KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

December 2023 – January 2024

NEWS FROM THE CJEU

Activity of a member of the board of directors of a public limited company

CJEU, judgment of 21 December 2023 - Case C-288/22 - TP

The judgment of the CJEU concerns the question of whether a member of the board of directors of a public limited company is an entrepreneur under Luxembourg law.

The case

TP is a member of the board of directors of several public limited companies under Luxembourg law and performs several tasks in this context. The order for reference states that, according to the explanations he provided, TP's activities consist in particular of receiving reports from managers or representatives of the companies concerned, discussing strategic proposals, decisions by operational managers, problems relating to the accounting of those companies and their subsidiaries and the risks they face. If necessary, he is involved in the preparation of the decisions that the representatives of the companies concerned have to make at the level of the boards of directors of the companies' subsidiaries. He is also involved in the preparation of the decisions on the accounts of the companies concerned and in the preparation of the proposals to be submitted to the shareholders' meetings, the risk policy and the decisions on the strategy to be pursued by these companies. Pursuant to Articles 441-10 and 441-11 of the Luxembourg law on commercial companies of 10 August 1915, the day-to-day management of these companies is assumed by a management committee comprising the appointed managing directors or managing directors or, in the absence of an operational activity requiring a management committee, by permanent representatives or members of the board of directors.

According to the CJEU's findings, he did not have a decisive vote in the decision-making process and did not represent or manage these companies on a day-to-day basis. Nor was he a member of a management committee (para. 49).

Due to these activities, TP received bonuses from the profits generated by the companies in his capacity as a member of the board of directors of the companies concerned by resolution of the general meetings of the shareholders of the companies.

Content

It is disputed whether TP carries out an "economic" activity within the meaning of Art. 9 of the VAT Directive and, in particular, whether the remuneration he receives is to be regarded as remuneration for the services provided to the public limited company. If this is to be affirmed, the further question arises as to whether TP carries out its activity "independently" within the meaning of Art. 9 of the VAT Directive.

From the reasons for the decision

The CJEU interprets Art. 9 of the VAT Directive as meaning that, under Luxembourg law, a member of the board of directors of a public limited company carries out an economic activity within the meaning of that provision if he provides a service to that company in return for remuneration and that activity is of a sustainable nature and is carried out in return for remuneration, the methods of determining which are foreseeable.

In the present case, it follows from TP's tasks that he provides a service within the meaning of Art. 2 (1) lit. c of the VAT Directive.

In the present case, it is apparent from the documents before the CJEU that TP received remuneration in return for his activities as a member of the boards of directors, which was obviously paid either in the form of bonuses approved by the general meetings of shareholders in proportion to the profit made by the public limited companies concerned or, as TP argued at the hearing before the CJEU, in the form of a lump sum.

A service "for consideration" appears to be given in the case of remuneration in the form of a lump sum determined in advance. In the case of remuneration in the form of bonuses, the referring court will have to examine whether, if the public limited company in question makes no or only a small profit, the general meeting of shareholders of that company may nevertheless grant TP, on the basis of other factors, an amount of bonuses which can be regarded as objectively reasonable for the service provided by TP.

As regards the fact that the royalties are granted by the general meeting of the shareholders of the company in question, it should be noted that the provision of a service 'for consideration' within the meaning of the VAT Directive, as is also apparent from Art. 73, it is not necessary for the consideration for the service to be provided directly by the recipient of the service, but that this consideration can also be provided by a third party (see, to that effect, judgment of 15 April 2021, Administration de l'Enregistrement, des Domaines et de la TVA, C-846/19, EU:C:2021:277, para. 40 and the case-law cited therein).

The existence of such a service is not sufficient to establish an economic activity within the meaning of Article 9(1) of the VAT Directive (judgment of 12 May 2016, Geemente Borsele and Staatssecretaris van Financiën, C-520/14, EU:C:2016:334, para. 28); other criteria must also be met.

An activity is generally considered to be economic if it is sustainable and is carried out in return for remuneration received by the person providing the service (judgment of 15 April 2021, Administration de l'Enregistrement, des Domaines et de la TVA, C-846/19, EU:C:2021:277, para. 47), which means that the remuneration itself must be sustainable. The CJEU refers here to the judgments of 13 December 2007, Götz, C-408/06, EU:C:2007:789, para. 18; of 13 June 2019, IO: Activity as a member of a supervisory board, C-420/18, EU:C:2019:490, para. 27, and of 15 April 2021, Administration de l'Enregistrement, des Domaines et de la TVA, C-846/19, EU:C:2021:277, para. 55.

In order to determine whether a service has been provided in such a way that this activity is carried out for remuneration and is therefore to be regarded as an economic activity, all circumstances under which the activity was carried out must be examined.

In this respect, it should be noted that the comparison between the circumstances in which the person providing the service in question provides the service and the circumstances in which such a service is usually provided can be one of the methods used to determine whether the activity in question constitutes an economic activity. It may also be relevant whether the amount of the remuneration is determined according to criteria which ensure that it is sufficient to cover the operating costs of the service provider.

In view of this case law, it must be assumed that the appointment as a member of the board of directors of a public limited company under Luxembourg law for a renewable term of office of a maximum of six years gives the activity of such a member of the board of directors a sustainable character. The possibility of dismissal at any time does not change this. This term of office of six years is also suitable for the remuneration granted in the form of bonuses.

However, in order to preserve that sustainable character, it is important that, if the bonuses are granted in accordance with the profits made by the company concerned, the members of the

board of directors may also be granted bonuses in financial years in which the company has not made any profits.

In answer to the first question, Article 9 of the VAT Directive must therefore be interpreted as meaning that, under Luxembourg law, a member of the board of directors of a public limited liability company carries out an economic activity within the meaning of that provision if he provides a service to that company in return for remuneration and that activity is of a sustainable nature and is carried out in return for remuneration whose method of determination is foreseeable.

The referring court's second question concerned self-employment with regard to the activity as a member of an administrative board. In this respect, the CJEU supplemented the facts of the case by studying the file and found that TP, as a member of a board of directors, had no casting vote and was not responsible for the representation or day-to-day management of these companies. Furthermore, TP was also not a member of a management committee (para. 49).

The question of independence was to be determined solely in the light of Art. 9 and not Art. 10 of the VAT Directive, because the relationship of subordination referred to therein was only a decisive criterion for assessing whether an economic activity was carried out independently. In order to assess the existence of this relationship of subordination, it is necessary to examine whether the person concerned carries out his activities in his own name, for his own account and under his own responsibility and whether he bears the economic risk associated with the performance of these activities.

In order to determine whether the activities in question are independent, the Court therefore took into account the absence of any hierarchical relationship of subordination and the fact that the person concerned acts for his own account and on his own responsibility, that he freely determines the arrangements for carrying out his work and that he himself receives the remuneration which constitutes his income (judgment of 13 June 2019, IO [VAT - activity as a member of a supervisory board], C-420/18, EU:C:2019:490, para. 39 and the case-law cited therein).

It is for the referring court to examine whether TP freely regulated the modalities of his work and collected the remuneration representing his income himself.

The fact that a member of a board of directors is free to submit proposals and advice and to vote in the board of directors is an indication of the absence of a hierarchical relationship of subordination.

When considering whether a member of the board of directors has acted in his own name, for his own account and on his own responsibility, particular account must be taken of national legislation on the allocation of responsibilities between the members of the board of directors and the company concerned.

Should it emerge at the end of the audit that the board member is not acting on his own responsibility, it would also have to be concluded that this person is rather acting on behalf of the company, as the advice and other activities are carried out in the interests and for the account of the company.

A person such as TP, who contributes his expertise and know-how to the board of directors of a company and participates in its votes, does not appear to bear the economic risk associated with his own activities, as the company itself has to face the negative consequences of the decisions of the board of directors and thus bears the economic risk associated with the activities of the members of the board of directors.

Such a conclusion is particularly necessary where, as in the main proceedings, it is apparent from the national legal framework that the members of the board of directors do not enter into any personal obligations in relation to the company's liabilities. It is also necessary where the amount of the remuneration received by the member of the board of directors in the form of bonuses depends on the profits of the company. In any case, this member does not bear any risk of loss in connection with his activity as a member of the Board of Directors, as participation in the company's profits cannot be equated with bearing his own risk of profit and loss. The above conclusion is all the more appropriate if the general meeting of shareholders grants the bonuses in the form of a lump sum, which is also paid if the company makes losses or finds itself in legal liquidation proceedings.

Please note:
According to the previous opinion of the tax authorities (sec. 2.2 para. 2 sentence 7 UStAE: "the activity as a member of the supervisory board is also carried out independently") and the BFH (BFH rulings of 27 July 1972, V R 136/71, BStBl I 1972, 810, and of 20 August 2009 V R 32/08, BStBl II 2010, 88), supervisory board remuneration was generally subject to VAT because it was assumed that the supervisory board member was generally a self-employed entrepreneur due to

the provision of control services to the company. This also applied if the supervisory board member was otherwise employed as an employee. The remuneration of a supervisory board member for VAT purposes included the supervisory board remuneration including the reimbursement of expenses. The CJEU relativized the German view in its ruling of 13 June 2019 Case C-420/18 - IO. It denied the entrepreneurial status of a supervisory board member of a foundation with fixed remuneration due to a lack of self-employment.

As a result of the CJEU ruling from June 2019, the BFH changed its case law in a timely manner (ruling from 27 November 2019 - V R 23/19, BStBl II 2021, 542) and denied the entrepreneurial status of a supervisory board member of an AG if they do not bear any economic risk. In the specific case in dispute at the BFH, the member received a fixed remuneration that did not depend on attendance at meetings or the actual hours worked, meaning that the BFH ruled out entrepreneurial status. It remained open as to when a supervisory board member can be self-employed.

The Federal Ministry of Finance (BMF dated July 8, 2021) then commented on the more recent case law with a time delay and determined that self-employment does not exist if the member of a supervisory board does not bear any remuneration risk due to non-variable fixed remuneration (cash payment or non-cash benefit). Fixed remuneration exists in particular in the case of a lump-sum expense allowance paid for the duration of membership of the Supervisory Board. If the remuneration of the Supervisory Board member consists of both fixed and variable components, he or she is generally deemed to be self-employed if the variable components in the calendar year amount to at least 10% of the total remuneration, including expense allowances received.

The principles of the financial administration on variable remuneration no longer appear to be tenable, as the variability of remuneration alone should say nothing about the economic risk of the Supervisory Board member.

It is noteworthy that in its BMF letter, the tax authorities have issued a transitional regulation until 31 December 2021 and do not object - also for the purposes of input VAT deduction - if the previous regulations in section 2.2 para. 2 sentence 7 and para. 3 sentence 1 UStAE continue to be applied.

Further adjustments are now likely to be necessary due to the CJEU ruling of 21 December 2023. It will be interesting to see whether the administration will need almost two years to do this again.

The question of what impact the current ECJ ruling will have on the taxation of supervisory board members or other board members will also be the subject of KPMG's annual VAT conference on 12 March 2024.

VAT 2024: Hybrid annual conference

on 12 March 2024

Further information and the registration form for the event can be found at the end of the newsletter and here.

NEWS FROM THE BFH

Opposition to a credit and withdrawal of a waiver to a VAT exemption following a demerger

BFH, ruling of 12 July 2023, XI R 41/20

This ruling from the German Federal Tax Court (BFH) concerns the question of who the subject of the opposition to a credit following a demerger is, and how the withdrawal of a waiver to a VAT exemption on the supply of investment gold (§ 25c German VAT Law (UStG)) must be carried out.

From the reasons for the decision

The BFH holds the view that after a demerger in accordance with the German Reorganization Act (UmwG) and entry in the commercial register, a waiver of a credit note that relies on the contract encompassed by the demerger must be declared to the acquiring legal successor.

The BFH establishes that a waiver, in terms of an effective declaration of intent, is requited. This means that the waiver must be declared to the person who is party to the contract and who, if applicable in the case of civil law differences of opinion, could seek clarification in civil proceedings as a creditor in relation to their entitlement (on the basis of an ancillary contractual obligation) to invoicing.

The registration in the commercial register assumes, as part of the special legal succession, that the company assets covered by the demerger, including liabilities and existing contracts shall accrue uno actu during the partial legal succession according to § 131 (1) no. 1 Transformation Act to the acquiring legal entity. A separate transferal with regard to the individual items is not necessary.

The partial legal succession encompasses inter alia the entirety of contractual relationships, which are transferred in this way by law, without the agreement of the other parties to the contract, to the acquiring legal entity.

Furthermore, the BFH discusses the revocation of a supply, subject to VAT, of investment gold in accordance with § 25c (3) UStG. If a trader has waived the VAT exemption on a transaction (here: § 25c (1) UStG) by issuing an invoice showing VAT to the recipient of the supply, they can only revoke the waiver contained therein by issuing the recipient of the supply with a corrected invoice that does not show VAT. The waiver and its revocation must in the process, actus contrarius, be treated equally with regard to the time limits of being exercised; it depends on how the trader treated the transaction in the last relevant time period.

Please note:
An invoice can also be issued by the recipient of the service by way of a self-billing credit note for VAT purposes and must be expressly designated as such since January 1, 2013.

A credit note within the meaning of the German VAT Act is not the (conventional) so-called "commercial credit note", which is a correction of a previously issued invoice (see section 14.3 para. 1 sentence 6 UStAE). Therefore, notifications of bonuses, discounts or rebates granted are also not credit notes in the aforementioned (VAT) sense. So-called "commercial credit notes", which represent a correction of an original invoice (cancellation invoices, e.g. for returned goods, weight defects, price differences, etc.) and so-called "commercial credit notes", which account for discounts (e.g. cash, quantity and special discounts, etc.) and sales rebates, loyalty discounts and bonuses (e.g. annual bonuses), must be recorded as a reduction in turnover for accounting purposes. The booking of these so-called credit notes must lead to a reduction of the assessment basis in the advance VAT return.

Invoicing using the VAT credit note procedure must be agreed and also entails risks for the recipient of the service who has to issue the credit note. According to the currently prevailing opinion (see BFH of 23 January 2013 - XI R 25/11), the mere objection to an invoice invalidates its effect ex nunc as an invoice, regardless of whether the objection was justified or even abusive. In this case, the recipient of the service will no longer be able to deduct input tax as a result of the objection and numerous questions will arise.

Please note the podcast to be published in mid-February 2024 on the problems with credit notes in VAT.

Listen in: VAT podcast "VAT to go"

Our tax expert Kathrin Feil and Rainer Weymüller, Of-Counsel at KPMG, talk about self-billing credit notes for VAT purposes in the new episode of our VAT podcast "VAT to go" from mid-February 2024 - listen in on Spotify and SoundCloud.

Revocation of the permission to use cash accounting due to abuse

BFH, ruling of 12 July 2023, XI R 5/21

In this ruling, the BFH has ruled on the revocation of permission to use cash accounting (§ 20 UStG) due to abuse.

The case
The plaintiff in the case is a trader and taxes his revenue, due to approval granted (while retaining the right to revoke the approval), on the basis of payments received (§ 20 UStG). In summer 2015, an audit was conducted at the plaintiff by the tax authorities. In the course of this, the auditor noticed that the plaintiff was commercially active as a managing director of several different companies (recipients of supplies), to which he had issued a significant number of invoices showing VAT, which were, however, only accounted for using settlement accounts, and for more than several years were not paid. The invoices showed neither terms of payment nor due dates. The auditor held the view that the plaintiff had not strived to receive a timely payment of the supplies invoiced but rather had been explicitly intended to be avoided.

Subsequently the tax authorities revoked the approval to tax the transactions on the basis of payments received from 1 January 2016. The immediate deduction of input VAT by the recipients of the supplies in the case of the lack of collection of fees for the transactions at the plaintiff gave rise to the assumption by related parties that the approval was being abused. An objection and legal suit were not successful.

From the reasons for the decision
The BFH viewed the plaintiff's appeal as justified. Even in the case of the existence of a reserved right of revocation, the revocation of the favorable administrative act is not permissible if the issuance of an administrative act was required. A rejection of the application would in any case be contrary to discretion if it relied on improper grounds.

If the recipient of a supply is already entitled to deduct input VAT, although as a result of the permission to use cash accounting no VAT has yet arisen at the supplying trader, this does not mean, from a VAT law perspective that an abusive set-up by the taxpayers participating in the exchange of supplies exists, but rather an inappropriate implementation or application of Art. 167 of the VAT Directive by the Member State, Germany.

It remains to be seen if the term "owed", within the meaning of § 15 (1) sent. 1 no. 1 sent. 1 UStG, in light of the CJEU ruling Grundstücksgemeinschaft Kollaustraße 136 - C-9/20 and Art. 167, Art. 179 sent. 1 of the VAT Directive, contain a time component and therefore must be interpreted to mean that the VAT is already owed by the supplier in order to be able to be deducted by the recipient of the supply as input VAT (and thus may not be deducted by the recipient of the supply as long as it is not yet owed by the supplier). This is not at issue in the case under dispute, which only ruled on the revocation of the permission to tax on the basis of payments received. It is, however, relevant in ruling on the tax procedures of the recipients of the supplies. If the input VAT deductions of the recipients of the supplies should not be denied, although – by no means already determined to be the case – the plaintiff has potentially not yet collected the VAT, this must be accepted by the Member State, Germany.

Please note:
In this case, the BFH denied the risk to tax revenue assumed by the tax office because this was based (if at all) on the inadequate implementation of EU law. Accordingly, there is no abuse by the supplier in allowing actual taxation if the recipient of the service already exercises the input VAT deduction upon receipt of the invoice.

No taxation at an average rate in the case of a paid waiver to a contractual right of supply

BFH, ruling of 23 August 2023, XI R 27/21

The BFH has ruled that a farmer's waiver to a contractual right of supply (by agreement upon the early dissolution of a contract for the supply of groceries) for an "indemnity" payment is subject to VAT and not covered by the taxation at an average rate of § 24 UStG.

From the reasons for the decision
The BFH gives as its reasoning that § 24 UStG, in light of Art. 295 et seq. of the VAT Directive, must be interpreted in compliance with the Directive. The requirement for simplification must be brought in line with the goal of balancing out the advance VAT burden for the farmer.

§ 24 UStG is a simplification provision, which must be narrowly interpreted since the rulings Harbs (CJEU ruling of 15 July 2004 – C-321/02) and Stadt Sundern (CJEU ruling of 26 May 2005 – C-43/04). The balancing out of the burden, as intended in Art. 295 et seq. of the VAT Directive, for the input supplies with VAT purchased by a farmer is only granted, in the classification of the lump-sum procedure, if the farmer supplies agricultural products or provides agricultural services. Other transactions carried out by the farmer in the course of the agricultural operation would be subject to the standard rate of VAT.

The waiver of a right to supply is neither an agricultural services within the meaning of § 24 UStG, Art. 295 of the VAT Directive, as it does not contribute to an agricultural production of the farmer, nor does the waiver supply agricultural products within the meaning of § 24 UStG, Art. 295 of the VAT Directive, as no items are produced by the agricultural operation of the farmer in the course of the activities listed in Annex VII.

In addition, this interpretation is the only one to take sufficient account of the fact that using the average rates, input VAT for the incoming supplies is lumped together on the basis of macroeconomic data (§ 24 (1) sent. 3 and 4 UStG, Art. 298 of the VAT Directive. The application of § 24 UStG therefore requires that a supply be one which can typically be assumed to result in a corresponding advance VAT burden or at least be able to result in one. For a waiver of a contractual right of supply, this does not apply, because the equipment of the agricultural operation is not needed for such a waiver.

This interpretation is in line with previous BFH case law on § 24 UStG. Thus, the BFH viewed the supply of a farmer, who made a parcel of land available as an ecological compensation site, as part of which the agricultural use (except for the use as pasture) was given up, to not fall under

§ 24 UStG, as it did not serve agricultural purposes. The same applies to the obligation to remove land from crop rotation over at least five years and refrain from using it for agricultural purposes that are damaging. Ultimately, the transfer of rights to payments and the transfer of livestock units does not fall under § 24 UStG.

Please note:
In the case of supplies provided by farmers that are subject to average rate taxation in accordance with Section 24 UStG, the decisive factor is whether the output transactions are to be assessed in full as a supply of agricultural products or as an agricultural service. If this is not the case, the sales are subject to standard taxation and the farmer must invoice accordingly.

VAT shown in an invoice in relation to § 24 (1) UStG

BFH, ruling of 17 August 2023, V R 3/21

This BFH ruling concerns showing VAT in an invoice in relation to § 24 (1) UStG taking the VAT Application Decree (UStAE) into account.,

The case

A private corporation under civil law (GbR), subject to taxation at an average rate in line with § 24 UStG), carried out farming activities on leased land. The partners in the GbR were, most recently, K and H. In 2010 (the year under dispute), they agreed to dissolve the GbR after 30 June 2010, whereby the GbR's economic assets would be transferred to the partners as part of the division. H received – in addition to other assets – the right of use to leased land with an area of 49.86 ha, corresponding to around 14% of the area farmed by the GbR, and K received the remaining assets that were not distributed to H. Subsequently K, himself commercially active, became a shareholder of a corporation (KG) and passed on the assets he had received to the KG to be used for a fee.

The GbR issued K with an invoice, showing VAT in the amount of 10.7%, for the assets allocated to him in the course of the division (among other things agricultural machinery and seed crops). K made use of the input VAT deduction for the amount of VAT shown in the invoice. The tax authorities assumed that the transfer of a business for the surrender of shares constituted a non-taxable sale of a business as a whole within the meaning of § 1 (1a) UStG. As only the legally owed VAT could be deducted as input VAT – with which the provisions of § 24 (1) sent. 3 UStG were referred to – the GbR owed, in accordance with § 14c (1) UStG, the VAT shown on the invoice. Following an unsuccessful extrajudicial legal remedy process, the Lower Tax Court allowed the action brought.

From the reasons for the decision

An appeal by the tax authorities to the BFH was successful. The Lower Tax Court was incorrect in not viewing the GbR as the issuer of the invoice with VAT. As this, even in the case where no VAT was legally owed, results in at least a VAT debt for the GbR in accordance with § 14c (1) UStG, the amount of the legally arising VAT must not be ruled upon. Furthermore, the VAT owed in the amount determined by the tax authorities is reduced by neither the input VAT deduction assumed by the GbR on the basis of § 24 (1) sent. 3 UStG nor by a correction of input VAT.

The GbR, which in essence did not oppose the assumption of a VAT debt in the amount of the VAT shown in the invoice, but rather held the view that it was entitled to an input VAT deduction in the same amount, is not entitled, contrary to its assumption, to an input VAT deduction from the transfer as part of the division in accordance with § 24 (1) sent. 3 UStG, as the necessary transaction within the meaning of § 24 (1) sent. 1 UStG is lacking.

The supply of machinery that the trader only used for transactions in accordance with § 24 (1) sent. 1 UStG, is not subject to average rate taxation (similarly Section 24.2 (6) sent. 2 UStAE). The BFH has abandoned its previously contradictory case law (BFH from 10 November 1994, Federal Gazette II 1995 p. 218).

Contrary to Section 24.2 (6) sent. 3 UStAE, no administrative simplification arises by treating the supply of items not subject to § 24 (1) sent. 1 no. 3 UStG as being subject to this provision.

Please note:
If an invoice is issued with a VAT statement, the issuer is liable for VAT (either in accordance with § 14c UStG or because he has provided a taxable service). The BFH has clarified this once again. If VAT claims are asserted against the contractor as the tax debtor within the meaning of sec. 13a para. 1 no. 1 UStG on the basis of sec. 14c para. 1 sentence 1 UStG, this constitutes an obligation by which a partnership becomes a taxable person within the meaning of sec. 33 of the German Fiscal Code, and thus also a legal relationship between the partnership and the tax office, until the settlement of which the partnership is to be treated as existing for the purposes of tax law despite its complete termination under civil law.

NEWS FROM THE BMF

Specific issues in the case of the application of the zero VAT rate for certain photo voltaic systems

BMF, guidance of 30 November 2023 – III C 2 – S 7220/22/10002 :013

Since 1 January 2023, VAT is reduced, according to § 12 (3) UStG to 0 per cent for the following transactions:

1. The supply of solar modules to the operator of a photovoltaic system, including the components essential for the operation of a photovoltaic system and the storage needed to store the electricity produced by the solar modules if the photovoltaic system is installed on or near to private apartments, apartments and public and other buildings used for activities serving the common good. The requirements for sentence 1 are deemed to be satisfied if the installed gross output of the photovoltaic system according to the market master data registry does not or will not amount to more than 30 kilowatts (peak);

2. The intra-Community purchase of the items indicated in no. 1, which satisfy the requirements of no. 1;

3. The import of the items indicated in no. 1, which satisfy the requirements of no. 1;

4. The installation of photovoltaic systems and storage to store the electricity produced by the solar modules if the supply of the components installed satisfies the requirements of no. 1.

The German Ministry of Finance (BMF) already delivered the administrative opinion on this new regulation in its guidance of 27 February 2023. The regulations published in the BMF guidance of 30 November 2023 supplement the BMF guidance of 27 February 2023. In addition, the VAT Application Decree was amended.

The principles of the BMF guidance of 30 November 2023 must be applied to all open cases.

With regard to the isolated expansion or renovation of a meter cabinet in connection with the installation of a photovoltaic system fulfilling the requirements of § 12 (3) no. 1 UStG, for supplies carried out before 1 January 2024, no objection will be raised if those involved agree, including with regard to an input VAT deduction at the system operator, to use Section 12.18 (10) example 1 UStAE in the version valid to 29 November 2023.

For reasons of the protection of legitimate expectations no objection – including for the purposes of the input VAT deduction of the recipient of the supply – shall be raised if the supplying trader relies on the application of the standard VAT rate for supplies, carried out up to 1 January 2024, of hydrogen storage devices with exclusive determination of the electricity production by means of reconversion of the hydrogen into electricity.

Please note:
The ancillary services for the delivery of the photovoltaic system include, among other things the transfer of the registration to the MaStR, the provision of software for controlling and monitoring the system, the assembly of the solar modules, the cable installations, the supply and connection of the inverter or the bidirectional meter, the supply of screws and power cables, the establishment of the AC connection, the provision of scaffolding or the supply of fastening material, the renewal or upgrading of a meter cabinet, the renewal or upgrading of the substructure of a photovoltaic system (e.g. by widening or doubling rafters) or the supply of pigeon protection. The renewal or upgrading of the substructure of a photovoltaic system (e.g. by widening or doubling rafters) or the supply of pigeon protection.

The ancillary services for the supply of the photovoltaic system do not include the mandatory measures (e.g. dismantling and re-installation of panels) when installing the photovoltaic system on roofs with covering materials containing asbestos or the adaptation of a lightning protection system.

Special duties for providers of payment services - § 22g UStG

BMF, guidance of 28 December 2023 - III C 5 - S 7420/20/10007 :004

The German Annual Tax Act 2022 inserted § 22g UStG – special duties for providers of payment services – into the German VAT Law. Thus, the Council Directive (EU) 2020/284 of 18 February 2020 to amend Directive 2006/112/EC regarding the introduction of certain requirements for payment services providers was transposed into national law.

On the basis of § 22g UStG providers of payment services are required, from 1 January 2024 to maintain records on cross-border payments in relation to the payment services they provide in every calendar quarter and to transmit these records to the Federal Central Tax Office (BZSt). This applies for all providers of payment services whose Member State of origin or host Member

State is the Federal Republic of Germany.

The information will be transmitted to a European database, the Central Electronic System of Payment Information (CESOP), where it will be centrally stored, aggregated, and compared with other European databases. Using the information providers by CESOP, Member States' competent authorities should be in a position to more quickly identify fraudulent companies and determine in which Member State services are being conducted. The goal is a further improvement in the battle against VAT fraud.

The BMF guidance of 28 December 2023 contains more detailed information on the material and personal scope of application (I), on the procedure for transmitting records (II), and on sanctions (III).

If a payment services provider does not fulfil their duties to record, report and retain information in accordance with § 22g (4 to 6) UStG for a payment, this constitutes an administrative offense according to § 26a (2) no. 8 to 10 UStG, punishable with a financial penalty of up to EUR 5,000.

In particular, a financial penalty can be imposed if a payment services provider, deliberately or through gross negligence, contrary to § 22g (4) UStG does not transmit information about a payment at all, does not transmit it correctly, in full, or in a timely manner. However, no financial penalty shall be levied if the transmission of information in line with § 22g (4) UStG for the first quarter of 2024 is not carried out until 31 July 2024.

Please note:
Time is of the essence. There are only a few weeks left for an impact analysis, data collection, processing and reporting. In particular, all payment channels used for transactions within the scope must be identified, the data aggregated and rules and criteria introduced for the selection of reportable transactions and the payment service providers that are to report them. In addition, an end-to-end reporting process must be implemented in order to transmit the data in the required format (XML) to the local tax authorities on a quarterly basis.

Companies can only report via an interface recently created by the BZSt; an upload option via the BOP is not available. To use the new interface, the connection must be programmed in advance or, alternatively, our own KPMG interface can be used.

We are happy to support companies with all the necessary steps - from the analysis of who is affected to the transmission to the BZSt via KPMG's own interface. We also offer innovative solutions through our network in the event of a Europe-wide reporting obligation.

VAT treatment of parking management contracts

BMF, guidance of 15 December 2023 – III C 2 - S 7100/19/10004 :005

In its ruling of 20 January 2022, C-90/20, Apcoa Parking Danmark, the CJEU ruled that the control fees charged by a private company charged with operating private parking lots in the case that motorists fail to comply with the general terms and conditions of use for those parking lots, should be considered to be a payment for a service, made for a fee within the meaning of Art. 2 (1) (c) of the VAT Directive and as such subject to VAT.

The BMF guidance of 15 December 2023 amended the VAT Application Decree accordingly.

The principles of the BMF guidance must be applied to all open cases. However, no objection shall be raised if the supplying trader assumes an actual compensation for damages for payments received up to 15 December 2023.

Please note:
In its guidance, the BMF does not address comparable cases in Germany that were previously treated as non-taxable (e.g. increased transportation charges in public transport or contractual penalties).

Place of a supply in the case of loss adjustment

BMF, guidance of 4 January 2024 - III C 3 - S 7117-f/21/10001 :001

Due to the CJEU ruling of 1 August 2022 – case C-267/21 – Uniqa Asigurari – the BMF has ruled on the place of supply within the meaning of § 3a (4) sent. 2 no. 3 UStG in the case of loss adjustments (B2C – recipient is domiciled in a non-EU country) and amended Section 3a.9 UStAE.

1. Place of supply within the meaning of § 3a (4) sent. 2 no. 3 UStG in the case of loss adjustment

Loss adjustment services provided by third-party companies in the name and for the account of an insurance company are not included among the services of consultants, engineers, consultancy bureau, lawyers, accountants and other similar services, as well as the data

processing and transmission of information, outlined in Art. 56 (1) (c) of the VAT Directive in the version valid up to 1 January 2010, now Art. 59 (c) of that Directive.

2. Amendment to Section 3a.9 UStAE

As a result of the CJEU ruling of 1 August 2022 – case C-267/21 – Uniqa Asigurari it can be inferred:

2.1. No pure consulting service exists, if a service requires the exercising of a decision-making authority (e.g. in relation to the granting or denial of compensation, such as in the case of loss adjustment);

2.2. Services carried out as part of the legal profession mainly and normally consist in the representation and defense of the interests of a client, which as a general rule takes place in the context of a dispute and in the presence of opposing interests;

2.3. The "similar services of other traders" sets out in § 3a (4) sent. 2 no. 3 UStG includes services that are similar to any one of the activities named, viewed separately; this is the case if both activities serve the same purpose.

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

MISCELLANEOUS

§ 14c UStG and Union law

Lower Tax Court Cologne, ruling of 25 July 2023, 8 K 2452/21; BFH ref. V R 16/23

This ruling concerns, inter alia, the extent to which § 14c (1) UStG can be interpreted as complying with Union law and thus it must also be examined if an incorrect invoice did not present a risk of loss in tax revenue.

The case
Z AG is in possession of a certificate from the BStZ in accordance with § 4 no. 11b sent. 2 UStG. There is a dispute between Z AG and the tax authorities if the product formal delivery (hereinafter referred to a PZA services) is a postal universal supply of services in line with § 4 no. 11b UStG and exempt from VAT to the extent that it is discounted or franked.

PZA services are the formal delivery (serving) of documents in accordance with the Code of Procedure and Administrative Service Law. PZA services are only intended to be used by local authorities, courts, bailiffs, and arbitrators. Z AG cannot rule out – albeit at a very low percentage – having sold PZA services with VAT to customers entitled to deduct input VAT. It has been indisputably accepted that invoices for PZA services in the amount of 0.1 per cent of net transactions were invoiced with VAT to customers entitled to deduct VAT.

It is also disputed whether the tax authorities must assess VAT for VAT-exempt PZA services in accordance with § 4 no. 11b UStG, which Z AG sold showing VAT incorrectly in its invoices in line with § 14c (1) UStG.

From the reasons for the decision
The Lower Tax Court deemed the suit to be valid. The VAT assessment notice is unlawful and damages the rights of Z AG when VAT was charged on its discounted and franked PZA services as subject to VAT.

As universal postal services in accordance with § 4 no. 11b UStG, Z AG's discounted and franked PZA services are exempt from VAT.

To the extent that Z AG issued invoices showing VAT for the PZA services contained in these VAT-exempt discounted and franked PZA services, the levying of VAT in accordance with § 14c (1) UStG is out of the question due to the lack of a risk to tax revenues.

To the extent that Z AG issued invoices showing incorrect VAT for non-exempt, in line with § 4 no. 11b UStG, discounted and franked PZA services, the levying of VAT in accordance with § 14c (1) UStG is out of the question partially due to the lack of a risk to tax revenues and partially due to Z AG's good faith regarding the incorrect VAT.

To the extent that Z AG, vis-à-vis customers not entitled to deduct VAT, provided VAT-exempt universal postal services in the form of PZA services, for which it incorrectly charged VAT to its customers, they can rely on the non-applicability of § 14c (1) UStG, which must be interpreted in compliance with Union law, and alternatively Art. 203 of the VAT Directive, as VAT revenues were not threatened by the incorrectly charged VAT. The Lower Tax Court infers this from the CJEU ruling of 8 December 2022 – case C-378/21 – P GmbH, in which the VAT was charged to end-users, but the transactions would nonetheless apply generally for invoices to customers not entitled to deduct input VAT.

To the extent Z AG indisputably provided, vis-à-vis customers entitled to deduct input VAT, VAT-exempt universal postal services in the form of PZA services, for which it incorrectly charged VAT to its customers, the principle of VAT neutrality must be kept in mind. This rules out a national provision such as § 14c (1) UStG, which make the correction of the tax burden of a demonstrably good faith issuer of an invoice dependent on the correction of their incorrect invoices, especially if the correction is de facto not

possible as the issuer of the invoice does not know the billing address. In that case, as happened here, the invoice issuer in question must rely on the principle of VAT neutrality.
§ 14c (1) UStG is to be interpreted as complying with Union law or the plaintiff can rely directly on Art. 203 of the VAT Directive.

An appeal has been lodged against this ruling (BFH ref. V R 16/23).

Please note:
The ruling of the tax court consistently applies the case law of the CJEU of 8 December 2022 also when examining sec. 14c para. 1 German VAT Act and comes to the conclusion that the lack of risk to the tax revenue eliminates a tax liability under sec. 14c para. 1 German VAT Act. In practice, the tax authorities still seem to be very reluctant to apply the CJEU ruling. It is therefore to be welcomed that the Federal Fiscal Court can comment on this in the appeal.

Copyright warnings

Lower Tax Court Berlin-Brandenburg, ruling of 29 August 2023, 5 K 7144/20; BFH ref. V R 19/23

This ruling concerns the VAT treatment of copyright warnings.

The case
In the period under dispute, 2012 to 2016, the plaintiff worked as an independent architectural photographer. As his photography was used on the internet and in other media without his consent, he contracted a lawyer to pursue these copyright infringements, inter alia by means of extrajudicial warnings.

These warnings were carried out according to the following process: First, the lawyers demanded that each infringer stop the unauthorized use of the photo. Following the submission of a corresponding cease-and-desist declaration, the lawyers then claimed damages in accordance with § 97 (2) Copyright Law (UrhG) and then compensation in accordance with § 97a (3) UrhG. The VAT treatment is disputed.

From the reasons for the decision
The Lower Tax Court reached the following conclusion: If, as a result of a warning from the copyright holder following an infringement of copyright, the infringer pays damages within the meaning of § 97 (2) UrhG and compensation within the meaning of § 97a (3) UrhG, all payments – regardless of their copyright law categorization as damages or compensation – constitute a payment for a supply provided by the copyright holder to the infringer.

An appeal has been lodged against this ruling (BFH ref. V R 19/23).

Note:
According to the Berlin-Brandenburg tax court, it does not matter whether the warning party claims compensation for expenses or damages because the warned party only avoids the consumable benefit of avoiding copyright action proceedings by paying all the amounts claimed by the warning party. If he only paid compensation for expenses, the warning party would generally not waive the execution of the threatened copyright action.

However, it is noteworthy that the tax court does not examine in detail whether the entire amount paid by the warned party constitutes remuneration for the warning service, but merely states this with reference to the BFH ruling from 2019. However, one must agree with the Berlin-Brandenburg tax court that this question was actually not clearly answered by the BFH in 2019 because the warning party only claimed a lump sum of EUR 450 at the time and this was not specifically itemized. Consequently, the BFH did not make an explicit distinction between compensation for expenses and damages, but merely pointed out that the legal basis under civil law on which the warning party relied was irrelevant for VAT purposes. The BFH can now clarify this issue in the appeal proceedings.

Please note:
The Lower Tax Court Mecklenburg-Western Pomerania (from 30 August 2023 - S 7100 - 00000 - 2014/005) refers to the BMF guidance of 1 October 2021 on the VAT treatment of warnings in the case of copyright infringement and fraudulent competitions. The BMF notes that, in line with the application provisions in that case, no objection will be raised if those involved agree, in the case of payments for copyright infringement made before 1 November 2021, to assume there is no payment subject to VAT, i.e. including with regard to an input VAT deduction for the infringer.

In this respect, the BMF took a position on the question of how the non-objection provision affects the input VAT deduction relating to the lawyers' supplies of services for the copyright holder. In cases in which use is made of the non-objection provision contained in the BMF guidance, and the supply of warning services are not subject to VAT as true damages, an input VAT

deduction for the lawyers' services must not be denied to the copyright holder, to the extent that their overall activities mean they are entitled to deduct input VAT.

Berlin International Tax Office launches

Press release no. 23-022 of 4 December 2023

On 4 December 2023, Berlin's Senator for Finance "launched the Berlin International Tax Office. The Berlin International Tax Office is responsible for the centralized sales taxation throughout Germany of companies based in more than 100 countries. We are talking about companies that are operating in Germany but do not have a domicile here. Thus, Berlin is making an important contribution to, among other things, the Germany-wide battle against VAT fraud: companies based abroad should not be able to evade their obligation to pay VAT in Germany.

In the area of VAT on companies based abroad there have been many developments in Germany. In particular in international online trading stricter regulations and new documentation obligations for the operators of electronic marketplaces were introduced. In the past few years, the number of online traders registered for tax in Berlin has thus increased considerably. With more than 115,000 registered foreign companies, the number has increased more than tenfold since 2019. Of these, more than 110,000 companies are based in the People's Republic of China, Hong Kong, Macao, and Taiwan, where many companies, especially those engaged in online trading, are based. This number of cases to be processed, particularly with regard to the VAT on online traders, has risen accordingly in the past few years.

The aim is to ensure that all of these cases continue to be comprehensively processed. Therefore, the Berlin International Tax Office establishes a totally new, specialized tax authority. It is starting out with 150 employees. In order to process the many cases even more effectively, there will be an extensive increase in the number of staff by the end of 2024. At that stage, the intention is to have up to 250 employees.

Up to now, the special responsibility for the entire area of "limited tax obligation" as well as the levying of VAT on companies based abroad lay with the Neukölln Tax Office. …"

FROM AROUND THE WORLD

TaxNewsFlash Indirect Tax

KPMG articles on indirect tax from around the world

You can find the following articles here.

19 Jan – Poland: Mandatory e-invoicing system postponed

12 Jan - Belgium: Law project to introduce a new e-invoicing mandate from January 2026

3 Jan - North Macedonia: New rulebook on VAT registration of foreign taxpayers through a tax representative

11 Dec - Romania: E-invoicing updates for established persons and nonresident VAT payers

6 Dec - Poland: Draft regulations related to mandatory use of national e-invoicing system (KSeF)

5 Dec - Belgium: Access to VAT e-services "Isabel" and "GlobalSign" to end beginning 31 January 2024

29 Nov - EU: VAT Committee considers that individuals regularly selling in-game assets are subject to VAT

27 Nov - Belgium: Joint VAT liability for electronic interfaces

27 Nov - Luxembourg: Temporary VAT rate reductions set to expire 1 January 2024

27 Nov - Saudi Arabia: Ninth wave of e-invoicing applicability

17 Nov - Mexico: List of 198 registered foreign providers of digital services (as of 31 October 2023)

EVENTS

VAT 2024: Hybrid annual conference

on March 12, 2024

The VAT year 2024 will be an exciting one, and it's not just the increasing digitalization, including in the form of e-invoicing, that will keep us busy. Keep up to date and attend our annual hybride VAT conference 2024 in March. The presentation event will take place in Munich.

What will not change: Representatives from the fiscal courts, the tax authorities, business and consulting practice will be there to provide information on current VAT topics and challenges. And there will also be plenty of opportunity for active exchange - we are already looking forward to your questions and comments during the live talks.

The event will focus on current publications in the field of VAT (e.g. BMF letters, BFH and CJEU rulings, legislative amendments), the VAT permanent establishment in Germany and abroad and the distinction from the income tax

permanent establishment and current practical cases from tax audits as well as a panel discussion on the introduction of e-invoicing and digital reporting obligations in Germany, various EU countries and with regard to VAT in the Digital Age.

Mr. Rainer Weymüller, Of-Counsel at KPMG, will once again be taking part. In addition, we were able to win Mr. Leonard Joost* from the VAT department of the state of North Rhine-Westphalia and Mr. Elmar Mohl*, VAT auditor at a tax office for large and group audits at the North Rhine-Westphalia tax authorities, for the event.

* in a non-official capacity

Further information and the registration form for the event are available 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
Olaf Beckmann*
T +49 211 475-7343
olafbeckmann@kpmg.com

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

Franz Kirch
T +49 211 475-8694
franzkirch@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

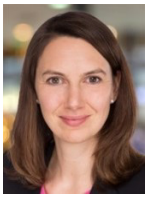
** Please note that KPMG International does not provide
any client services.

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