cabot Plastics) if the latter – due to the exclusive contractual obligations – provides to it both tolled services as well as a series of ancillary services that contribute to the economic activities of the non-EU recipient in that EU Member State.

Please note:
The judgment of the CJEU continues the series of decisions it has issued on the concept of a fixed establishment (in Germany according to Section 3a UStG: permanent establishment) under Article 11 of Implementing Regulation (EU) No. 282/2011. In its ruling of 7 April 2022 (C-333/20), it decided that the existence of a permanent establishment cannot be inferred solely from the fact that a subsidiary is maintained abroad. No own resources would have to be available, but the entrepreneur would have to be authorized to dispose of his own personnel and technical equipment. In the case in question, the attributable personnel was identical to the personnel with which the services were rendered to clients. If the subsidiary uses its equipment to provide services to the parent company, this equipment cannot constitute a branch of the parent company. In any case, a subsidiary does not become a permanent establishment of the parent company on the basis of mere affiliation under company law.

In its judgment of 3 June 2021 (C-931/19), the CJEU had already reiterated its case law that the term "fixed establishment" requires a minimum number of staff and material resources required for the provision of certain services. Article 11 of the VAT Regulation also confirms this interpretation, according to which a fixed establishment must have, among other things, a "suitable structure in terms of personnel and technical equipment". Thus, the existence of a fixed place of business presupposes that the two equipment characteristics of personnel and material resources must always be present. A property leased in a Member State is thus not a fixed establishment if the owner of the property does not have his own personnel for the provision of services in connection with the lease.

Travel services in the case of isolated purchase and sale of accommodation services

CJEU, ruling of 29 June 2023 – case C-108/22 – C

The CJEU has ruled that the supplies of a company that consist in purchasing accommodation services from companies and reselling these to other economic operators, still fall under the special VAT provisions for travel agents even if these services are not accompanied by any other ancillary services.

The case

C, a company under Polish law, carries on an economic activity as a “hotel services consolidator”. In the context of that activity, it offers its customers, namely entities carrying on a commercial activity, the possibility of booking accommodation facilities in hotels and other establishments with a similar function located in Poland and abroad.

Given that C does not have its own accommodation capacity, it purchases accommodation services in its own name and on its own behalf from other entities liable for VAT, which it then resells to its customers.

Depending on its customers’ needs and expectations, the company also provides advice on the choice of accommodation and help with travel arrangements. However, for the most part C only provides accommodation services. The price at which C resells those accommodation services includes the cost of purchasing that service and C’s margin, in the form of a booking price intended to cover the transaction fee.

Whether C’s activity must be qualified as a travel service for VAT purposes within the meaning of Art. 306 et seq of the VAT Directive is disputed. The Polish court hearing this suit has doubts as to the interpretation of Union law and submitted the case to the CJEU for a preliminary ruling.

From the reasons for the decision

According to Art. 306 of the VAT Directive, Member States apply the special VAT scheme for on travel agents to transactions carried out by travel agents to the extent those travel agents deal with customers in their own name and use supplies of goods or services bought in from third parties, in the provision of travel facilities.

In this case, C, as a hotel services consolidator, purchases accommodation services in its own name from other taxable persons and then resells them to its customers, namely entities carrying on a commercial activity. It follows that a company such as C satisfies the substantive conditions laid down in Art. 306 of the VAT Directive to be eligible, in principle, for the special tax scheme provided for in that article.

However, it is necessary to assess whether the provision of accommodation services is covered by the special scheme for travel agents in cases where it is

not accompanied by ancillary services, which the CJEU affirms.

The CJEU has already ruled that Art. 306 et seq of the VAT Directive must be interpreted to mean that the mere supply by a travel agent of holiday accommodation rented from other companies or such a supply of a holiday residence combined with the supply of additional ancillary services, regardless of the importance of those ancillary services, each amount to a single service covered by the special scheme for travel agents (ruling of 19 December 2018 – case C-552/17 - Alpenchalets Resorts).

In the case at hand, it is apparent from the request for a preliminary ruling that C sells services relating to the provision of accommodation in hotels and other establishments with a similar function in Poland and abroad. However, the CJEU case law mentioned above in connection with the supply by a travel agent of holiday accommodation also applies to the sale of services relating to the provision of accommodation in hotels and other establishments.

Please note:
Art. 306 et seq of the VAT Directive (in Germany § 25 UStG) only applies if, with the help of travel services from a third party, travel services are provided in its own name. If only intermediary services are provided, the special VAT provisions do not apply and the general provisions are applicable.

Taxation of spa taxes

CJEU, ruling of 13 July 2023 – case C-344/22 - A

In this case the CJEU has ruled on the taxation of spa taxes.

The case
The municipality A is a state-recognized spa resort with a healthful climate. Its spa administration is managed as a government-operated business under municipal law and qualifies as a commercial business for the purposes of corporation tax laws.

In this regard, A collects a spa tax in order to cover the costs of erecting and maintaining the facilities provided for spa and leisure purposes and for the events organized for that purpose.

The following are subject to the spa tax: first, persons staying in the municipality who are not resident in the municipality and who are offered the opportunity to use those facilities and to participate in those events; second, residents of the municipality, the focal point of whose life is in a different municipality; and, third, non-local persons staying in the municipality for professional reasons to attend conferences or other events (together, “persons liable to pay the spa tax”). In contrast, the spa tax is not collected from day visitors, non-local persons or residents working or undergoing training in the municipality.

The spa tax is set at a certain amount per day of stay for non-local persons and, for residents subject to it, at an annual flat rate amount payable irrespective of the duration, frequency and season of their stay.

Anyone who provides paid accommodation, operates a camping site or lets out their apartment as a holiday home to non-local persons must notify the arrival and departure of those persons within three days following their arrival and their departure. Furthermore, travel agencies are required to make a declaration for the purposes of the spa tax where that tax is included in the consideration to be paid by the tourist.

From 2009 to 2012, A financed the erection, maintenance and renovation of the spa park, spa building and footpaths with the revenue from the collection of that tax. Those facilities are freely accessible to everyone; there is no need to present a ticket in order to gain admittance.

For the years under dispute, A considered the spa tax to constitute remuneration for an activity subject to VAT, namely the operation of a spa establishment and claimed a deduction of the VAT paid on all the input services which had been provided to it and which were connected with tourism. A legal suite against the Lower Tax Court’s ruling to the contrary was not successful. The German Federal Tax Court (BFH) has doubts about the interpretation of the Union law and referred the case to the CJEU for a preliminary ruling.

From the reasons for the decision
The deduction of input VAT requires that the levying of the spa tax takes place as part of a business and in particular that the supply of a service for a consideration takes place.

It does not appear that there is a legal relationship in which there is reciprocal performance between a municipality which, on the basis of municipal by-laws, imposes a spa tax of a certain amount per day’s stay on visitors staying in the municipality and those visitors, who are entitled to use the spa facilities made available by that municipality, which are freely accessible to everyone, including persons not subject to that tax.

Above all, the obligation to pay the spa tax is linked not to the use by the persons subject to that obligation of the spa facilities

provided by the municipality, but to the stay in the territory of the municipality, irrespective of the reasons for that stay. Thus, visitors staying in the municipality are obliged to pay that fee, even when they are staying there for other reasons, such as visiting family members or acquaintances residing there, and do not intend to use the spa facilities.

Furthermore, although the persons liable to pay the spa tax are able to use the spa facilities, those facilities are in fact freely and gratuitously accessible to everyone, including to residents and day visitors, regardless of whether or not they are required to pay the spa tax. Thus, persons liable to pay the spa tax do not enjoy any advantages other than those enjoyed by persons using those spa facilities who are not subject to the same tax.

Please note:
The collection of spa tax used to be considered a business activity. For this reason, an input tax deduction was also granted on all spa facilities (paths, squares, special buildings and facilities). The (sovereign) use by the general public was corrected by way of the gratuitous transfer of value. Later, the BFH restricted the input tax deduction and stated: If a city uses its marketplace for both economic and sovereign purposes, it cannot fully attribute it to its economic activity and is therefore only entitled to a pro-rata input tax deduction (ruling of 3 August 2017 - V R 62/16). With the request for a preliminary ruling, which led to the CJEU ruling of 13 July 2023, the BFH gave the CJEU the opportunity to answer the question of whether the levying of a spa tax can be seen as an exchange of services at all. The CJEU impressively answered this question in the negative.

Margin taxation in the case of works of art

CJEU, ruling of 13 July 2022 – case C-180/22 – Mensing II

This ruling concerns the basis of assessment for margin taxation in the case of works of art previously acquired in the context of an intra-Community supply.

The case
The entrepreneur is an art dealer established in Germany who operates art galleries in a number of German cities. In 2014, works of art originating from artists established in other Members States were supplied to him. Those supplies were declared as exempt intra-Community supplies in the Member States where the artists are established. The entrepreneur paid VAT on those supplies as intra-Community acquisitions.

The entrepreneur applied for the use of margin taxation for these supplies. As § 25a (7) no.1 (a) UStG, provides that the margin scheme does not apply to the supply of goods acquired by the dealer in the course of an intra-Community acquisition, where the supply of the goods to the dealer benefited from the exemption for intra-Community supplies elsewhere in the territory of the European Union, the tax authorities refused to grant his request, and, therefore, declared the entrepreneur liable for an additional amount for VAT.

Following the rejection of his complaint contesting the tax assessment relating to the additional VAT, the entrepreneur brought an action before the Lower Tax Court. He claimed that the national legislation in question is incompatible with EU law and requested the direct application Art. 316 (1) (b) of the VAT Directive. As the Lower Tax Court had doubts in this regard, it submitted a request for a preliminary ruling to the CJEU.

In its ruling of 29 November 2018 – case C-264/17 - Mensing in relation to this request, the CJEU first held that Art. 316 (1) (b) of the VAT Directive must be interpreted to mean that a dealer liable to VAT may opt for the application of the margin scheme to the supply of works of art which were supplied to him in the context of an exempt intra-Community supply by the creator or his successors in title, even if those persons do not fall within the categories of persons listed in Article 314 of the Directive.

Second, the CJEU held that a dealer liable for VAT may not opt for the application of the margin scheme to an input supply of works which were supplied to them in the context of an exempt intra-Community supply and, at the same time, claim a right to deduct input VAT in the situations in which such a right is precluded under Art. 322 (b) of the VAT Directive, if that latter provision has not been transposed into the national law.

Subsequent to this ruling, the Lower Tax Court granted Mr. Mending's suit in its ruling of 7 November 2019. In essence, that court held that the taxable amount had to be determined pursuant to EU law and that, having regard to Art. 317 (1) of the VAT Directive in conjunction with Articles 312, 315 and 316 of that Directive, VAT must, as a component of the "purchase price", reduce the profit margin.

The Hamm tax authorities appealed this ruling to the BFH, arguing that VAT in respect of intra-Community acquisitions does not reduce the taxable amount.

The BFH observes that, under national law, it is possible to take account of VAT when determining

the basis of assessment for the purposes of the margin scheme on the basis of an interpretation of § 25a (3) sent. 3 UStG which is consistent with EU law. However, that court has doubts as to whether the national court of last instance may, where a company relies on the application of the margin scheme provided for in Art. 311 et seq of the VAT Directive, interpret § 25a (3) sent. 3 UStG as meaning that the tax on the intra-Community acquisition does not form part of the basis of assessment.

From the reasons for the decision
According to the CJEU, Articles 312, 315 and 317 of the VAT Directive are to be interpreted as meaning that the VAT paid by a taxable dealer on the intra-Community acquisition of a work of art, the subsequent supply of which is subject to differential taxation under Article 316 of the VAT Directive, forms part of the taxable amount of that supply.

NEWS FROM THE BFH

Waiver for reasons of equity in relation to interest on arrears in the case of the inappropriate allocation of transactions

BFH, ruling of 23 February 2023, V R 30/20

This BFH ruling concerns the waiver, for reasons of equity, of interest on arrears in the case of the allocation of transactions to inappropriate periods of time.

The case
In the years under dispute, 2009 to 2013, a company submitted monthly advance VAT notifications (advance notifications) for the agreed fees on supplies of services subject to VAT. As part of an external audit, it was determined, inter alia, that the company, which had not availed of a permanent deadline extension in the years under dispute, had continuously declared its transactions in the month in which invoices were issued although 90 per cent of its supplies had already been provided in the month before.

The reason for this was that the company usually only received the information necessary for issuing the invoice from its subcontractors after the submission deadline for the individual advance notification period. To correct the erroneous allocation of transactions, the external audit allocated 90 per cent of the transactions declared in January to the year before. For the years under dispute interest on arrears in the amount of approx. EUR 1,919,000 was set.

The tax authorities denied the application for a waiver of interest on arrears for reasons of equity. An appeal was not successful.

In response to the legal action brought against this, the Lower Tax Court required the tax authorities to issue a new decision. The determination of interest is objectively unfair within the meaning of § 227 AO. As the new allocation of the transactions reported in January did not lead to an increase of the previous year's revenue but rather also led to a similar reduction of the revenue for the year in which the advance notification was carried out, the revenue increases and reductions balanced out over the years.

As the liquidity advantage in each case only existed for one month, an interest term of up to 56 months is not equitable. The tax authorities incorrectly considered a permanent liquidity advantage. An advantage of one month, in each case over the course of the year, is irrelevant with regard to § 233a (1) sent. 2 AO.

However, one discretionary decision with one subject matter is not the only option. Thus, the levying of interest on arrears for just the months in which the year-to-year liquidity benefit existed could be justifiable. Taking the grace period of § 233a (2) sent. 1 AO into consideration, however, a complete waiver is also reasonable. The tax authorities' discretion is limited to either waiving the interest on arrears entirely or, in any case, at least to the extent that it exceeds the actual liquidity advantage for 90 per cent of the revenue arising in December. The plaintiff's calculation of interest, stemming from the sum of the monthly interest refunds and interest payment obligations for the years under dispute would only give rise to a liability for interest in the amount of EUR 15,282.28. In the administrative process, the tax authorities assumed a liquidity benefit of EUR 47,457.

From the reasons for the decision
The BFH rejected the tax authorities' appeal as unfounded. The Lower Tax Court correctly required the tax authorities to issue a new decision within regard to the company. In this case, the tax authorities incorrectly implied the existence of a liquidity benefit throughout the year in its decision on a waiver.

The waiver of interest on arrears for VAT does not preclude the shifting of transactions over several successive years (subsequent to the BFH ruling of 11 June 1996 – V R 18/95, Federal Tax Gazette II 1997, 259).

The Lower Tax Court was correct in judging that no interest be levied on the advance payment assessed (§ 233a (1) sent. 2 AO), so that a monthly interest advantage which the legislator does not want to capture cannot be used as a justification for the

lack of fairness in determining interest for the annual VAT, especially as the plaintiff, at the start of the interest term, had already paid, by means of their monthly advance notifications, all taxes arising on transactions.

Equally, as the Lower Tax Court assumed that since the tax due (for the year of the forward shift) was not set off against a tax refund (for the year in which the revenue was previously recorded), nothing stood in the way of a waiver for reasons of inequity. Thus, for example, the tax reduction arising from the shift of revenue from January 2010 to December 2009, as a result of another shift of revenue (from January 2011 to December 2010), did not lead to a tax refund for 2010 which could be set off against the back taxes for 2009. This is not relevant as it is crucial for an individual review of the revenue shifted that it, in its own right, would have led to the necessary offsetting of the additional charge for 2009 against a refund for 2010. The fact that a refund for 2010 failed because of a netting out with other tax bases is irrelevant with regard to this individual review.

Thereby, the inclusion of liquidity advantages arising through the year that is favored by the Lower Tax Court proves to be inappropriate in the consideration of a waiver. This type of inclusion is also ruled out to the extent that any shift of revenue year-to-year did not lead to any changes that would have been significant for the annual VAT assessment relevant for the creation of interest. Ultimately, the tax authorities' view is that, contrary to the wording of § 233a (1) sent. 2 AO and the resulting legislative assessment (no interest for advance payment assessments), additional interest nevertheless arises on the basis of the consideration of liquidity with regard to the amended annual VAT assessments.

Please note:
1. Calculation errors affecting the interest run cannot be corrected via the amendment provision of Sec. 233a (5) Sentence 1 AO, but only on the basis of the rules applicable to interest determinations pursuant to Sec. 239 (1) Sentence 1 AO in Secs. 129, 172 et seq. AO (BFH judgment of 13 December 2022 VIII R 16/19).

2. In its ruling of 12 May 2023 (1 V 115/23 A -U-), the Lower Tax Court Duesseldorf concluded that there were no serious doubts as to the legality of the assessment of interest on arrears for VAT because Section 233a of the German Fiscal Code (AO) did not violate European Union law. However, the Lower Tax Court allowed an appeal against the ruling due to the fundamental importance of the case.

On the input VAT deduction of a managing holding company

BFH, ruling of 15 February 2023, XI R 24/22 (XI R 22/18)

Following a referral to the CJEU for a preliminary ruling (judgment of 8 September 2022 – C-98/21 – Finanzamt R), the BFH has ruled on the input VAT deduction of a managing holding company.

The case
In 2013, W GmbH (W) held shares in X GmbH & Co. KG (X) and in Y GmbH & Co. KG (Y), whose activities consisted in constructing and selling buildings and residential units, to a large extent exempt from VAT. W and X, and W and Y, agreed that W would provide, for a consideration, accounting and management services for X and for Y in connection with their construction work. In additional, on the basis of supplementary agreements to the shareholder agreements, W provided a shareholder contribution to both X and Y. This contribution consisted in each case of the free-of-charge provision of services. W provided these supplies of services in part with its own staff and equipment, in part by purchasing goods and services from other companies. Whether W is entitled to deduct input VAT on the input services is disputed. The BFH had doubts about the interpretation of Union law with regard to input VAT deductions and submitted the case to the CJEU for a preliminary ruling.

From the reasons for the decision
The BFH has ruled as follow:

In the case at hand, W's activity was not limited to the purchase and holding of shares in X and Y but rather it provided accounting and management services to both of its subsidiaries for a consideration, which constitutes an economic activity within the meaning of the VAT Directive. Therefore, according to the BFH, W must be classified as a trader.

At the same time, W does not have any right to deduct input VAT in this case. A holding company must be denied an input VAT deduction for input supplies which,

- have no direct and immediate connection to the supplies of services provided by the Holding but rather with the free-of-charge services owed by it as part of its shareholder contribution,
- have no direct and immediate connection to the Holding's own transactions but rather with the transactions of third parties (the subsidiaries),

whether these third-party transactions are subject to or exempt from VAT,
- are not included in the price of the taxable transactions carried out for the subsidiaries, and
- do not form part of the general costs of the Holding's own economic activity.

Please note:
The previous provisions in the UStAE on the deduction of input tax for holding companies should not be affected by this individual case decision, in which the full input tax deduction should be claimed for non-taxable shareholder contributions of a holding company, even though the receiving subsidiary has itself carried out VAT-exempt transactions. It therefore remains the case that if a holding company provides taxable services to a subsidiary against payment, an input tax deduction is in principle possible to the full amount.

NEWS FROM THE BMF

Market fees and initial costs

BMF, guidance of 20 June 2023 - III C 2 - S 7200/19/10006 :001

The BMF has accepted the principles of the BFH rulings of 13 September 2022, XI R 8/20 on so-called market fees from producer organizations in the fruit and vegetable sector and of 11 October 2022, XI R 12/20 on so-called initial costs in connection with the supply of animals to slaughterhouses, and amended the VAT Application Decree accordingly.

New Section 1.1. (26) UStAE
So-called market fees charged by producer organizations in purchasing foodstuffs from their members for the marketing of those foodstuffs, do not constitute a fee for other services of the producer organization but rather reduce the basis of assessment of the members' supplies of goods to the producer organization, if the uses underlying those costs lie in the produce organization's own interests (cf. BFH resolution of 13 September 2022 – XI R 8/20).

A slaughterhouse purchasing animals intended for slaughter that deducts the costs arising in the course of the slaughter (so-called initial costs, for example costs for quality control management including costs for veterinary services, for auditing customers' operations, compliance with increased hygiene requirements and the costs for guaranteeing traceability of the animals) from the purchase price of the animal in question, is not providing other services to the animal suppliers even if the processes underlying these costs also lie in the interests of the slaughterhouse. In this case there is also a reduction in the fee for the supply of animals.

Application
The principles of the BMF guidance must be applied in all open cases.

For the period until the publication of the BMF guidance, no objection shall be raised if the passing on of initial costs is treated in derogation from Section 1.1 (26) VAT Application Decree, that is an exchange of supplies is assumed.

Please note:
Both BFH rulings are relevant in practice for all constellations in which payments are made from suppliers to the recipients of the supplies. This generally leads to the question of whether it constitutes a reduction in fees or a fee for a supply that must be considered separately. These types of constellations occur very frequently in the form of agreements on conditions, reimbursements, bonuses and allowances.

The BMF guidance of 20 June 2023 treats both BFH rulings as special cases. In both cases there was no exchange of supplies as the expenses underlying the costs were (also) in the interests of the producer organization / the slaughterhouse. This common criterion of differentiation will likely also be relevant in other cases.

VAT exemption for intra-Community supplies of goods

BMF, guidance of 11 July 2023 - III C 3 - S 7141/21/10002 :00

According to § 17b (3) sent. 1 no. 4 (a) German VAT Operating Regulation, a trader can provide proof of arrival for intra-Community supplies of goods in the case of goods subject to excise duty under suspension of excise and usage of the IT process, EMCS (Excise Movement and Control System – IT-based transportation and monitoring system for goods subject to excise duty), by using the validated EMCS report of receipt from the competent authorities in the other Member State.

It is mandatory to enter the place of the supply (destination) in the EMCS report of receipt only if the supply in question is to a tax warehouse, a direct supply or a supply to a certified recipient. In the case of all other supplies, the place of supply is not a mandatory field in EMCS. The validation occurs in these cases even if no entry is made for the place of supply.

The BMF makes clear that in cases in which there is a validated EMCS report of receipt, this may only be taken into account as a

proof of arrival of an intra-Community supply if the details of the destination are contained in it. In cases in which these details are missing, the trader must submit additional documents which show the destination in a manner that is clear and easy to verify. Section 6a.5 (13) UStAE shall be amended accordingly. The principles of the BMF guidance must be applied in all open cases.

MISCELLANEOUS

Special VAT audits 2022

BMF, announcement of 10 July 2023

The special VAT audits carried out in 2022 led to an additional VAT take of around EUR 1.53 billion. The results from the participation of special VAT auditors in general field audits or tax investigations are not contained in this additional amount.

Special VAT audits take place independently from the regular cycle of field audits and without taking the size of the businesses into consideration. In 2022, 64,250 special VAT audits were carried out. An annual average of 1,673 special VAT auditors were deployed.

Each auditor carried out an average of 38 special audits. This means that for each auditor deployed, on average an additional amount of around EUR 0.91 billion was found.

FROM AROUND THE WORLD

TaxNewsFlash Indirect Tax

KPMG articles on indirect tax from around the world

You can find the following articles here.

11 Jul - Poland: Mobile application for e-invoicing; consultation on schemas for digital platform operators (DAC7)

7 Jul - Spain: Deadline to claim VAT refunds for 2022 is 30 September 2023

6 Jul - Australia: Guidance on GST treatment of digital currency transactions

5 Jul - Vietnam: Draft decree on VAT reduction policy

29 Jun - Belgium: Toll manufacturer does not constitute VAT fixed establishment (CJEU judgment)

29 Jun - Cyprus: Changes to application of reduced VAT rate on supply or construction of permanent residence

26 Jun - Switzerland: Increase to VAT rates effective 1 January 2024

20 Jun - Spain: Draft e-invoicing regulations published

15 Jun - Australia: Requirements of recipient created tax invoice for GST purposes

14 Jun – Czech Republic: VAT treatment of electricity supplies from charging stations (CJEU judgment)

EVENTS

2023 KPMG E-invoicing & Digital Reporting Forum

Berlin, 14 September 2023

More information including registration can be found here.

The number of participants is limited.

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International Network of KPMG
If you would like to know more about international VAT issues please visit our homepage KPMG International**. Further on this website you can subscribe to TaxNewsFlash Indirect Tax and TaxNewsFlash Trade & Customs which contain news from all over the world on these topics. We would be glad to assist you in collaboration with our KPMG network in your worldwide VAT activities.

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* Trade & Customs

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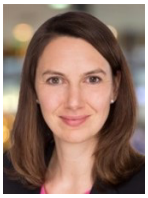

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