KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

March 2024

LEGISLATION

Bundesrat adopts Growth Opportunities Act

Bundesrat, resolution of 22 March 2024

On 17 November 2023, the Bundestag (German Parliament) passed the „Law to Strengthen Chances for Growth, Investment and Innovation and Tax Simplification and Tax Fairness" (Growth Opportunities Law (WtChancenG). On 24 November 2023, the Bundesrat (German Federal Council) did not approve the law and called for the conciliation committee to be convened, which dealt with the Growth Opportunities Act on 21 February 2024. The committee concluded negotiations with a severely reduced Growth Opportunities Act. The Bundestag confirmed the mediation results on 23 February 2024. On 22 March 2024, the Bundesrat finally approved it.

In particular, the law contains the following VAT changes:

Mandatory use of electronic invoicing
In anticipation of the planned reporting system (EU Commission proposal for a directive "VAT in the Digital Age" from December 2022), mandatory electronic invoicing will be introduced (§ 14 (1) to (3) German VAT Law (UStG)). The requirement is limited to supplies between domestic companies and in these cases applies without the approval of the recipient of the invoice. Invoices for small amounts and travel tickets are excluded from the requirement. However, generous transitional provisions apply to the introduction of the e-invoice (see § 27 (38) UStG).

In addition, e-invoicing shall be newly legally defined as an invoice that is issued, transmitted, and received in a structured electronic format that allows it to be processed electronically, and which in general complies with the provisions of the Directive 2014/55/EU of 16 April 2014. The Bundestag incorporated an alternative to this (see § 14 (1) sent. 6 no. 2 UStG). The structured electronic format of an electronic invoice can also be agreed between the issuer and the recipient of an invoice. This assumes that the format enables the correct and complete extraction of the details required by this law from the electronic invoice in a format that corresponds to the previously mentioned European norm, or is interoperable with that norm. According to the details of the legislative intent, this shall ensure,

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in particular, that invoices issued using EDI processes also comply with the format requirements.

At the same time, the wording is open to other technologies and also allows for other (including new) electronic invoicing formats.

The changes will generally come into force on January 1, 2025 with **transitional provisions for the period 2025 to 2027**, which have been extended compared to the government draft (see § 27 (38) UStG): For a transaction carried out after 31 December 2024 and before 1 January 2027 (i.e. in 2025 and 2026), other invoices on paper or, subject to the recipient's consent, in another electronic format are permitted (other invoices); by the end of 2027, invoices may be issued on paper or in another electronic format (other invoices) if the turnover of the contractor issuing the invoice was not less than EUR 800,000 in the previous year; in 2026 and 2027, invoices may be issued in another electronic format if they are issued by means of electronic data interchange using the EDI procedure, which requires the consent of the recipient.

Simplifications in the taxation process
The simplification provision, according to which the **recipient of the supply** is deemed to be **the taxpayer**, if the supplying trader and recipient of the supply have used the reverse charge process although this is not objectively applicable, can also be used for transactions arising from the transfer of emissions certificates in accordance with § 3 no. 2 Fossil Fuel Emissions Trading Law (§ 13b (5) sent. 8 UStG); entry into effect on 1 January 2024.

Expansion of cash accounting:
The threshold for cash accounting, in which VAT can be calculated according to the collected rather than the agreed payments will be increased from the current EUR 600,000 to EUR 800,000 (§ 20 sent. 1 no. 1 UStG); entry into effect on 1 January 2024.

Small business provision:
In principle, it will then no longer be necessary to submit advance VAT returns or an annual VAT return. However, this should not apply to cases under § 18 (4a) UStG. Even if the tax office requests a return (cf. sec. 149 para. 1 sentence 2 AO), the obligation to submit a return should still apply.

The waiving of the small business provision can in future be declared up to the end of the second calendar year following the taxation period in question (previously: until the period in which the VAT assessment can no longer be appealed) (§ 18 (1) sent. 1, (3) sent. 1, § 19 (1) sent. 4, (2) UStG); first applicable for the 2024 tax period (see § 27 (39) UStG: "Tax periods ending after 31 December 2023").

Advance VAT return
The submission of an advance VAT return is generally waived for small businesses within the meaning of § 19 (1) UStG. Entrepreneurs are to be exempted by the tax office from the obligation to submit the advance return and pay the advance payment if the tax for the previous calendar year did not exceed EUR 2,000 (previously EUR 1,000). The regulation applies from the 2025 tax period.

Reduced tax rate for corporations in accordance with § 12 para. 2 no. 8 letter a UStG
In § 12 para. 2 no. 8 letter a sentence 3 UStG, it is clarified that this only applies to services provided by special-purpose entities in accordance with sec. 66 to 68 AO. In the case of services provided by special-purpose entities in accordance with sec. 65 AO, no VAT law review of the competitive relevance of these services will take place in future, even according to the law. This is because, in the case of special-purpose enterprises within the meaning of Section 65 AO, the idea of competition is already sufficiently taken into account by the definition of a special-purpose enterprise in Section 65 AO.

The amendment to § 12 para. 2 no. 8 letter a sent. 3 UStG takes place against the background of case law (see BFH ruling of 26 August 2021 V R 5/19). There, the BFH had decided that the competition clause of sec. 12 para. 2 no. 8 letter a sentence 3 UStG, according to the current wording of the law, also applies to special-purpose entities within the meaning of sec. 65 AO (see also the new BFH decision XI R 4/20 at the end of this newsletter).

Government draft for a Fourth Bureaucracy Reduction Act

Status: 13 March 2024

The German Cabinet has determined the Government Draft for a Fourth Act for the Removal of the Burden of Bureaucracy from Citizens, the Economy, and the Administration (Fourth Bureaucracy Reduction Act – BEG IV-E). The government draft contains new taxation measures.

Contrary to the initial draft the following measures in particular have now been included in the area of VAT:

Advance reporting period:
Increase of the VAT threshold of the past year for the application of a calendar month as the advance reporting period from EUR 7,500 to EUR 9,000 (§ 18 (2) sent. 2, (2a) sent. 1 Draft German VAT Law (UStG-E))

Margin taxation in the case of retailers: Increase of the purchase price threshold from EUR 500 to EUR 750 (§ 25a (4) sent. 2 UStG-E)

The intended reduction of the retention period of accounting documents that was already contained in the initial draft from ten to eight years – to be uniform in both tax and trade law – remains unchanged. This reduction shall also apply for invoices in accordance with § 14b UStG.

NEWS FROM THE CJEU

Reduction of the basis of assessment in the case of uncollectibility

CJEU, ruling of 29 February 2024 – case C-314/22 – Consortium Remi Group

The CJEU ruling concerns in particular the interpretation of Art. 90 of the VAT Directive. It comes as part of a legal suit between the Consortium Remi Group (C) and the Bulgarian tax authorities regarding the refusal to grant to C a correction of VAT, which it paid for accounts receivable that were not paid by the debtor.

The case

The Bulgarian company C is engaged in the construction of buildings and facilities.

In the period from 2006 to 2010 and for 2012, C issued invoices to five companies. These invoices showed VAT and, in respect of most of the VAT periods, the VAT was remitted. Due to the failure of the companies to pay those invoices, C's total VAT debt amounts to around EUR 309.085.

In the tax assessment notice of 31 January 2011, a debt was assessed for Consortium Remi Group in line with the VAT law for the period from 1 January 2007 to 31 July 2010, including the VAT shown in the invoices to one of these companies. C brought legal proceedings challenging that notice but its action was dismissed by the court of first instance, whose decision was confirmed by the Supreme Administrative Court.

On 7 February 2020, C made an application to the Bulgarian tax authorities for an amount of EUR 309.085 plus interest for late payment to be set off against its VAT debt. This application corresponded to the VAT that was declared and remitted on the basis of the invoices issued to the five companies. In the annex to its application for set-off, Consortium Remi Group included a "list of the amounts not paid by the counterparties".

However, this application was denied on the grounds that it was made after the expiry of the limitation period in line with Art. 129 (1) of the Bulgarian Tax and Social Security Procedural Code (DOPK). In addition, C had not provided evidence of a total or partial non-payment of the debts concerning the VAT invoiced to the debtor companies.

During the administrative appeal of the decision that rejected that application, C submitted decisions initiating insolvency proceedings adopted concerning the five companies as well as evidence showing that those debts had been accepted by the liquidators of the companies and that they were contained in the schedules of acknowledged claims drawn up as part of the insolvency proceedings.

The decision to reject the application for set-off was confirmed in its entirety by a decision adopted on 22 May 2020 by the Director.

C brought an action before the Varna Administrative Court against the decision rejecting the application for set-off, confirmed by the Director. This legal suit was rejected. C appealed that judgement on a point of law before the Bulgarian Supreme Administrative Court, which is the referring court. It claimed that, in accordance with Art. 90 (1) of the VAT Directive, the taxable amount for VAT purposes should be reduced in cases where the taxpayer person did not receive all or part of the consideration due following the delivery of goods or supply of services that were made. This provision has direct effect and should therefore be applied, as it is infringed by the national provisions.

According to the referring court states, Bulgarian law makes no provision for a reduction in the taxable amount of VAT in the case of non-payment. Bulgarian VAT law only provides for such a reduction in the event of the nullification or cancellation of a transaction.

Relying on the reasoning of the Court in the judgments of 23 November 2017, *Di Maura* (C-246/16, no. 21 to 27), and of 3 July 2019, *UniCredit Leasing* (C-242/18, no. 62 and 65), the referring court considers that, as C maintains, the possibility of refunding VAT in the event of non-payment of the price cannot be totally excluded, notwithstanding the derogation provided for in Art. 90 (2) of the VAT Directive. That is the case, in particular, where the taxpayer proves that, taking the circumstances into consideration, the obligation to pay an invoice is unlikely to be fulfilled on the part of the recipient of that invoice.

According to the referring court, the derogation provided for in Art. 90 (2) of the VAT Directive was not taken into account in specific legislation in Bulgaria, neither to the extent in which the tax base is adjusted where the obligation to pay a VAT debt is not

likely to be fulfilled nor with regard to the conditions under which a refund of the VAT paid may be requested.

From the reasons for the decision

On the jurisdiction of the CJEU

In the case at hand, the dispute in the main proceedings relates to the taxable periods for VAT purposes in respect of the years 2006 to 2010 and in respect of the year 2012. Accordingly, the CJEU has no jurisdiction to rule on the questions referred for a preliminary ruling to the extent they concern the supplies of goods or services that took place in 2006, thus occurring before the accession of the Republic of Bulgaria to the European Union on 1 January 2007.

On the submitted questions 1, 3 and 4

Art. 90 of the VAT Directive, in conjunction with the principles of fiscal neutrality, proportionality and effectiveness, must be interpreted as not precluding legislation of a Member State which provides for a limitation period to apply for a VAT refund resulting from a reduction in the taxable amount of VAT in the event of total or partial non-payment, the expiry of which results in penalising an insufficiently diligent taxable person, provided that that limitation period only begins to run from the date on which that taxable person was able, without showing a lack of diligence, to assert its right to a reduction. In the absence of national provisions concerning the rules governing the exercise of that right, the starting point for such a limitation period must be identifiable by the taxable person with a reasonable degree of probability.

On the submitted questions 2 and 5

The CJEU concluded that Art. 90 (1) and Art. 273 of the VAT Directive, in conjunction with the principles of fiscal neutrality and proportionality, must be interpreted as precluding, in the absence of specific national provisions, a requirement on the part of the tax authority which renders the reduction in the taxable amount of VAT, in the event of total or partial non-payment of an invoice issued by a taxable person, subject to the condition that that taxable person corrects the initial invoice beforehand and that it communicates beforehand to its debtor its intention to cancel the VAT, where it is impossible for that taxable person to make such an adjustment in due time, for reasons beyond its control.

On the submitted question 6

According to the CJEU Art. 90 (1) of the VAT Directive, in conjunction with the principle of fiscal neutrality, must be interpreted as meaning that any right to a reduction in the taxable amount of VAT in the event of total or partial non-payment of an invoice issued by a taxable person gives a right to a refund of the VAT paid by that taxable person, together with interest for late payment, and that, in the absence of rules in the legislation of a Member State for applying any interest due, the date from which the taxable person asserts its right to that reduction in the VAT return relating to the ongoing tax period is the starting point for the calculation of that interest.

Please note:

As Art 90 (1) and Art. 273 of the VAT Directive, apart from the limits set therein, does not set out the conditions or the obligations that Member States can stipulate, according to the CJEU these articles grant the Member States plenty of leeway, in particular with regard to formalities, in setting the requirements that the taxpayer must satisfy vis-à-vis the tax authorities of the Member State, in order to reduce the tax basis of assessment.

Therefore, Member States may – but are not required to – generally make the basis of assessment dependent on the trader corrected their original invoice. In Germany, the obligation to correct in the case of a change to the basis of assessment is not dependent on change to the amount of VAT in the original invoice and a replacement invoice (cf. Section 17.1 (3) sent. 3 and 4 VAT Application Decree (UStAE)). It was also noteworthy in the CJEU's response that it may grant companies a claim to default interest after the tax return and the assertion of uncollectibility in the event of delays by the tax office. It remains to be seen whether and how the tax authorities will react to the CJEU ruling in this respect.

To round off the case, reference must also be made in this preliminary ruling to the Opinion of Advocate General Kokott of 7 September 2023, who made remarkable statements on irrecoverability. According to her, a reminder, a complaint or a written refusal to pay by the recipient of the service is suitable as proof that payment has not been made in order to reduce the assessment basis. The taxpayer is the only person who can assess whether the payment will still be made or will no longer be made in the foreseeable future. If this is the case, then the taxpayer's declaration as to when, in his view, a "final" non-payment can be assumed is also decisive.

VAT exemption of intra-Community supplies of goods

CJEU, ruling of 29 February 2024 – case C-676/22 – B2 Energy

This CJEU ruling concerns the evidence of the VAT exemption of intra-Community supplies of goods from the Czech Republic to Poland.

The case

In 2015, the Czech company, B2 Energy delivered rapeseed oil to Poland. According to the referring court, those goods were not supplied to the recipients declared in the tax documents but to other recipients established in that Member State, some of whom confirmed receipt by stamping and signing international consignment notes.

After having carried out a tax audit on 15 July 2015 for the months from February and May 2015, the tax authorities concerned found that B2 Energy had not demonstrated, on the basis of the documents provided, that it satisfied the conditions for entitlement to the VAT exemption. Although they did not dispute that the goods concerned had actually been transported to another Member State, they took the view that B2 Energy had not shown that it had transferred the right to dispose of those goods as owner to the persons presented in the tax documents as being the recipients or even that those goods had been supplied to a person registered for tax purposes in another Member State. The tax authority therefore took the view that B2 Energy did not satisfy the conditions for entitlement to the exemption. The objection to this was rejected.

The legal suit brought by B2 Energy was rejected by Prague City Court stating, that B2 Energy had not even demonstrated that the goods concerned had been delivered, through the recipients declared on the tax documents, to the recipients it presented as being the final recipients. More specifically, Prague City Court held that the documents submitted did not indicate either the person who assumed responsibility for the goods in the name of the recipient or the recipient to whom the goods had been delivered. As a result, it is not possible to identify the person entitled to exercise the right to dispose of those goods as owner.

B2 Energy brought an appeal against that judgment before the referring court, claiming, in essence, that it had provided evidence that the conditions for exercising the right to exemption from VAT for the supply of goods to another Member State were satisfied. The evidence provided, certifying the actual receipt of the goods concerned by companies other than the entities declared on the relevant tax documents, makes it possible to establish the identity of the recipients to whom the right to dispose of those goods has been transferred.

The referring court holds the view that, the CJEU, in its judgment of 9 December 2021, Kemwater ProChemie (C-154/20), accepted that the conditions for eligibility for the right to deduct VAT are satisfied where the identity of the supplier is not established, if the tax authority has the information needed to verify that that supplier had the status of taxable person for the purposes of VAT. The referring court questions whether it is possible to apply the ruling in that judgment for the purposes of assessing the right to a VAT exemption upon supplies of goods to another Member State, where the facts show that those goods were accepted not by the recipient declared in the tax documents but by another recipient who had the status of taxable person.

From the reasons for the decision

the referring court is, according to the CJEU, essentially asking whether Article 138 (1) of the VAT Directive, relating to the exemption of intra-Community supplies, must be interpreted as meaning that the exemption from VAT of a supplier established in one Member State having supplied goods to another Member State, who has not proved that those goods were supplied to a recipient having the status of taxable person in that Member State, must be refused.

The question is if, in view of the facts and information submitted by that supplier, the tax authorities of the Member State of departure have the information necessary to verify that the person to whom the goods were physically supplied had the status of a taxable person acting as such in the Member State of arrival.

The fact that the goods were received by entities other than those mentioned in the tax documents could indicate that they were the subject of a commercial transaction, the time of which may be decisive for the application of the exemption. The classification of the supply as an intra-Community supplydepends on whether the transport (as part of a chain transaction) can actually be ascribed to that supply (cf. in this regards CJEU ruling of 27 September 2012, VSTR, C-587/10, no. 31).

In this respect, it should be noted that, with a view to the exemption from VAT, the tax authorities must take proper account of all the information in their possession, such as the documents mentioned by the referring court, for the purposes of examining whether those documents may, where necessary, substantiate the likelihood of the actual supply of the goods transported to a

Member State other than the Member State of departure of the transport or dispatch.

Furthermore, in light of the principle of fiscal neutrality, a taxable person could not be required, in order to be able to exercise their right to exemption from VAT, to prove in every case where the recipient of the goods concerned has not been identified, that that recipient has the status of a taxable person to the extent that this clearly follows from the factual circumstance that that recipient necessarily had that status (cf. corresponding ruling of 9 December 2021, Kemwater ProChemie, C-154/20).

In those circumstances, the tax authorities and the competent national courts need to ascertain, on the basis of all the documents produced, including the documents in the supplier's possession, whether the material conditions for entitlement to the VAT exemption were met.

It is only where, taking the actual circumstances into consideration, and despite the evidence provided by the taxpayer, the information necessary to verify that the conditions laid down in Art. 138 (1) of the VAT Directive are satisfied is lacking, that the taxpayer must be refused the VAT exemption, without the tax authorities being required to prove that that taxpayer was involved in VAT fraud.

In light of all that, the answer to the submitted question is that Art. 138(1) of the VAT Directive must be interpreted as meaning that the exemption from VAT of a supplier established in one Member State, having supplied goods to another Member State, must be refused where that supplier has not shown that the goods were supplied to a recipient having the status of a taxable person in that Member State and that – taking the actual circumstances and evidence provided by the supplier into consideration – the information necessary to verify that the recipient had that status is lacking.

Please note:
It is clear from the decision that the CJEU does not focus on the formal requirements for tax exemption in the case of intra-Community supplies and mainly focuses on whether there has been a supply to another EU Member State to another company. Although the taxable person bears the burden of proof for the examination of tax exemption, the authority must examine all documents and records available to it in order to comply with the principle of VAT neutrality.

In the case at hand, the Czech tax directorate's argument based on Art. 138 (1) (b) of the VAT Directive, as amended by Council Directive (EU) 2018/1910 of 4 December 2018 (OJEU 2018 L 311, p. 3), which provides that Member States are to exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the European Union, where the taxable person or non-taxable legal person for whom the supply is made is identified for VAT purposes in a Member State other than that in which dispatch or transport of the goods began and has communicated its VAT identification number to the supplier, is irrelevant for the CJEU.
This provision, introduced (substantively) in Directive 2018/1910, is not applicable *ratione temporis* to the facts of the case in the main proceedings.

Denial of input VAT for a non-operating company

CJEU, ruling of 7 March 2024 – case C-341/22 – Feudi

The CJEU ruling concerns the question, submitted from Italy, of whether non-operating companies, as a result of a national provisions, may be denied a deduction, refund or offsetting of input VAT.

The case
Vigna (V) was a company incorporated under Italian law that carried on an economic activity of producing and marketing wine in the Campania region (Italy). In 2010, the tax authorities issued a tax assessment notice to V indicating, inter alia, that the company V was considered to be a non-operating company (a so-called 'dormant company') for the 2008 tax period on the grounds that the amount of the output transactions subject to VAT that it declared was below the threshold under which, for the purposes of Article 30 of Law No. 724/1994, companies are presumed to be non-operational. The tax assessment notice also stated that this threshold had not been reached by Vigna over three consecutive tax periods, that is for 2006, 2007 and 2008. Consequently, the tax authorities denied V's claim for a deduction of a VAT credit of EUR 42,108 for the 2009 tax period.

V unsuccessfully brought an action against the tax assessment notice. Feudi, which took over V in 2012, appealed that judgment, and that appeal was also unsuccessful. In 2014, Feudi lodged an appeal with the referring court. In essence, it is claiming that the refusal to grant it the right to deduct VAT is incompatible with EU law.

From the reasons for the decision
The CJEU interprets Art. 9 (1) of

the VAT Directive to mean that it may lead to a person being denied the status of taxable person for VAT purposes where that person, during a given tax period, carries out transactions subject to VAT, the economic value of which does not reach the threshold prescribed by national legislation, which corresponds to the return that can reasonably be expected from the assets held by that person.

Art. 167 of the VAT Directive and the principles of VAT neutrality and of proportionality must be interpreted as precluding national legislation under which the taxpayer is denied the right to deduct input VAT on account of the transactions subject to output VAT carried out by that taxpayer being considered insufficient. The mechanism established in Article 30 of Law No 724/1994 is based on the presumption that, if the amount of output transactions carried out by a company during a given taxable period does not reach a threshold calculated by following the criteria laid down in that article, that company is not an operational company unless it succeeds in demonstrating that objective circumstances justify it not having been able to reach that threshold. An entitlement to deduct input VAT can, however, only be refused if the facts relied on to demonstrate such tax fraud or abuse have been established to the requisite legal standard, otherwise than by assumptions. Moreover, a general assumption of fraud and abuse cannot justify a tax measure that compromises the objectives of a directive. Similarly, it cannot be accepted that such an assumption, even if it can be refuted, leads to the right to deduct input VAT being refused for reasons unconnected to the determination of a fraudulent or abusive reliance on that right.

Please note:
The CJEU has once again ruled that a lack of national registrations or the failure to meet national thresholds does not, for this reason alone, allow a company to be denied input VAT deduction if it has actually received the input supplies in question. Presumptions that tax evasion has played a role in this respect are in any case not sufficient for the denial of input VAT deduction in the opinion of the CJEU.

Inaccurate tax statement, correction of an overstated tax statement by means of registered tax receipts

CJEU, ruling of 21 March 2024 – case C-606/22 – B

This ruling concerns the correction of VAT in Poland due to a VAT rate that was too high.

The case
B provides recreational services and services to improve physical fitness in Poland; specifically, through the sale of passes that provide access to the premises of a sports club as well as unrestricted use of that club's facilities. In 2016, it decided, in accordance with the new Polish tax doctrine in that area, to apply a reduced rate of VAT (8% instead of 23%) to those supplies of services. B therefore submitted amended VAT returns.

The tax authorities refused to find that B had overpaid VAT, stating inter alia that, as long as the document confirming that a taxable activity had taken place was not corrected in accordance with the law on the tax on goods and services, the taxable person was not entitled to correct its records or returns.

This decision was upheld by the Tax Administration Chamber, stating that there were no legal provisions stipulating the possibility of adjusting the taxable amount and the tax payable as indicated in the VAT return relating to the tax periods covered by the application for a declaration that VAT had been overpaid, in the case of sales of tickets or access passes allowing use of the facilities concerned that were not evidenced by invoices. That is, B could not issue corrected invoices because no invoices had been issued at the time of those sales. Therefore, taking the input VAT deduction into account, B was required to pay the full amount received from final consumers to the Polish treasury, as tax due.

The Bydgoszcz Regional Administrative Court, before which B brought an action against that decision, set it aside, and determined, in particular, that § 3 (3) to (6) of the Regulation of the Minister for Finance on Cash Registers does not cover all events capable of constituting a ground for adjustment, with the result that such an adjustment may also be possible in other situations. Consequently, the taxpayer is entitled to correct the amount of tax payable on sales whose existence is evidenced by cash register receipts. The absence of the original cash register receipt issued to the purchaser does not constitute an obstacle in that regard, since the cash register allows the data recorded on it to be read multiple times. Thus, consulting the memory of that cash register is a reliable means of obtaining evidence of the transaction to be corrected due to an error made by the taxable person. The Tax Administration Chamber brought an appeal on a point of law against the judgment before the Supreme Administrative Court, which referred the case to the CJEU for a preliminary ruling.

From the reasons for the decision

The question submitted, according to the CJEU, is basically clarifying if Art. 1 92) and Art. 73 in conjunction with Art. 78 (a) of the VAT Directive must be interpreted, in light of the principles of fiscal neutrality, proportionality and equal treatment, as precluding a practice on the part of the tax authorities of a Member State in which an adjustment of VAT due, made by way of a tax return, is prohibited where goods and services have been supplied subject to a VAT rate that is too high, on the grounds that cash register receipts rather than invoices were issued for those transactions.

The CJEU affirmed an entitlement to a refund for a taxable person who incorrectly applied the standard VAT rate (in this case a rate of 23%) to their transactions subject to VAT, if this was, however, in line with the guidance initially provided by the tax authorities of the Member State concerned, although the correct rate was the reduced rate of 8%.

This entitlement cannot, as a matter of principle, be made dependent on the fact that invoices containing the incorrect VAT rate must be corrected, which would lead to a systematic denial of the refund, if no invoices were issued for the taxpayer's economic transactions as due to the type and amount only cash register receipts – which cannot be adjusted – were issued.

However, the tax authorities can rely on an unjust enrichment of the taxpayer if they have established, following an economic analysis taking all of the relevant circumstances into consideration, that the economic burden imposed on that taxpayer due to the incorrectly levied VAT has been completely neutralised.

Please note:

This judgment is directly related to the CJEU judgment of 8 December 2022, C-378/21, Finanzamt Österreich. There, P-GmbH (P) had operated an indoor playground. In the year in dispute, its customers were almost exclusively end consumers who were not entitled to deduct input VAT. P invoiced its customers for the admission price showing the Austrian VAT of 20%. In fact, the admission price was taxable at the reduced rate of 13%. The tax authorities refused to make a correction and took the view that P owed the higher VAT by virtue of invoicing. This would apply at least until it had corrected its invoices. The fact that the customers had paid the VAT to P and thus borne it economically also stood in the way of a correction. As a result, P would be unjustly enriched by a tax refund. The CJEU already ruled on 8 December 2022 that the issuer of an invoice does not owe the overstated VAT if it has issued the invoices exclusively to end consumers who are not entitled to deduct input tax. Art. 203 of the VAT Directive therefore (only) applies if the VAT was wrongly invoiced and there is a risk to the tax revenue because the addressee of the invoice can assert his right to deduct input VAT. With the aforementioned ruling of 21 March 2024, the CJEU then rebuts another counter-argument, namely that a company would be unjustly enriched if it were allowed to keep the overpaid VAT. The CJEU does not consider this to be the case because the parties involved in the transaction had agreed a gross price for the use of the gym, meaning that the customer was not entitled to a VAT refund but owed a fixed price. However, a Member State could refuse to reimburse the unlawfully overstated VAT on the grounds that the reimbursement would lead to unjust enrichment of the taxable person if the economic burden to which the unlawfully levied tax had led for him had been completely neutralized, which the referring court would have to ascertain.

NEWS FROM THE BFH

VAT reduction for the supply of works of art

BFH, ruling of 18 October 2023, XI R 15/20

The German Federal Tax Court (BFH) has ruled on the VAT reduction for the supply of works of art by their creator or that creator's legal successor (§ 12 (2) no. 13 UStG).

The case

The case under dispute concerns a GbR (civil law partnership), founded in 2014 by the artist U and the gallery, G with equal shares of capital. The business purpose of the GbR is the production and marketing, including sale, of up to three sculpture installations under the name of S, as well as the production and marketing of up to four additional individual stelae, which would be created under the artistic direction of U. The GbR is entitled to carry out any and all transactions in connection with and in support of this business purpose, and also to establish branches or subsidiaries at home and abroad to this end. The GbR is represented by G as the managing director. U granted to the GbR the exclusive right to produce or have produced a limited series of up to three copies of the sculpture installations, to exhibit these publicly, to market, and to otherwise utilize them. U had the right to have a fourth sculpture installation produced, as an artist's copy, at their own cost. Neither the GbR, U nor G are

entitled to any further reproductions or copies. Furthermore, U granted the GbR the exclusive right to, in addition to the sculpture installations, produce or have produced up to four solo stela, to exhibit these publicly, to market, and to otherwise utilize them. In accordance with these agreements, the GbR contracted a third-party to produce the sculpture installations.

In November 2014, the GbR and U concluded a sales and transfer agreement with a buyer relating to the acquisition of two sculpture installations. Whether the supply of a sculpture installation in 2015 is subject to the reduced rate of VAT is disputed. The BFH has denied this.

From the reasons for the decision
According to § 12 (2) no. 13 (a) UStG, VAT is reduced to seven per cent for supplies of goods and intra-Community acquisitions of those items set out in no. 53 of Annex 2 if the supplies are effected by the creator of the items or their legal successor. The list in Annex 2 of § 12 (2) UStG includes works of art under no. 53, and under (c) can be found original sculptures or statuary made of materials of all kinds (item 9703 00 00).

Even if the sculpture installations at the heart of this dispute are in fact reduced rate works of art in line with no. 53 (c) of Annex 2 to § 12 (2) UStG, the supply was not effected by the creator or their legal successor in accordance with § 12 (2) no. 13 (a) UStG, because the GbR is neither the creator nor the legal successor of the creator of the works supplied. The person considered to be the creator or their legal successor, must also be determined within the framework of § 12 (2) no. 13 UStG in accordance with the provisions of the Act on Copyright and Related Rights. The creator, within the meaning of § 12 (2) no. 13 UStG is therefore the (intellectual) creator of the work; their legal successor is the universal successor.

The parties assumed correctly that the case under dispute is not covered by the elements regulated in § 12 (2) no. 13 (b) UStG and that a direct application in line with the standard was thus ruled out. However, the application of the provision desired by the GbR is also out of the question, which the BFH specified.

Please note:
This ruling is the first decision of the BFH on § 12 para. 2 no. 13 of the German VAT Act, which has been in force since January 1, 2014. The VAT reduction pursuant to § 12 of the German VAT Act (UStG), which was in force until 31 December 2013, with numbers 49 letter f, 53 and 54 of Annex 2 to the UStG, violated the binding requirements of EU law by applying without restriction to all transactions and the rental of these goods. The infringement of Union law related in particular to the commercial art trade and the rental of works of art and collectors' items. The European Commission therefore initiated infringement proceedings against Germany. In order to avoid a condemnation by the CJEU, the tax reduction for works of art and collectors' items was limited to the extent permitted under EU law by amending Section 12 (2) UStG. Since then, the import of works of art and collectors' items has continued to be tax-reduced, the resale of these items only under the narrow conditions of § 12 para. 2 no. 13 UStG. The BFH has now stated that the VAT reduction only applies if an item is supplied by the author himself or his legal successor or, if other conditions are met, by an entrepreneur who is not a reseller. According to the BFH, the terms "author or legal successor" are to be defined in accordance with the provisions of the German Copyright Act.

VAT rate for the supply of stray animals

BFH, resolution of 18 October 2023, XI R 4/20

The BFH has ruled on the VAT treatment of supplies of stray animals by animal welfare associations.

The case
The plaintiff is an animal welfare association recognized as being a non-profit organization. From 2010 to 2016 the plaintiff “conveyed” animals from other EU countries to Germany. The parties interested in the animals in Germany paid – on the basis of type of animal, breed, age, and physical condition – a “nominal fee” of generally around EUR 300 to the plaintiff, in individual cases this was sometimes reduced. For the years from 2011 and 2012, the plaintiff held the view that the “conveyance of animals” did not make him a trader. For the subsequent years (2013 to 2015), the plaintiff declared the “nominal fees” as transactions of a special purpose enterprise, with the reduced VAT rate.

As a result of an external audit, the tax authorities held the view that, for all years, it was a commercial business operation, subject to the general VAT rate, and issued assessment notices accordingly. In a legal suit, the plaintiff claimed that the transactions were not subject to VAT. Or, alternatively, that as the transactions of a special purpose enterprise, they were subject to the reduced VAT rate. The Nuremberg tax authorities allowed

the action. The “conveyance” of animals as taxable transactions is subject to the reduced VAT rate in all years. The plaintiff, through the “conveyance” of animals, carried out transactions subject to VAT, as he was acting in the market on his own responsibility and carried out supplies for payment. However, this activity is subject to the reduced VAT rate in line with § 12 (2) no. 8 (a) UStG, as it is a special purpose enterprise within the meaning of § 65 German Tax Code. The plaintiff did not appear to a large degree in the role of a competitor to businesses that could not avail themselves of the reduction, which is unavoidable for the fulfillment of reduced VAT purposes.

From the reasons for the decision

The BFH rejected the appeal as being without cause. The supply of stray animals that were brought into the Federal Republic of Germany from abroad can, according to the BFH be subject to the reduced VAT rate set out in § 12 (2) no. 8 (a) UStG, if the stray animals, on the one hand, and the animals available from commercial sellers, on the other, are not the same (and therefore there is no competition).

The uncertain origin of stray animals (for example of dogs) is not comparable with the clear origin of animals (for example of dogs) sold by those supplying animals commercially. As a rule, there is little to no information available regarding the origins of stray animals and the experiences they have had previously in their lives. This means, for example, that it cannot be ruled out that they may suffer from behavioral difficulties or similar. It is not certain that a stray animal will acclimate to a new owner; a portion of stray animals usually remain “unsellable”. Commercial animal suppliers, on the other hand, deal especially with young animals that have been bred appropriately for their breed and whose lineage is traceable without gap, and for which such dangers do not therefore exist in a comparable manner. Animals from animal suppliers are sometimes even purebred and in possession of a corresponding pedigree. They are therefore – in comparison to stray animals – sold for significantly higher prices. If items (in this case animals) are not comparable in the eyes of the average consumer, different VAT rates may be applied (cf. most recently CJEU ruling Dyrektor Krajowej Informacji Skarbowej of 5 October 2023 - C-146/22).

Please note:

This judgment confirms the legislator's view that there is a need for action with regard to the application of the reduced VAT rate pursuant to sec. 12 para. 2 no. 8 lit. a of the German VAT Act (see the comments above on the changes to sec. 12 para. 2 no. 8 lit. a of the Growth Opportunities Act). The BFH has once again applied the provision in a restrictive manner under EU law to the non-profit animal welfare association that transports animals from abroad to Germany. The reduced tax rate may only be applied insofar as it leads to no or only a low risk of distortion of competition (see BFH rulings from 26 August 2021 - V R 5/19, from 23 July 2019 - XI R 2/17, from 5 April 2023 - V R 14/22). In the case of the animal welfare association, however, it then came to the conclusion that it did not compete to a greater extent with non-beneficiary businesses because the animals of the animal dealers were to be assessed differently in terms of rearing and the price offered.

With the Growth Opportunities Act, § 12 para. 2 no. 8 letter a UStG has now been amended. According to this, a competitive assessment is no longer to be carried out for non-profit businesses that benefit from § 65 AO.

NEWS FROM THE BMF

Showing incorrect VAT in invoices to final consumers

BMF, guidance of 27 February 2024 – III C 2 - S 7282/19/10001 :002

The German Ministry of Finance (BMF) has ruled on showing the wrong VAT in invoices to final consumers.

The background to this BMF guidance is the CJEU ruling of 8 December 2022, C-378/21, Finanzamt Österreich, according to which a taxpayer who has provided a supply of services, and shown an amount of VAT in their invoice, calculated on the basis of an incorrect VAT rate, does not owe the incorrectly invoiced portion of VAT in line with Art. 203 of Directive 2006/112/EC, if there is no risk to the tax income as this supply of services was exclusively provided to final consumers, who are not entitled to deduct input VAT.

“Final consumers” in this respect should include, according to the BMF, non-traders and traders that are not acting as such (especially traders in the case of purchases for their private use or an activity that is, strictly speaking, a non-economic activity, cf. also Section 2.3 (1a) UStAE).

The CJEU ruling C-378/21 can therefore not be transferred to cases in which the invoice in question is issued to a trader for their commercial interests. The most relevant factor in relation to the tax debt arising in accordance with § 14c UStG, is not whether and, if applicable, to what extent an input VAT deduction is actually

carried out. Therefore, the VAT arises in accordance with § 14c UStG even if the invoice is issued to, for example, a small business, "compounding" or so-called flat-rate farmers and foresters, or a trader with output transactions, which are wholly or partially excluded from deducting input VAT. Because in these cases an input VAT deduction – for example by means of a later option to be liable for VAT, via a later VAT adjustment in line with § 15a UStG or even unlawfully – cannot be fully ruled out.

Please note:
The BMF guidance is already outdated immediately after its publication. In its ruling of 30 January 2024, C-442/22, P, the CJEU found that Art. 203 of the VAT Directive does not apply if there is no risk to the tax revenue (here: B2B and not B2C as in C-378/21).

In the BMF letter of February 27, 2024, the administration still assumes the opposite, according to which the CJEU ruling of 8 December 2022 is only to be applied in the B2C area. In this respect, there is a clear contradiction to the CJEU ruling of 30 January 2024. See the detailed description of the ruling in the VAT Newsletter of February 2024.

Please note in this respect the contradictory ruling of Cologne Lower Tax Court of 25 July 2023, 8 K 2452/21; BFH ref: V R 16/23, according to which even in the case of commercial recipients of supplies that are not entitled to deduct input VAT, there is a risk to VAT revenue and thus Art. 203 of the VAT Directive should not be applied.

This Lower Tax Court This ruling also contradicts the BMF letter dated 27 February 2024.ruling and was a particular topic in our December 2023 – January 2024 VAT Newsletter.

In addition, the CJEU ruling of 8 December 2022 discussed in the BMF letter has not yet led to the conclusion of proceedings in Austria. As has been known for some time, an appeal by the Austrian tax authorities has resulted in the original case still being referred to the Administrative Court in Austria (see VAT Newsletter February 2024). In response to the tax authorities' appeal, the Austrian administrative court, in its resolution of 14 December 2023, resubmitted the case to the CJEU with the following questions:

1. Is Art. 203 of the Council Directive 2006/112/EC of 28 November 2006 on the common VAT system to be interpreted to mean that a taxpayer who has provided a supply and shown an amount of VAT in their invoice, which is calculated on the basis of an incorrect VAT rate, in line with this provision does not owe the incorrectly invoiced portion of VAT, if the specific supply shown in the invoice is provided to a non-taxable person, even if the same taxpayer has provided similar supplies to other taxable people?

2. Is a "final consumer, who is not entitled to deduct input VAT", within the meaning of the CJEU ruling of 8 December 2022, C-378/21, only to be understood to be a non-taxable person or can it also be a taxpayer who is only using the specific supply for private purposes (or for other purposes for which there is no entitlement to deduct input VAT) and is therefore not entitled to deduct input VAT?

3. On the basis of what criteria is, in the case of a simplified accounting system in accordance with Art. 238 of the Directive 2006/112/EC, a determination to be made for which of the taxpayer's invoices (if need be as an estimate) the incorrectly invoiced amount is not owed by them, as there is no risk to VAT revenue?

Therefore, there would have been sufficient reason for the German administration to broaden the scope of the BMF circular or at least to wait for the outcome of the legal dispute in Austria before making changes to the application of sec. 14c UStG.

IN BRIEF

Rental of living space and input VAT deduction from a heating system

BFH, ruling of 7 December 2023, V R 15/21

If the landlord of a living space is also liable for the provision of heat and hot water in order for the space to be used in accordance with the contract, costs of that landlord for a new heating system are certainly indirectly and directly connected to the VAT-exempt rental, to the extent that this does not include running costs, which the renter must bear separately.

Please note:
Since the decision of the CJEU in 2015 (CJEU ruling of 16 April 2015, C-42/14), there has been a considerable need for clarification as to whether the long-standing administrative practice and case law, which, among other things, qualifies supply services in rental relationships as ancillary services for VAT purposes (sec. 4.12.1 para. 5 UStAE), is in conformity with EU law. The Münster tax court (5 K 3866/18 U) had decided in the case in question that energy

supplies provided by a landlord to his tenants, if these are billed separately for each tenant via ancillary rental cost invoices and the tenants can regulate the energy consumption individually, are not ancillary services to the tax-free letting of apartments, but independent taxable services (with the consequence that an input VAT deduction from the new construction of a heating system and hot water system is not possible in accordance with Section 15 para. 2 sentence 1 no. 1 UStG).

The BFH has now taken a different view. In the case in dispute, the supply of heat and hot water was part of the contractual use owed to the tenants because apartments with heating had been rented out. In the present case, the landlord owes the supply of heat, i.e. the provision of an intact heating system, and thus also the supply of hot water, irrespective of the exact technical design, in the case of the piped heat and (hot) water supply - in principle in contrast to electricity, without the need for a separate agreement in this respect. If - as an objective circumstance - the transfer of living space for contractual use also includes the supply of heat and hot water, the costs for the purchase and installation of a heating system are in principle cost elements of tax-free letting. The direct and immediate connection to VAT exempt letting is also confirmed by the fact that the installation of a significantly improved heating system under the conditions of an energy modernization would have led to a rent increase in accordance with §§ 555b, 559 BGB and thus to an increase in the VAT exempt remuneration, but not to apportionable operating costs, whereby mere maintenance measures would not be sufficient for a rent increase in accordance with § 559 para. 2 BGB.

Contrary to the judgment of the tax court, the input tax deduction from the purchase and installation of the heating system was therefore excluded in accordance with § 15 para. 2 sentence 1 no. 1 UStG, as the purchase and installation of the system was directly and immediately related to the VAT exempt letting in accordance with § 4 no. 12 sentence 1 letter a UStG.

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20 Feb - Poland: Guidance and consultation on national e-invoicing system (KSeF)

15 Feb - Netherlands: Qualification of land as developed or undeveloped for VAT purposes (Supreme Court decision)

EVENTS

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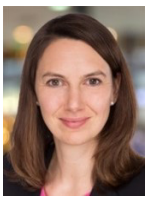

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