KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

August/September 2023

LEGISLATION

Growth Opportunities Law and Financing for the Future Act

The German Ministry of Finance (BMF) has published the government drafts of the “Law on Strengthening Opportunities for Growth, Investments and Innovation and on Tax Simplification and Fairness” (Growth Opportunities Law) and the Financing for the Future Act.

E-invoicing from 2025
In particular, the Growth Opportunities Law will give rise to changes in e-invoicing from 2025. In anticipation of the planned reporting system (EU Commission proposal for a directive “VAT in the Digital Age” from December 2022), mandatory electronic invoicing (e-invoicing) shall be introduced (§ 14 (1) to (3) Draft German VAT Law (UStG-E)). Exceptions to this shall be invoices for small amounts and tickets for travel.

The obligation is intended to be limited to supplies between domestic companies and shall apply in these cases without agreement from the recipient of the invoice. In addition, an “e-invoice” shall be given the new legal definition of an invoice which is issued, transmitted, and received in a structured electronic format, which makes it possible to process it electronically, and which satisfies the requirements of the Directive 2014/55/EU of 16 April 2014.

The government draft adds a new § 14 (6) sent. 2 UStG-E laying down an ordinance authorization in order to be able to implement potential changes to the VAT Directive with regard to the requirements for an e-invoice and amendments of the CEN format EN 16931 even at short notice, including with regard to the prospective reporting system.

These changes shall generally enter into effect on 1 January 2025 with transitional arrangements for the period from 2025 to 2027.

According to a transitional provision in § 27 (39) sent. 1 no. 1 UStG-E, in January 2025, as well as the newly structured invoice, any other previously used invoices (on paper or – with the agreement of the recipient of the supply – another electronic format) shall also be able to be used.

As a result of the new para. 39 sent. 1 no. 2 of the government draft, the provision in no. 1 for invoices issued by companies with a total revenue in the previous calendar year of up to EUR 800,000 shall be extended

Content

for an additional year up to 31 December 2026.

EDI (Electronic Data Interchange) invoices shall, with approval from the recipient of the supply, continue to be able to be issued for the period from 1 January 2025 to 31 December 2027 (para. 39 sent. 1 no. 1 and 3).

Please see the note below for our 27 October 2023 webcast on E-Invoicing and Digital Reporting.

Further VAT-related changes through the Growth Opportunities Law
Besides e-invoicing, the government draft contains the following VAT-related changes:

- Clarification in the case of the reduced VAT rate for dedicated activities (non-application BFH ruling); for dedicated activities in accordance with § 65 German Tax Code (AO) the lack of a requirement for a test of competition will continue (§ 12 (2) no. 8 (a) sent. 3 and 4 UStG-E).
- Additional exemption for guardian's ad litem (§ 4 no. 16 (m) UStG-E).
- Expansion of the simplification provision on the VAT liability of the recipient of the supply to the transactions in emissions certificates falling under § 13b German VAT Law (UStG) (§ 13b (5) sent. 8 UStG-E).
- Exemption from submitting advance VAT report and from making advance payments from EUR 1,000 to EUR 2,000 from 1 January 2024 (§ 18 (2) sent. 3 UStG-E).
- Exemption of small business from obligations to declare VAT (§ 19 (1) sent. 4 UStG-E).
- Raising of the limit for VAT cash accounting in accordance with § 20 UStG-E from EUR 600,000 to EUR 800,000 from 1 January 2024.
- Reduction of the average rate and the input VAT allowance for farmers from 9.0% to 8.4% from 1 January 2024 (§ 24 UStG-E)

Financing for the Future Act
In the government draft for a Financing for the Future act, two changes to § 4 no. 8 UStG-E are stipulated:

- Expansion of the VAT exemption in (a) ("Granting and Arrangement of Loans") to include the administration of loans, in (g) ("Assumption of liabilities, Sureties and other Guarantees and the Arrangement of such Transactions") to include the administration of loan collateral by the lender.
- Expansion of the VAT exemption in (h) with regard to the administrative services of alternative investment funds (AIF) in line with § 1 (3) Capital Investment Code.

NEWS FROM THE CJEU

Right of direct action against the tax authorities

CJEU, ruling of 7 September 2023 – case C-453/22 – Schütte

This CJEU ruling concerns a legal dispute between a farmer and forester and the German tax authorities relating to the equitable right to obtain discharge from incorrectly deducted input VAT and the interest assessed on it if the VAT can no longer be claimed under civil law by the supplying trader.

The case
From 2011 to 2013, a farmer and forester purchased timber from various suppliers and subsequently resold and delivered it to his customers as firewood. Although the VAT stated in the invoices of his suppliers was 19 per cent, he invoiced his customers the reduced rate of 7 per cent. the VAT stated on the invoices issued by the applicant in the main proceedings to his customers was the reduced rate of 7%.

The suppliers and the farmer and forester declared the transactions and paid VAT to the German tax authorities. The farmer and forester paid tax on his sales at 7 per cent and was granted an input VAT deduction of 19 per cent on his purchases.

During an audit, the tax authorities concluded that the output transactions of the farmer and forester should not have been subject to the reduced VAT rate, but rather to the standard rate.

Following that audit, an action was brought before the Lower Tax Court Münster, which ruled, in a judgment that has now become final, that the output transactions of the farmer and forester were indeed subject to the reduced VAT rate. However, the purchases made by the farmer and forester should also have been subject to the reduced rate of 7 per cent. The deduction of input VAT by farmer and forester was therefore reduced accordingly.

In order to implement that judgment, the tax authorities sought to recover the VAT due for

the years 2011 to 2013, plus interest. The farmer and forester then contacted his suppliers for them to correct the invoices issued to him and pay him the difference. All of the suppliers invoked the defense of limitation provided for under German civil law against the applicant. Accordingly, the invoices in question were not corrected and the farmer and forester did not receive the repayments he had requested from his suppliers.

Under these circumstances, the farmer and forester applied to the tax office for discharge, on grounds of equity, from the additional VAT which he had tried to recover and the interest on that amount, in accordance with §§ 163 and 227 AO.

The tax office rejected that application on the grounds that the farmer and forester was himself responsible for the situation. The objections he directed against those rejection assessments were also considered to be unfounded.

The farmer and forester brought an action before the Lower Tax Court Münster against the rejection of his application for discharge of the VAT recovery of which had been sought. The court is uncertain as to the interpretation of the VAT Directive regarding the application of the principle of fiscal neutrality and of the principle of effectiveness to the right to claim reimbursement and submitted the case to the CJEU for a preliminary ruling. As the presenting court, the Lower Tax Court Münster specified that at no point were there any indications that the farmer and forester would become insolvent and there was no suspicion of fraud on his part.

From the reasons for the ruling
According to the CJEU, the principle of fiscal neutrality constitutes a fundamental principle of the common VAT system. In that context, the claim for repayment of improperly overpaid VAT concerns the right to recovery of sums paid but not due which, according to settled case-law, helps to offset the consequences of the tax's incompatibility with EU law by neutralizing the economic burden which that tax has improperly imposed on the trader who has, in fact, ultimately borne it. The Court has already recognized many times that a system in which, first, the supplier of an item who has paid the VAT to the tax authority in error may seek to be reimbursed and, second, the purchaser of that item may bring a civil law action against the supplier for recovery of the sums paid but not due. Thus, the purchaser who bore the tax invoiced in error, is able to obtain reimbursement of the sums improperly paid (no. 22).

If the reimbursement of the VAT becomes impossible or excessively difficult, in particular in the case of the insolvency of the supplier, the principle of effectiveness may require that the purchaser of the item concerned be able to address his application for reimbursement to the tax authorities directly. Thus, in order to maintain the principle of effectiveness, the Member States must provide for the instruments and procedural rules necessary to enable the purchaser to receive a refund of the improperly invoiced tax.

Moreover, if it is shown, in the light of objective factors, that the right to reimbursement of improperly invoiced and paid VAT is being relied on fraudulently or abusively, that right must be refused.

A national rule or practice which results in refusing an input VAT reimbursement to a purchaser of goods in respect of which they were improperly invoiced and which they overpaid to their suppliers appears not only contrary to the principles of VAT neutrality and of effectiveness but also disproportionate, where it is impossible for them to claim reimbursement from those suppliers on the sole ground of the limitation period on which those suppliers rely against them, even though the purchaser cannot be criticized for any established fraud, abuse or negligence.

Under such circumstances, if it is impossible or excessively difficult for the purchaser to obtain reimbursement from the suppliers of the improperly invoiced and paid VAT, that purchaser, failing any established fraud, abuse, or negligence on their part, is fully entitled to address their application for reimbursement to the tax authorities directly.

With regard to the risk of a double reimbursement arising from the fact that the suppliers could adjust the invoices they issued initially to the purchaser subsequent to the reimbursement thereof by the tax authorities and then request reimbursement of the overpaid VAT from those authorities, such a risk is, in principle, precluded in circumstances such as those in the main proceedings.

If the suppliers were to adjust those invoices and claim reimbursement of the overpaid VAT from the tax authorities after those authorities have reimbursed the overpaid tax to the purchaser of the invoiced goods, even though those same suppliers had first relied on the limitation period vis-à-vis that purchaser and thereby shown that they had no interest in rectifying the situation, those claims would have no other objective than obtaining an advantage contrary to the principle of fiscal neutrality. Such a practice would therefore be

abusive and could not result in reimbursement to that supplier so that the risk of double reimbursement is precluded.

If the VAT improperly collected by the tax authorities is not refunded within a reasonable time, the financial damage arising due to the amount equal to the incorrectly collected not being available must be compensated by the payment of default interest.

Please note:
With this ruling, the CJEU has further developed the direct claim of the service recipient against the tax office in favor of the taxpayer. The claim is now not only possible in the event of insolvency of the service provider, but also if the recipient of the service has a defense of statute of limitations. In practice, this is likely to be the case in significantly more cases than insolvencies. The BMF had answered this problem differently in its letter of 12 April 2022. So far, however, it remains the case that a direct claim for VAT is to be decided within the framework of an equity procedure (§§ 163, 227 AO). In doing so, the BMF had set up very high hurdles, in particular requiring an application for insolvency already rejected for lack of assets or the conclusion of insolvency proceedings. In view of the clear statements of the CJEU, the BMF letter is not likely to remain without fundamental revision. In particular, because the BMF has rejected the case of the limitation of a claim against the providing entrepreneur as a possible direct claim from the outset (marginal no. 13 in the BMF of 12 April 2022).

In its ruling, the CJEU also answered the question of the Münster Regional Court as to how to proceed if, after the VAT has been refunded by means of a direct claim, the supplier corrects its invoice and also applies for a refund of the VAT. Such a repeated refund is ruled out because the request of the supplier for a refund to the recipient of the service is an abuse of rights.

As a result, the CJEU's opinion means that the scope of application of Section 14c (1) UStG now only relates to a concrete threat to tax revenue and no longer to an abstract threat, as was previously the case. If the tax office has already collected the VAT incorrectly shown on the invoice and the recipient of the service is unable to obtain repayment from the supplier, the recipient still has a direct claim against the tax office. In many cases, the recipient may actually be spared the burden of VAT. It will be interesting to see how the tax authorities react to the follow-up decision of the Münster Regional Court and the BFH.

The topic of rights to direct action in the area of VAT will also be a subject of the next “VAT to go” podcast in September/October 2023.

Listen in shortly: VAT podcast "VAT to go

If you have paid too much VAT, then you usually have to contact the service provider to have the invoice corrected.
But what if the invoice correction is time-barred? Is there a direct claim against the tax office?
The CJEU has now issued an important ruling on this. Our tax expert Kathrin Feil and Rainer Weymüller, former presiding judge at the Munich Tax Court, talk about this in the new episode of our VAT podcast "VAT to go" - listen in shortly on Spotify and SoundCloud.

NEWS FROM THE BFH

No requirement to split in the case of the rental or lease of property with operating equipment

BFH, resolution of 17 August 2023, V R 7/23 (V R 22/20)

Following a reference to the CJEU for a preliminary ruling, the German Federal Tax Court (BFH) has come to the following conclusion: § 4 no. 12 sent. 2 UStG is not applicable to the leasing of permanently installed operating equipment if this is an ancillary supply to the leasing of a building as a primary supply, which, as part of a contract concluded between the same parties in accordance with § 4 no. 12 sent. 1 (a) UStG is exempt from VAT so that a single supply exists.

The case
In the years under dispute, 2010 to 2014, the plaintiff leased barns for raising turkeys. The buildings had permanently installed equipment and machinery, specifically intended as equipment for the contractual use as a barn for raising turkeys. The plaintiff assumed that in the case of the leasing of barns for raising turkeys with permanently installed equipment and machinery, his supply was fully exempt from VAT. A single payment existed, which in accordance with the provisions of the contract was not divided into the rental of the barn on the one hand and the equipment and machinery on the other.

In contrast, the tax authorities held the view that of the single payment agreed, based on the costs arising for the plaintiff, 20 per cent was attributable to the equipment and machinery and thus subject to VAT. The tax authorities therefore issued the corresponding assessment notice changes for the years at issue. An appeal against these notices was not successful.

However, the Lower Tax Court granted the legal suit brought against this. It the court's view one single VAT-exempt supply, including the leasing of the installed equipment and machinery, exists. While the independent leasing of these types of equipment and machinery would be subject to VAT, if – as in the case at hand – the transfer of such equipment and machinery is ancillary to the transfer of a barn, the lease is also exempt from VAT to the extent it is attributed to the transfer of this equipment and machinery.

In an appeal case, the BFH set aside the proceedings and submitted the case to the CJEU for a preliminary ruling. The CJEU replied in its ruling of 4 May 2023 – case C-516/21 – Finanzamt X as follows:

"Art. 135 (2) sent. 1 (c) of the Directive 2006/112/EC (...) must be interpreted as not applying to the letting of permanently installed equipment and machinery where that letting constitutes a supply ancillary to a principal supply of leasing a building, carried out under a leasing agreement concluded between the same parties and exempt under Art. 135 (1) (l) of that Directive, and those supplies form a single economic supply."

From the reasons for the ruling
The BFH holds that the tax authorities' appeal was unfounded. The Lower Tax Court had correctly ruled that there was a supply that was completely exempt from VAT. Because the so-called requirement to split of § 4 no. 12 sent. 2 UStG is – taking the CJEU ruling into consideration – not applicable to the rental or leasing (in this case: leasing) of a permanently installed equipment and machinery, if these constitute an ancillary supply to the rental or leasing (in this case: leasing) of a building as a primary supply, which is exempt from VAT in accordance with § 4 no. 12 sent. 1 (a) UStG under a contract concluded between the same parties such that a single economic supply exists.

In its previous case law, the BFH assumed that § 4 no. 12 sent. 2 UStG gives rise to a requirement to split in relation to operating equipment. According to this, the rental and leasing of operating equipment is not exempt from VAT, even if they constitute a significant component of the property. The requirement to split does not permit the inclusion of the transfer of operating equipment in the exemption from VAT of the property rental, from the point of view of a dependent ancillary supply (BFH, ruling of 28 May 1998 - V R 19/96, Federal Tax Gazette II 2010 p. 307). This is also what the tax authorities followed (Section 4.12.10 sent. 1 VAT Application Decree (UStAE)).

The BFH no longer holds to the previous assumption of a requirement to split, as § 4 no.12 sent. 2 UStG according to Art. 135 (2) sent. 1 (c) of the VAT Directive must be interpreted in compliance with the directive. The assessment of operating equipment therefore corresponds to the transfer of inventory (cf. in this regard BFH ruling of 11 November 2015 – V R 37/14, Federal Tax Gazette II 2017, p. 1259).

Please note:
In the case of similar transactions with open assessments based on returns with a split into transactions exempt from VAT (leasing of property) and subject to VAT (leasing of operating equipment), we recommend a review of the corresponding impacts in the individual case (VAT refund; partial loss of input VAT deduction; net or gross price agreement, etc.).

The tax authorities have, up to now, commented on the VAT treatment of operating equipment, in particular in the Sections 4.12.10 and 4.12.11 UStAE.

Up to now, in Section 4.12.10 UStAE the tax authorities have assumed that the rental and leasing of operating equipment is subject to VAT even in accordance with § 4 no. 12 sent. 2 UStG, if it constitutes a significant component of the property.

If a trader transfers a full sports facility to another trader as the operator for the transfer to a third party (a so-called interim rental), the transfer of use to that operators, according to Section 4.12.11 (2) UStAE must be divided into a VAT-exempt transfer of property and a rental 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 to what extent the tax authorities will amend their implementation in a BMF guidance with, if applicable, a corresponding non-objection provision, and in changes to the UStAE to take account of the new BFH and CJEU case law.

In addition, two appeals before the BFH (ref. V R 15/21 and XI R 8/21) should be noted, which deal with the question of the VAT treatment of supplies of electricity

as ancillary supplies to a VAT-exempt rental.

Input VAT deduction in the case of business events

BFH, ruling of 10 May 2023, V R 12/16

In its ruling of 10 May 2023 (V R 12/16), the BFH ruled that an input VAT deduction for business events is precluded in the case of the EUR 110 exemption limit being exceeded.

The case

In December 2015, an association held a Christmas party for its employees from the board, the tax and legal departments, and in-house auditing department (in each case including management). Of the employees invited, 32 people registered for the event and 31 people actually took part. For the Christmas party, the association organized a "cookery event", for which they rented a corresponding cookery studio from an event organizer. The participants, directed by two chefs, prepared their dinner together, which they subsequently ate together. The association was issued with an invoice for the "cookery event for 32 people" in the amount of EUR 3,919.90 plus EUR 774.78 VAT (gross amount EUR 4,664.68). It is disputed whether the association is entitled to deduct the input VAT from the invoice issued for the Christmas party. The tax authorities denied this. An appeal and legal suit were not successful.

From the reasons for the ruling

The BFH rejected the appeal as unfounded. For an input VAT deduction for company events, it must be examined if and, if applicable, to what extent the supplies received in this respect served solely for the private needs of company employees or were, under special circumstances, due to the commercial activity of the company. Case law would have affirmed the type of commercial interest necessary for the taxation if, among other things, the personal benefit accruing to the employees from serving of meals, without exception, appeared to be subordinate to the requirements of the company (CJEU ruling Danfoss and AstraZeneca of 11 December 2008 – case C-371/07).

If, on the other hand, a company event serves solely to improve the company atmosphere through joint leisure activities, then an exclusive connection exists for the supplies received for a company event to the private needs of the staff and thus a withdrawal in line with § 3 (9a) no. 2 UStG, which does not give rise to an entitlement to deduct input VAT. If the company event is one leading to withdrawal taxation, the trader is only entitled to deduct input VAT if the withdrawal taxation in accordance with § 3 (9a) no. 2 UStG is excluded, as it deals with a "sign of attention" with in the meaning of § 3 (9a) no. 2 UStG. Due to the lack of a direct connection to a specific output transaction, the decision on the input VAT deduction must be made in relation to the overall economic activity of the trader.

In contrast to the income tax provisions of § 19 (1) sent. 1 no. 1a Income Tax Law, the amount of EUR 110 per employee is not a tax-free allowance but rather with regard to a "sign of attention" an exemption limit. To the extent the association made a claim by reference to earlier BFH case law, the costs of the upper limit must not be taken into consideration in calculating the EUR 110 limit, the Lower Tax Court, in a non-objectionable way for the appeal, assumed that the VAT law related principal assessment of the company event as a single supply, contrary to the splitting of the costs. Ultimately, according to the BFH ruling of 29 April 2021, VI R 31/18, the full costs of the employer must be divided equally on the basis of those who participated in the event and not those who registered. For the employee in this case who did not participate therefore, no expenses arose for which an input VAT deduction could come into question.

Please note:

If a company event only serves to improve the working atmosphere by organizing leisure time together, this can be a withdrawal according to § 3 (9a) no. 2 UStG, which does not entitle the employee to an input tax deduction. An exception to this rule is a sum of up to 110 euros per employee. According to the BFH, this is an exemption limit that also includes the external framework of a company event (e.g. room rental).

Reduced VAT rate for transport of blood and tissue

BFH, ruling of 5 April 2023, V R 14/22

In its ruling of 5 April 2023, V R 14/22, the BFH commented on the VAT rate reduction in accordance with § 12 (2) no. 8a UStG.

The case

The parties dispute the application of the reduced rate of VAT for the transport of blood and tissue carried out by a registered association from 2014 to 2016. In the years under dispute the association transported, inter alia, blood and tissue samples from doctors' surgeries or hospitals to laboratories. The vehicle used for this purpose were partially equipped with rotating blue lights and sirens. Contractual relationships existed only between the association and the hospitals, doctors, and labs but not to the patients whose samples were being transported. The tax authorities assumed that the transactions arising from the transport of blood and tissue were

subject to the standard rate of VAT. After an unsuccessful appeal process, the Lower Tax Court granted the suit.

From the reasons for the ruling
The tax authorities' appeal was considered by the BFH to be justified, the Lower Tax Court's ruling was dismissed, and the case was returned to the Lower Tax Court for different proceedings and ruling. The Lower Tax Court incorrectly affirmed the reduced VAT rate of § 12 (2) no. 8 (a) UStG. Due to a lack of sufficient determinations, the BFH could not rule on the case itself.

According to § 12 (2) no. 8 (a) UStG the VAT is reduced under the prerequisites set out there for supplies of corporations fulfilling solely and directly non-profit, charitable, or religious aims within the meaning of §§ 51 to 68 AO. This VAT rate reduction does not apply for supplies carried out as part of an economic business operation (§ 12 (2) no. 8 (a) sent. 2 UStG). Therefore, in accordance with § 64 (1) AO, it is necessary that the supplies are supplies carried out by the corporation as part of a dedicated activity. If this type of dedicated activity exists, § 12 (2) no. 8 (a) sent. 3 UStG must also be taken into account. For supplies carried out as part of a dedicated activity, the VAT reduction only applies if the dedicated activity does not serve in the first place to achieve additional revenue though carrying out transactions which are in direct competition to supplies of other traders subject to the standard VAT rate (alternative 1), or, if the corporation uses these supplies to itself realize its dedicated activities for statutory purposes subject to reduced VAT set out in §§ 66 to 68 AO (alternative 2).

For supplies as part of a dedicated activity, § 12(2) no. 8 (a) UStG requires that the prerequisites of sentence 3 of this provision are also fulfilled. In the case under dispute, the Lower Tax Court named the limiting prerequisites of § 12 (2) no. 8 (a) sent. 3 UStG. However, it then determined, without further examination, that these requirements for a reduced VAT rate were satisfied. In doing so, the Lower Tax Court affirmed the prerequisites of this provision without making it clear on the basis of which facts, and due to which legal considerations the Lower Tax Court reached this conclusion.

In the case at hand, the amendment of Annex III no. 15 of the VAT Directive by Directive (EU) 2022/542 of 5 April 2022 (OJ l EU no. L 107, page 1) – as the Union law basis for § 12 (2) no. 8 (a) UStG – does not have retroactive effect on transactions before the date it entered into effect.

VAT and co-ownership by defined shares

BFH, resolution of 28 August 2023, V B 44/22

The BFH continues to maintain that a co-ownership by defined shares does not provide supplies for a consideration as a trader. In the case at hand, the ruling should not have been made using § 2 (1) sent. 1 UStG as amended by Art. 43 (6) in conjunction with Art. 16 no. 2 German Annual Tax Act 2022.

The case
The parties dispute if the tax authorities was correct in carrying out a correction of input VAT in accordance with § 15a UStG for 2015, the year at issue. The plaintiff was the sole owner of a property, which had a hotel building on it, until October 2014. From 2011, he rented the property, subject to VAT, to his son, who used it for the commercial operation of a hotel and restaurant.

In a contract of 20 October 2014, the plaintiff transferred half of the ownership in the property to his wife. Subsequently, the couple sold the property to their son by means of a contract of 20 January 2015. The couple did not declare a waiver of the tax exemption of the transfer of property.

Following an external audit, the tax authorities assumed that a VAT-exempt supply of property made by the plaintiff would lead to a correction of the input VAT deduction he had previously claimed in accordance with § 15a UStG. No VAT-exempt sale of a business in accordance with § 1 (1a) UStG existed. On 20 March 2019, the tax authorities issued a corresponding VAT assessment notice for the year at issue. The tax authorities rejected the objection submitted against this as unfounded.

The legal suit which followed was not successful. The Lower Tax Court dismissed the case against the VAT assessment notice that was issued during and became the subject of the proceedings, with no permission to lodge an appeal at the BFH.

This is what the plaintiff's complaint addresses. In particular he claims that the Lower Tax Court ruling does not make it clear what the actual and legal considerations were relevant for the Lower Tax Court ruling.

From the reasons for the ruling
The BFH finds the complaint to have merit. In the case at hand, it is clear from the facts of the case in the contested ruling, that the plaintiff had granted half of the ownership of the property to his wife before the year under dispute, and in the year under dispute the couple supplied the property to their son. If the Lower

Tax Court, under these circumstances – and with no evidence whatsoever for the existence of a private corporation – did not pursue the question of whether the claim for a correction of input VAT correction by the tax authorities was aimed at the plaintiff or a co-ownership by defined shares formed by him and his wife, with regard to the relevant point of argument, it is not possible to examine the ruling in respect of its lawfulness.

In its previous case law, the BFH assumed that a co-ownership by defined shares can be a trader. The BFH also ruled on this basis that a sale of a business exists if a renting trader transfers the ownership of a property that is rented subject to VAT to their spouse does not trigger an input VAT correction for the renting trader in line with § 15a UStG, and that the co-ownership by defined shares of a property rented subject to VAT, at the time of its creation, in accordance with § 571 (1) German Civil Code (BGB) (corresponding to § 566 (1) BGB in the year under dispute), simultaneously becomes party to the existing rental contract. The result of this view is that the co-ownership by defined shares formed by the couple would be viewed as the beneficiary of the transfer and thus as an acquiring trader, as the BFH at that time assumed that it would continue the rental company of the previous sole owner.

The case law on a co-ownership by defined shares having the characteristic of a trader was however, later abandoned by the BFH. Following the BFH rulings of 22 November 2018 – V R 65/17 and of 7 May 2020 – V R 1/18, a co-ownership by defined shares cannot provided supplies for a consideration, so that it is not a trader and instead a partial supply by the joint owners must be assumed. The BFH holds to these rulings.

The addition of “regardless if it is has legal capacity according to other provisions” to § 2 (1) sent. 1 UStG does not led to a different conclusion, even if this change, taking into consideration its legal grounding in the German Annual Tax Act 2022, is intended to correct the case law of the BFH from its rulings of 22 November 2018 and 7 May 2020. This change first entered into effect on 1 January 2023 and did not already apply to the year at issue. Accordingly, the case at hand should not decide if this new provision leads to a co-ownership by defined shares providing supplies as a trader, other it is not in the position to carry out a commercial activity in its own name, for its own account and under its own responsibility and in addition cannot bear an economic risk arising in connection with this activity.

In the case at hand, therefore, a claim for a correction of input VAT directed at the plaintiff can only be assumed if the plaintiff, from a VAT law perspective – according to a civil law assessment – was, due to the amended BFH case law, even in the year under dispute – in addition to his wife – the renter of the hotel property. Conversely, it follows from the previous case law that in the year under dispute, from a VAT law perspective, there was a rental – and then a sale – of the hotel property by a co-ownership defined by shares distinct from the person of the plaintiff. The latter leads to a correction of input VAT – with regard to a sale of a business by the plaintiff and the co-ownership in accordance with § 1 (1a) UStG in conjunction with § 15a (10) UStG - at the co-ownership but not for the plaintiff.

The BFH deems it appropriate to dismiss the contested ruling and to refer the case back to the Lower Tax Court for new proceedings and a new ruling. Because whether in the case at hand the previous or new BFH case law must be taken as the basis for taxation shall be determined by § 176 (1) sent. 1 no. 3 AO. For this purpose, a second legal process must decide on additional determinations, in particular on the formal status of assessment notices before the issuance of the originally contested annual VAT assessment notice of 20 March 201.

Please note:
The tax authorities have not yet published the BFH rulings of 22 November 2018 – V R 65/17 and of 7 May 2020 – V R 1/18 in the Federal Tax Gazette. Rather, Section 2.1 (2) sent. 2 UStAE is still used by the authorities to determine that a trader can also be a co-ownership by defined shares.

VAT groups - economic integration

BFH, ruling of 11 May 2023, V R 28/20

In its ruling of 11 May 2023, the BFH commented on the need for economic integration in the case of VAT groups.

The case
The parties are disputing the existence of a VAT grouping in the years 2008 to 2011 (years under dispute). The focus of the business of a GmbH was the renting and administration of residential and commercial properties. The sole shareholder and sole director was G. G managed a sole tradership focused on purchasing real estate assets.

The GmbH was a part of the “V group”, which owned several

corporations and a limited partnership, and offered services in the real estate arena until the end of 2011. This included not only the renovation and construction of residential and commercial buildings but also financial advice for investors and owners, the procurement, marketing, rental and administration of properties and project development, although every company had its own area of business. The limited partnership was the head of the business group.

The commercial activity of the GmbH included, inter alia, the administration of rental units located on twelve properties with apartment buildings on them, which belonged to G. In addition, the GmbH rented office space from a private company, of which G was a 95 per cent shareholder.

In 2014, the GmbH was unsuccessful in claiming to be a subordinate company of G as the controlling enterprise. An appeal and lawsuit were dismissed as unfounded.

From the reasons for the ruling
The BFH found the GmbH's appeal to be justified. It led to the cancellation of the preliminary ruling and a return of the case to the Lower Tax Court. The Lower Tax Court was legally incorrect in denying the existence of a VAT group. In particular, they did not consider, that the GmbH, as a result of interconnections with other companies of the V group, which could also be subordinate companies of G, could be economically integrated in G's company. The case was not yet ripe for a decision.

Economic integration requires that the business areas of controlling and subordinate companies are interlinked with each other. In the case of a clear expression of the financial and organizational integration, BFH case law considers it harmless if there is a reasonable economic connection between the subordinate company and the controlling enterprise within the meaning of an economic unit, cooperation, or interrelationship. The activities of the controlling enterprise and the subordinate company merely be coordinated and in doing to mutually promote and complement each other. In this respect, the existence a more than negligible between the controlling enterprise and the subordinate company suffices, with the subordinate company needing to be economically dependent on the controlling enterprise. The economic integration cannot exist only as a result of the direct relationship to the controlling enterprise but must also be based on the intertwining of business areas of different subordinate companies.

In the case under dispute, the Lower Tax Court denied the economic integration in an error of law.

The Lower Tax Court was correct in denying an economic integration with regard to the provision of property management services by the GmbH to G insofar as property management services – such as accounting and human resources services or winter maintenance – are generally standardized supplies of services for which there are many suppliers, who could be switched to with relative ease. However, the economic integration of the GmbH in G's company can be found in the case under dispute in the importance of the property management services for the GmbH as the supplier. Whether this is the case is not apparent from the Lower Tax Court ruling. The Lower Tax Court also left open the question of whether an economic interconnection existed between the plaintiff and other V group companies.

An economic integration cannot – contrary to the view of the tax authorities – be denied just on the basis that G may not have allocated his share in the GmbH to his company assets. The sole deciding factor is whether the controlling enterprise and subordinate company are interconnected.

For the rest of the proceedings, the BFH refers in particular to the following: With regard to a potential indirect economic integration of the GmbH in G's company, it must be determined what relationships existed in the years under dispute between the GmbH and the other V group companies, and, if this leads to an economic interconnection between the GmbH and another V group company, whether the company economically interconnected with the GmbH was a subordinate company of G. In this regard it must be considered that the provision of services by the plaintiff to third parties – apartment or property owners – taken by itself does not constitute grounds for an interconnection between the plaintiff and the V group companies. Furthermore, for the indirect economic integration of the GmbH it is not sufficient for G to have provided, for the payment of commission, supplies to the other V group companies, as this would merely be grounds for the existence of a VAT group between G and those companies.

NEWS FROM THE BMF

Liability of the recipient of a supply to pay tax in the case of the transfer of emissions certificates

BMF, guidance of 5 September 2023 - III C 3 - S 7279/20/10004 :003

In its guidance of 5 September 2023 (III C 3 - S 7279/20/10004 :003), the BMF has ruled on the reverse charge procedure in the case of the transfer of emissions certificates in accordance with § 3 no. 2 of the Fuel Emissions Trading Act (BEHG) (§ 13b (2) no. 6 UStG).

Legislative amendment
In the Eighth Law for the Amendment of Excise Duties of 24 October 2022, § 13b (2) no. 6 UStG was rewritten with effect from 1 January 2023. The existing rule on the tax liability of the recipient of the supply was expanded to include the transfer of emissions certificates in line with § 3 no. 2 BEHG.

This change leads to the recipient of the supply becoming liable for VAT in the case of transfers of emissions certificates in accordance with § 3 no. 2 BEHG to traders carried out after 31 December 2022.

Provisions on application
The BMF commented separately on cases with the following configurations:

– Final invoice for supplies provided after 31 December 2022 in the case of advance payments before 1 January 2023;

– Correction of an invoice issued before 1 January 2023 for down payments if the payment first took place after 31 December 2022;

– Invoices after 31 December 2022 for supplies provided before 1 January 2023;

– Corrections after 31 December for supplies provided before 1 January 2023.

FROM AROUND THE WORLD

TaxNewsFlash Indirect Tax

KPMG articles on indirect tax from around the world

You can find the following articles here.

11 Sept – Bulgaria: New reporting obligation for VAT-registered persons

6 Sept – Belgium: Application of VAT to company cars

5 Sept – Poland: Updated version of national e-invoicing system

1 Sept – EU: Enhanced enforcement of VAT rules on non-resident digital economy businesses

23 Aug – India: Legislation introducing changes to GST on gaming

16 Aug – Denmark: Increase in VAT audits of nonresident digital services providers

14 Aug – Brazil: Tax reform bill involving federal, state, and municipal indirect taxes

28 Jul – France: Delay in e-invoicing and e-reporting implementation

27 Jul – Luxembourg: Payment service providers VAT legal package

27 Jul – Luxembourg: VAT treatment of activities carried out by board member (CJEU Advocate General opinion)

EVENTS

Webcast E-Invoicing & Digital Reporting

on 27 October 2023

As a follow-up to the EMA E-Invoicing & Digital Reporting Forum on September 14, 2023 in Berlin, we will present the changeover to e-invoicing in Germany on the basis of the Growth Opportunities Act as well as the input of the associations, highlight the related proposals of VAT in the Digital Age in this context and provide an overview of the regulations on e-invoicing & digital reporting in selected countries.

Registration will be available here shortly.

Cologne VAT Congress

on 30 November and 1 December 2023 in Cologne

Topics

- Current developments in relation to VAT groups
- Guarantee commitments – challenges and open questions on practice and applicability to leasing structures
- Current case law and news from the tax authorities
- Invoices and VAT liability in line with § 14c UStG and interest in the case of the shifting of periods
- Challenges in the case of chain and triangular transactions due to current developments
- Obligatory electronic invoicing and transaction-related reporting system following the

- legislative proposal “VAT in the Digital Age” from the European Commission and current plans for national implementation

You can find further information and the registration form for the event here.

Contacts

KPMG AG
Wirtschaftsprüfungs-
gesellschaft

Head of Indirect Tax Services
Dr. Stefan Böhler
Stuttgart
T +49 711 9060-41184
sboehler@kpmg.com

Berlin
Dr. Bastian Liegmann
T +49 30 2068-2160
bliegmann@kpmg.com

Duesseldorf
Thorsten Glaubitz
T +49 211 475-6558
tglaubitz@kpmg.com

Franz Kirch
T +49 211 475-8694
franzkirch@kpmg.com

Peter Rauß
T +49 211 475-7363
prauss@kpmg.com

Frankfurt/Main
Prof. Dr. Gerhard Janott
T +49 69 9587-3330
gjanott@kpmg.com

Wendy Rodewald
T +49 69 9587-3011
wrodewald@kpmg.com

Nancy Schanda
T +49 69 9587-2330
nschanda@kpmg.com

Dr. Karsten Schuck
T +49 69 9587-2819
kschuck@kpmg.com

Hamburg
Gregor Dzieyk
T +49 40 32015-5843
gdzieyk@kpmg.com

Antje Müller
T +49 40 32015-5792
amueller@kpmg.com

Hanover
Michaela Neumeyer
T +49 511 8509-5061
mneumeyer@kpmg.com

Cologne
Peter Schalk
T +49 221 2073-1844
pschalk@kpmg.com

Leipzig
Christian Wotjak
T +49 341-5660-701
cwotjak@kpmg.com

Munich
Dr. Erik Birkedal
T +49 89 9282-1470
ebirkedal@kpmg.com

Christopher-Ulrich Böcker
T +49 89 9282-4965
cboecker@kpmg.com

Kathrin Feil
T +49 89 9282-1555
kfeil@kpmg.com

Stephan Freismuth*
T +49 89-9282-6050
sfreismuth@kpmg.com

Mario Urso*
T +49 89 9282-1998
murso@kpmg.com

Nuremberg
Dr. Oliver Buttenhauser
T +49 911 5973-3176
obuttenhauser@kpmg.com

Stuttgart
Dr. Stefan Böhler
T +49 711 9060-41184
sboehler@kpmg.com

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.

Our homepage / LinkedIn
You can also get up-to-date information via our homepage and our LinkedIn account Indirect Tax Services.

* Trade & Customs

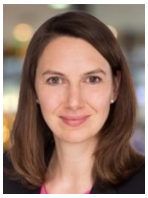
** Please note that KPMG International does not provide
any client services.

Imprint
Issuer***

KPMG AG
Wirtschaftsprüfungsgesellschaft
THE SQUAIRE, Am Flughafen
60549 Frankfurt/Main

*** Responsible according to German Law (§ 7 (2) Berliner PresseG)

Editor



Kathrin Feil (V.i.S.d.P.)
T +49 89 9282-1555
kfeil@kpmg.com

Christoph Jünger
T + 49 69 9587-2036
cjuenger@kpmg.com

VAT Newsletter and Trade & Customs News – Free Subscription
To subscribe, please register here (VAT Newsletter) **and** there (Trade & Customs News).

www.kpmg.de

www.kpmg.de/socialmedia