KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

February 2024

NEWS FROM THE CJEU

Fake invoices issued by an employee

CJEU, ruling of 30 January 2024 – case C-442/22 – P

This CJEU ruling concerns the interpretation of Art. 203 of the VAT Directive (in German law see: § 14c German VAT Law (UStG)). According to this, VAT is owed by any person who enters this tax into an invoice.

The case

In the period from January 2010 to April 2014, the employee of a Polish company that operated a gas station issued 1,679 invoices for a total of around EUR 320,000, which did not reflect any actual sales of goods. For this purpose, she used her VAT taxable employer's data without their knowledge or agreement. The fraudulent invoices were not recorded in the company's tax returns. They were used by the recipients of the invoices to unduly achieve a refund of input VAT without the corresponding VAT having been paid into the State's coffers.

From the reasons for the decision

In its ruling, the CJEU stated that Art. 203 of the VAT Directive does not apply if a risk to the tax revenue is precluded.

The CJEU further states in its ruling that the VAT may not be owed by the apparent issuer of a fake invoice, if they have acted in good faith and the tax authorities know the identity of the person who actually issued this invoice. In such a case it is this person who is liable to pay the VAT. Any other interpretation would run counter to the aim of the VAT Directive to prevent tax evasion, and would not be compatible with the fact that fraudulent reliance on the provisions of Union law is not permissible.

In order to be viewed as acting in good faith, the employer must exercise the due diligence reasonably required to monitor the conduct of their employees and so prevent their data from being used to issue fake invoices. If such due diligence was not displayed, the employer must be considered to be the person obliged to pay the VAT entered into the fraudulent invoices.

It is for the tax authorities or the national court, taking all the relevant circumstances into consideration, to determine if the employer displayed such due diligence.

Content

Please note:
The decision is of particular importance because the CJEU clearly defines for the first time who is the issuer of an invoice within the meaning of Art. 203 of the VAT Directive (Section 14c UStG). The CJEU considers it conceivable in principle that the employee or the entrepreneur can be the issuer if the employee uses the employer's data without the employer's knowledge. The CJEU then poses the question of making an overall assessment of all relevant circumstances in order to determine whether the taxable person whose VAT identification data was used by his employee without authorization to issue false invoices for fraudulent purposes exercised reasonable care to monitor the actions of this employee. If this is not the case, this taxable person is obliged to pay the VAT shown on these invoices in accordance with Art. 203 of the VAT Directive. Therefore, if an employee has made unauthorized use of the employer's data, it will be necessary to prove to the tax office what measures have been taken in advance to avoid such incidents.

With this judgment, the CJEU confirms its case law (see judgment of 8 December 2022, C-378/21, Finanzamt Österreich) that, in the case of Art. 203 of the VAT Directive and an invoice with an incorrect tax statement, it depends on whether there is a risk to the tax revenue. Accordingly, a taxable person who has provided a service and has shown a VAT amount in his invoice that was calculated on the basis of an incorrect tax rate is not liable for the incorrectly invoiced part of the VAT in accordance with Art. 203 of the VAT Directive. The case concerned invoices (receipts) that had been issued to customers of an indoor playground. Here, the CJEU did not see any risk to the tax revenue because this service was provided exclusively to final consumers who were not entitled to deduct input VAT.

The new decision also clarifies that the risk to tax revenue does not only play a role in the B2C sector, but also in the B2B sector for customers who are not entitled to deduct input VAT. In this respect, it has already overtaken the new submission from Austria. Here, the CJEU has been called upon again in the second instance in the case of indoor playgrounds.

In the follow-up decision to the CJEU ruling of 8 December 2022, C-378/21, the Federal Fiscal Court of Vienna initially ruled in favor of the indoor playground and taxed only 0.5% of the turnover by way of an estimate, because this amount was estimated to be a business connection and therefore a risk to tax revenue could be considered.

In response to the tax office's appeal, the Austrian Administrative Court referred the case back to the CJEU with the following questions in its ruling dated 14 December 2023:

(1) Is Article 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax to be interpreted as meaning that a taxable person who has made a supply and has shown in his invoice an amount of VAT calculated on the basis of an incorrect rate is not liable, under that provision, for the part of the VAT wrongly invoiced if the supply shown in the specific invoice was made to a non-taxable person, even if that taxable person has made further supplies of the same kind to other taxable persons?

(2) Is a "final consumer who is not entitled to deduct input VAT" within the meaning of the judgment of the European Court of Justice of 8 December 2022, C-378/21, to be understood to mean only a non-taxable person or also a taxable person who uses the specific supply only for private purposes (or for other purposes not entitled to deduct input VAT) and is therefore not entitled to deduct input VAT?

(3) In the case of simplified invoicing in accordance with Article 238 of Directive 2006/112/EC, what criteria should be used to assess for which invoices (possibly in the context of an estimate) the taxable person is not liable for the amount wrongly invoiced because there is no risk to the tax revenue?

Place of import is not determined on the basis of customs law

CJEU, ruling of 18 January 2024 – case C-791/22 – G.A.

This CJEU ruling concerns the place of import of goods brought into the customs territory of the European Union in a first Member State in breach of customs provisions and subsequently transported to a second Member State.

The case
G. A., resident in Poland, purchased a total of 43,760 cigarettes at a market in Poland in 2012. The packaging of these cigarettes bore only Ukrainian and Belarussian tax stamps. He transported the cigarettes, without informing the customs authorities, to the area of Brunswick, where he delivered them to his German buyer. In doing so he was arrested, and the cigarettes were secured and later destroyed. The Brunswick Main Customs Office

took the view that the cigarettes had been unlawfully introduced into the customs territory of the European Union, and that therefore a customs debt had been incurred, owed by G.A. It also held the view that, in accordance with § 21 (2) UStG, the import VAT arose in Germany. Therefore, it issued a VAT assessment noticed EUR 2,006.38. Following an unsuccessful objection to the VAT assessment, G.A. brought an action for its annulment to the Hamburg Lower Tax Court, the referring court.

The Lower Tax Court holds the view that the place of importation of the cigarettes is Poland, as it is there that they entered the economic network of the Union. Consequently, the German customs authorities would be competent to assess and collect the import VAT only if that tax were deemed to have been incurred in Germany by virtue of a legal fiction as to the place in which it arose. According to § 21 (2) UStG, Art. 215 (4) Customs Code, which deems a customs debt, if the amount of the debt is less than EUR 5,000, to have arisen in the Member State where the occurrence of the VAT is determined, is applicable mutatis mutandis. That being so, Hamburg Lower Tax Court has doubts as to whether § 21 (2) UStG is compatible with the VAT Directive.

From the reasons for the decision

In its ruling, the CJEU interprets Art. 30 (1), Art. 60 and Art. 71 (1) (2) of the VAT Directive as precluding the national legislation, according to which Art. 215 (4) Customs Code applies to import VAT with regard to the determination of place where the VAT arises. Art. 30 (1) of the VAT Directive defines the importation of goods as the entry into the European Union of goods which are not in free circulation within the meaning Art. 29 TFEU. Art. 60 of the VAT Directive stipulates that the importation into a Member State occurs in the territory in which the goods are located at the time they are brought into the Union. According to Art. 70 of the VAT Directive, the chargeable event for VAT occurs and VAT becomes chargeable at the point in time at which the goods are imported. If, however, imported goods are subject to customs duties, according to Art. 71 (1) (2) of the VAT Directive, the chargeable event occurs, and VAT becomes chargeable when the chargeable event in respect of those duties occurs and those duties become chargeable. This provision does not establish a general link between Directive 2006/112 and the Customs Code, and, in particular, does not determine the place of importation of goods for the charging of VAT.

This interpretation is confirmed in the CJEU case law, which is gone into in further detail in the ruling. In the case at hand, the cigarettes were intended for consumption in Poland. This must however be verified by the referring court, in particular in regard to the quantity of goods unlawfully imported into the Union and the manner in which they were purchased and subsequently passed on.

Thus, the CJEU found that Poland should therefore be regarded as the place where import VAT was incurred on those cigarettes.

Please note:

Despite the close link with customs law, the responsibilities for levying customs duties and import VAT must be considered separately according to the case law of the CJEU (CJEU ruling of 29 April 2010 - C-230/08). This is because the differences between customs duties and VAT must be taken into account when considering the question of collection competence. Customs duties are paid to the EU as own resources. Therefore, it is not decisive which Member State levies the customs duty. The revenue from EU VAT, on the other hand, flows into the national budgets. In its ruling, the CJEU comes to the clear conclusion that Art. 30 para. 1, Art. 60 and Art. 71 para. 1 subpara. 2 of the VAT Directive must be interpreted as precluding a national regulation according to which Art. 215 para. 4 of the CC applies to import VAT for the determination of its place of origin. In other words, the VAT Directive prohibits the application to import VAT of a customs-law fiction that the customs debt arises in the Member State in which a breach of customs-law obligations has been established if it is established that the import VAT has already arisen in another Member State.

NEWS FROM THE BFH

CJEU submission on taxation of transactions carried out using an app store – legal position up to 31 December 2014

BFH, resolution of 23 August 2023, XI R 10/20

The German Federal Tax Court (BFH) has presented several questions on the taxation of transactions carried out using an app store (legal position up to 31 December 2014) to the CJEU for a preliminary ruling.

The questions are as follows:

1. Under circumstances such as those in the main proceedings, in which a German taxpayer (developer) provided a supply of services, before 1 January 2015, electronically to a non-taxpayer resident elsewhere in the EU (end user) via an app store of an Irish taxpayer, is Art. 28 of the VAT Directive to be applied with the

result that the Irish taxpayer is treated as if they had received this supply of service from the developer and provided it to the end user, because the app store first named the developer as the supplier and showed German VAT in the order confirmation provided to the end user.

2. If the answer to question 1 is yes: Is the place of supply, fictitious in line with Art. 28 of the VAT Directive, for the supply of service provided by the developer to the app store in line with Art. 44 of the VAT Directive, Ireland, or, in line with Art. 45 of the VAT Directive, the Federal Republic of Germany (Germany)?

3. If, following the answer to questions 1 and 2, the developer did not provided a supply of service in Germany: Does the developer bear a tax burden for German VAT in line with Art. 203 of the VAT Directive, as the app store, in line with the agreement, named her in its email of the order confirmation to the end user and showed German VAT, although the end user is not entitled to deduct input VAT?

The preliminary ruling was based on the following facts:

A company U, which distributes game apps, used an app store X from Ireland in the years 2012 to 2014, which provided the apps to customers free of charge; however, it was possible to purchase benefits for the respective game for a fee. According to the agreement with X, U was the seller of the products. X was to offer the products on behalf of U, for which X received a commission. The end customer then received an invoice stating that he had made a purchase from U. The invoice also showed German VAT.

The BFH now believes that the turnover from U to X should actually be invoiced net as B2B turnover with place of performance in Ireland. However, it considers it conceivable that the place of performance in the B2B area could be determined differently in the case of a commission for services. He assumes the legal consequence of the application of sec. 3 para. 11 UStG, Art. 28 of the VAT Directive, which determines the legal fiction of two similar services that are provided one after the other. The economic operator, who is the commission agent, is treated as if he had first received the services in question from the economic operator for whose account he is acting and who is the principal, and then provided these services to the customer himself.

The BFH considers it conceivable that the legal relationship between the commission agent and the principal, on whose account he is acting, could be treated for VAT purposes in the same way as the service in which the commission agent is involved. The fiction of Art. 28 of the VAT Directive would be extended to the entire supply, i.e. both supplies (that of the principal to the commission agent and that of the commission agent to the end customer) would be treated in the same way as if the principal were to supply the service directly to the end customer.

He also considers it possible that at least the location of the service to which the commission agent is added also determines the location of the service between the principal and the commission agent. In both cases, U would have to invoice its sales with German VAT and not net. Questions 1 and 2 of the BFH go in this direction.

Question 3 concerns the German tax statement in the invoices to the end customers.

The BFH considered if the developer owed the VAT shown, with her agreement, in her name in line with Art. 203 of the VAT Directive, as the emailed order confirmations from the app store could be invoices within the meaning of Art. 203 of the VAT Directive. The right of the app store to issue invoices in the name of the developer stems from the agreements that the Lower Tax Court determined to have been agreed between the app store and the developer. The app store was merely supposed to receive a commission. The end customer would also have agreed to the electronic transfer of the order confirmation. The potential non-compliance with the requirements of Art. 233 et seq of the VAT Directive could not be of significant importance for the tax liability in accordance with Art. 203 of the VAT Directive.

The tax liability of the developer in accordance with § 14c UStG, Art. 203 of the VAT Directive that the BFH was considering as a result of the order confirmation created by the app store in the name of the developer could, however, be contrary to the CJEU ruling Finanzamt Österreich (VAT incorrectly invoiced to end users) of 8 December 2022 – C-378/21.

Even though the recipients of the supply are not liable for VAT, in the case under dispute, there could be a risk to the tax revenue, which Art. 203 of the VAT Directive also wants to prevent. The invoicing requirements also serve, that is, to monitor the payment of the VAT owed, to ensure the exact levying of the VAT, and prevent tax evasion. The BFH expanded on this point.

In any case, if several taxpayers participate in the provision of a supply, both the accounting-related assignment of a supply permitted by the developer to (from her point of view) the

incorrect supplier and also the accounting-related assignment of a supply to (from her point of view) the incorrect tax creditor would put the EU tax revenue at risk, even if the customer is not entitled to deduct input VAT. According to the Lower Tax Court, there is a threat that ultimately the transaction will not be taxed, as Ireland assumes that Germany has the right of taxation, in accordance with the order confirmation, while the Lower Tax Court assumed that Ireland had the right of taxation in the case of X, which would contradict this.

In the case at hand, the developer triggered this situation. Initially, she authorized the app store, in itself permissible (Art. 220 (1) of the VAT Directive, § 14 (2) sent. 4 UStG), to name her in the order confirmations as the supplier (and to draw the resulting VAT consequences vis-à-vis the end customer through withholding the German VAT), but later took the opposite view vis-à-vis the tax authorities, that the app store operator was the supplier (and the VAT invoiced in her name was not owed by her). The BFH considered this behavior to be contradictory. If she is of the opinion that the app store is the supplier, she cannot permit the app store to name her as the supplier. The developer's contradictory behavior could justify the assumption of her liability to VAT in accordance with Art. 203 of the VAT Directive.

Please note:
The CJEU's decision still relates to the old legal situation prior to the entry into force of Art. 9a of the VAT Regulation. Nevertheless, the BFH's preliminary ruling clarifies important questions relating to the services comission. Until now, the following could be stated in this respect: The supply service shares the fate of the procured service for VAT purposes and both services are either tax-free or taxable if there is a service commission. It is now also being finally clarified whether the fate of the two supplies is also linked to the right of taxation (place of supply).

The CJEU ruling of 28 February 2023 C- 695/20 (Fenix) on service commission for internet portals should also be seen in this context. According to this ruling, in the case of services provided electronically via a telecommunications network, an interface or a portal such as an app store, it is always assumed that a taxable person involved in this provision is acting in his own name but on behalf of the provider of these services, so that he himself is considered to be the provider of these services if he authorizes the billing of the recipient of the services, authorizes the provision of the services or determines the general conditions of the provision.

NEWS FROM THE BMF

Input VAT division using the overall sales key

BMF, guidance of 13 February 2024 - III C 2 - S 7306/22/10001 :001

The German Ministry of Finance (BMF) has ruled on the division of input VAT on the basis of the ratio of transactions within the meaning of § 15 (4) sent. 3 UStG, Usage of Overall Sales Key.

I. Basis for division of input VAT

If a trader uses items supplied, imported, or purchased intra-Community, or avails of another supply for their business, both for transactions for which input VAT is entitled to be deducted and transactions which preclude the deduction of input VAT in accordance with § 15 (2) and (3) UStG, they must divide the VAT amounts arising into deductible and non-deductible portions. According to Union law (Art 173 (1) and Art. 174 of the VAT Directive), for this division in principle a transaction key related to the totality of transactions effected by the trader (proportion of input VAT deduction, "overall sales key") must be used. The deductible proportion is determined in accordance with Art. 175 (1) of the VAT Directive as a percentage on an annual basis and rounded up to a full percentage.

The Member States could, however, in accordance with Art. 173 (2) of the VAT Directive deviate from this principle. The German legislature made use of this possibility in § 15 (4) sent. 3 UStG in the form of the prioritizing "other economic attribution" rather than a division based on the proportion of transactions (overall sales key).

The division of input VAT must take place in line with an appropriate division key. If, besides the overall sales key (equal to a transaction key relating to the overall revenue or the overall company), a different division key can be used, another division key must be used if it delivers a more precise result. If, besides the overall sales key, several other more precise division keys come into consideration, the most precise method does not necessarily need to be used. In these cases, the choice of which more precise method is applied is left up to the trader; however, the tax authorities can subsequently review this key for appropriateness.

II. Usage of the overall sales key
The overall sales key is a fraction made from the relationship of transactions, for which input VAT can be deducted, to the totality of the trader's sales, in each case in relation to the taxation period (calendar year). Imports and intra-Community purchases are not transactions in this sense and therefore not to be included in the sales key. The same applies for transactions for which the trader owes VAT as the recipient of a supply in accordance with § 13b (1) or (2) in conjunction with (5) UStG.

Then, the BMF gives detailed notes as to what transactions must be taken into consideration for the numerator and denominator.

In the case of an input VAT division on the basis of the overall sales key, the percentage of input VAT capable of being deducted must be rounded up to the nearest full percentage point (see Art. 175 (1) of the VAT Directive). In the case of a different, more precise division key being used, this rounding provision does not apply. This is permissible due to the CJEU ruling of 16 June 2016 – case C-186/15 – Kreissparkasse Wiedenbrück. In these cases, you must round up to the second decimal place.

The overall sales key could be applied on a temporary basis in the advance notice procedure (for example, on the basis of the previous years), and corrected to the final percentage in the annual assessment (see also Section 15.16 (2a) VAT Application Decree (UStAE)).

III. Amendments to the VAT Application Decree
The UStAE shall be amended accordingly.

IV. Provision on application
The principles of this BMF guidance must be applied in all open cases.

Please note:
With the new letter, the BMF is implementing two rulings of the BFH and the CJEU from 2016. Last year, the administration already provided extensive explanations on the application of the area or turnover key in sec. 15.17 para. 6 to 7 UStAE. It is now supplementing this with explanations on the overall sales key.

Until now, the overall sales key of a company has only played a minor role in the UStAE. Only in sec. 15.17 para. 7 no. 2 sentence 3 of the German VAT Circular did the administration state that, in the absence of any other more precise allocation, input VAT could only be allocated according to the overall sales key in the case of significant differences in equipment if the property (e.g. an administration building) was used to carry out the company's total turnover.

The BMF goes on to explain that an allocation based on turnover figures for only part of the turnover (partial turnover key, e.g. a property or department-related turnover key) also represents a different method of economic allocation and therefore takes precedence over the overall sales key.

Payment of a device bonus by mobile communications company for relinquishing an end-user device by the agent of a cellular contract

BMF, guidance of 23 January 2024 - III C 2 - S 7200/19/10003 :019

The BMF has ruled on the VAT treatment in cases of mobile communications contracts.

Up to now the tax authorities have established the following provisions in Section 10.2 (5) sent. 7 to 8 UStAE:

"If the agent of a cellular contract supplies, in their own name, a mobile device or other electronic item to the customer and if the mobile communications company grants the agent, due to a contractual agreement, a commission dependent on handing out a mobile device or other electronic item, or a commission component dependent on that, this commission or commission component is not, in this respect, a payment for the agency service to the mobile communications company, but rather a fee paid by a third party within the meaning of § 10 (1) sent. 2 UStG for the supply of a mobile device or other electronic item (cf. BFH ruling of 16 October 2013 – XI R 39/12, Federal Tax Gazette II 2014 p. 1024). This applies regardless of the amount of any additional charge to be paid by the customer.

The following Sentence 9 will now be added:

"If a contract is concluded between the mobile communications company and the agent, according to which the mobile communications company pays to the agent an (acquisition) commission whether or not a mobile device is handed out (contractual decoupling) to the

end customer, the commission overall constitutes payment for the agency services."

Please note:
The principles of the BMF guidance must be applied in all open cases.
As a result of the narrow formulation in the BMF guidance the question will arise in practice when and under what circumstances a contractual decoupling can actually be assumed, thus avoiding a payment from a third party.

Benefits and input VAT deduction

BMF, guidance of 24 January 2024 - III C 2 - S 7109/19/10004 :001

Subsequent to the CJEU ruling of 16 September 2020, C-528/19, Mitteldeutsche Hartstein-Industrie, the BMF, in its ruling of 16 December 2020 – XI R 26/20 (XI R 28/17), has ruled, deviating from previous case law and the tax authorities' view that the deduction of input VAT is permissible on the purchase of a supply prompted by an indirect commercial reason that is then supplied to a third party free of charge, and that the resulting benefit in kind will not be taxed, if there is no risk of a final consumption that is not taxed.

The BMF guidance of 24 January 2024 draws the following conclusions from the change to the case law.

Application of the cases law for an input VAT deduction in the case of "indirect" causes

The BFH ruled that a trader can also be entitled to deduct input VAT if they purchase a supply in order to pass it on free of charge to a third party and at the same time make their own commercial activities possible. This demands, however, that the input supply does not exceed what is necessary or indispensable to fulfil this purpose, and the costs of the input supply (imputed) are contained in the price for the output transaction effected, and the benefit to the third party (in the case of this ruling: the general public) is, in any case, incidental. It is only under these conditions that, contrary to previous case law, an "indirect" cause for the deduction of input VAT arises.

Two illustrative examples

The VAT Application Decree has been amended accordingly. Using two examples, the BMF illustrates the conditions under which an input VAT deduction should be possible.

Example 1 illustrates the case in the BFH ruling of 16 December 2020. In this case, the BMF affirmed, under the conditions mentioned above, the input VAT deduction for the building of a municipal road in order to operate a quarry.

In Example 2, the input VAT deduction was similarly affirmed for the building of a municipal road in order to operate a quarry. To minimize the rise in accidents due to the high number of cyclists, the company voluntarily built an additional cycle path. Due to a condition in the approval, the trader took steps to green the area in order to maintain the character of the local recreation area affected.

The BMF denied an input VAT deduction for the cycle path and the greening measures. The use of the road built by the lorries is also possible without the cycle path. At the same time, the benefit for the municipality and the general public is not only incidental, as the cycle path now gives cyclists the use of their own, previously non-existent traffic lane. The greening measures were not necessary for the carrying out of the economic activity. Even the municipal condition to undertake such measures does not lead to these being indispensable for the carrying out of the economic activity. In addition, the benefit for the municipality and the general public of the greening is not merely incidental but rather directly serves their needs.

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

Please note:
According to the previous BFH case law and the view of the financial authorities, there must be, for the supply acquired, a direct and immediate connection between the input and output supplies (cf. BFH ruling of 11 April 2013 – V R 29/10). Only indirect aims were, up to now, insignificant (cf. BFH ruling of 13 January – V R 12/08). This strict opinion has now been given up by the BFH and the tax authorities. However, the tax authorities, in the BMF guidance at hand, makes not of the narrow boundaries (in particular benefit to of the third party only incidental, costs of the input supply contained in the output price). The authorities then illustrated and demarcated their view using the two examples given above.

Note:
In its ruling dated January 29, 2024 (15 K 871/22 U), the Münster tax court ruled that a development measure required for business purposes entitled the taxable person to deduct input VAT and denied a gratuitous transfer of value. The input services were necessary for the company. The benefit for third

parties (general public) was at best incidental.

MISCELLANEOUS

The characteristic of being a trader for members of supervisory boards

Cologne Lower Tax Court, ruling of 15 November 2023, 9 K 1068/22; Az. des BFH: XI R 35/23

This ruling concerns the question of the characteristic of being a trader for members of supervisory boards and § 14c UStG.

The case
The plaintiff was the chair of the supervisory board for several companies within a corporate group. The companies each took out personal liability insurance for this activity. In addition to the reimbursement of expenses, the plaintiff received a fee per meeting day of the supervisory board.

In his VAT returns for the years under dispute, the plaintiff treated the payment as subject to VAT, his invoices issued to the companies showed VAT, and he submitted corresponding VAT returns. No deduction of input VAT was claimed by the individual recipients for the invoices in question. Instead, they declared – if anything at all – solely transactions not subject to VAT with no input VAT deduction.

Later, the plaintiff applied for an amendment to those VAT assessment notices that were still open, as a result of the jurisprudence relating to the lack of a characteristic of being a trader for members of supervisory boards. The tax authorities denied this as a fee for a meeting is not comparable with the fixed remuneration considered in the CJEU/BFH rulings (CJEU, ruling of 13 June 2019 – C-420/18 - IO; BFH, ruling of 27 November 2019 - V R 23/19 (V R 62/17).

From the reasons for the decision
In the finance authorities' view, the plaintiff's activity as the chair of a supervisory board does not give rise to the characteristic of being a trader within the meaning of § 2 (1) UStG.

In his function as the chair of the supervisory board and thus as a member of a legally stipulated body of the corporation, the plaintiff acts neither in his own name nor under his own responsibility. He also bears no economic risk, as his remuneration is based on provisions set out in laws, statutes and company by-laws and specifically does not receive a "variable" payment. The remuneration depending on meetings is also not at his disposal.

Finally, there is also no economic risk due to claims for damages arising through breaches of duty. The insurance policies taken out preclude this risk.

Please note:
The Cologne tax court denied an economic risk for the chairman of the supervisory board with regard to his remuneration, even though he received remuneration based on the number of meetings as fixed remuneration and not as "variable" remuneration (different view in section 2.2 para. 3a sentence 4 UStAE). Against the background of the CJEU ruling in the case TP – case C-288/22 – of 21 December 2023 (see VAT Newsletter December 2023 – January 2024), this distinction should no longer to relevant to the decision as the CJEU focuses on whether the person concerned carries out their activities in their own name, for their own account and under their own responsibility. As long as a board member has no personal obligations in relation to the company's liabilities, there is no economic risk in practice. According to the CJEU, liability for breaches of duty is also not sufficient..

The Lower Tax Court also denied a tax debt in accordance with § 14c UStG, as at no time was there any risk to the tax revenue. Up to now, the CJEU has rejected any danger to the tax revenue in the case of those invoice recipients who are end-users (CJEU ruling of 8 December 2022, C 378/21, Finanzamt Österreich). The Lower Tax Court has now also rejected the existence of a risk to tax revenue in the case of traders without outgoing transactions that do not give rise to an entitlement to deduct input VAT. This is in line with the CJEU ruling of 30 January 2024 – case C-442/22 – P that was later published (see article in this VAT Newsletter).

Interest of payment of arrears in line with § 233a AO

Saarbrücken Lower Tax Court, resolution of 13 November 2023, 1K 1313/21; binding

Issue: The auditor made additional estimates for the plaintiff (GmbH) in the years 2014 to 2016, among others. On the basis of these additional assessments, the defendant issued corresponding VAT and corporation tax assessments in 2018 as well as assessments for interest on arrears in accordance with Section 233a AO for these taxes. Following unsuccessful appeal proceedings and an amendment to the interest assessment notices in the legal proceedings, the present meeting judgment only concerned the remaining VAT interest assessed

in accordance with Section 233a AO.

The provisions on interest of payments of arrears in line with § 233a German Tax Code (AO) , which are based on additional estimates, do not violate, according to Saarbrücken Lower Tax Court European law principles.

While the European principle of neutrality of VAT is generally applicable to the provisions on interest, in the case of interest of payments of arrears, it is not violated, as the trader is not burdened in this sense due to the levying of a liquidity benefit.

The interest provisions are already not compatible with the European legal principle of proportionality, as the German procedural law stipulates the possibility of grounds of equity (§§ 163, 227 AO). However, they did not, even if viewed as disproportionate by the German Federal Constitutional Court since 2014, stand in opposition to the European legal principle to the extent that in assessing the disproportionality in this sense, in the case of the calculation of something to set off the liquidity benefit, European law benchmarks would apply and, in the question of a lenient remedy with regard to the interest load, other potential yields from the transfer of capital must be taken into consideration.

Please note:
On the topic of breaches of Union law, the Dusseldorf Lower Tax Court also ruled in agreement in mid-2023 (resolution of 12 May 2023, 1 V 115/23 A (U), and ruling of 23 June 2023, 1 K 1869/22 U). In this respect, there are currently complaint proceedings (ref. V B 34/23 (suspension of operations)) and appeal proceedings (ref. V R 14/23) pending at the BFH.

VAT to go: The VAT Podcase – Episode 5: VAT "credit notes" (self-invoicing)

Everybody has heard of credit notes: If you buy clothes but they don't fit, you get a refund, that is, a mercantile credit note. VAT "credit notes", however, are invoices that recipients of a supply write themselves. Agents, supervisory board members and even consignment storage facilities work with VAT credit note (self-invoicing).

As well as information on the basic utilization of self-invoicing, the prerequisites, and the VAT liability, the fifth episode of our podcast deals with questions surrounding objections to self-invoices. In this connection, our focus will also be on a remarkable ruling from the BFH.

Listen now: VAT to go – the VAT Podcast: Episode 5 - Self-Invoicing | Podcast on Spotify

FROM AROUND THE WORLD

TaxNewsFlash Indirect Tax
KPMG articles on indirect tax from around the world

You can find the following articles here.

13 Feb – Greece: Guidance on new reporting obligations for digital platform operators (DAC7)

13 Feb – Poland: VAT rate on take-away meals; eligible costs of new investment projects (Supreme Administrative Court decisions)

12 Feb – EU: VAT treatment of transfer pricing adjustments (CJEU referral from Romania)

9 Feb – Philippines: Tax on e-commerce transactions

7 Feb – Mexico: Updated platform for filing monthly VAT returns

6 Feb – Senegal: VAT on cross-border provision of digital services

5 Feb – Belgium: Parliament approves new law project to introduce e-invoicing mandate from 1 January 2026

2 Feb – KPMG report: Mexican rulings on exportation of services eligible for 0 % VAT

31 Jan – Colombia: Proposed amendments to e-invoicing regulations

31 Jan – Italy: Amendments to direct and indirect tax rules effective 1 January 2024

EVENTS

VAT 2024: Hybrid annual conference

on March 12, 2024

The countdown is on: In less than a month, this year's hybrid VAT annual conference will take place at KPMG's Munich office.

It's going to be exciting. It's not just the increasing digitalization, including in the form of e-invoicing, that is keeping us busy (see the Mediation Committee's proposal for the Growth Opportunities Act). The latest CJEU rulings from February 29, 2024 (When can VAT be reclaimed from the tax office due to irrecoverability?), January 30, 2024 (Is there no risk to tax revenue in the B2B sector; Section 14c UStG excluded? December 2023 (Entrepreneurial status of a board of directors with effects on activities in committees) and, in particular, the BMF letter dated January 24, 2024 (Input VAT deduction from an indirect business-related supply of services) will bring about changes in practice. The presentation by a tax auditor, who will address the administration's audit priorities, should be very interesting. In this context, the current considerations on possible audit simplifications through an effective Tax CMS will also play a role. Visit our hybrid annual VAT conference in March 2024 and find out about all this and more.

Rainer Weymüller, former presiding judge at the Munich tax court and of-counsel at KPMG, will be there again. We have also been able to attract Tanja Schumacher, Senior Vice President Tax Brenntag Group, Leonard Joost* from the VAT department of the Ministry of Finance of the State of North Rhine-Westphalia and Elmar Mohl*, specialist VAT auditor at a tax office for large and group audits at the North Rhine-Westphalia tax authorities, to the event.

* in a non-official capacity

Further information and the registration form for the event are available here.

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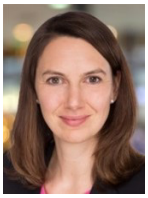

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