KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

April 2024

LEGISLATION

Annual Tax Act 2024

Ministerial draft bill of 22 March 2024

The business associations have received an (unofficial) ministerial draft bill for an Annual Tax Act 2024. The ministerial draft bill has not yet been published by the Federal Ministry of Finance (BMF). According to reports, the current draft has been submitted by the BMF for early coordination within the government (consultations between the Chancellery, Ministry of Economic Affairs and Ministry of Finance on the draft bill). The intended VAT amendments are as follows:

Place of supply of other services for virtual services with entry into force on 1 January 2025:

• In the case of **events / activities**, in particular in the field of culture, the arts, sport, science, education and entertainment, which are made available virtually (e.g. via streaming), the place of supply is deemed to be the place where the recipient is established.

• **Entitlement to admission** to cultural, artistic, scientific, educational, sporting, entertainment or similar events: Exemption for virtual participation

Tax exemptions:

• Abolition of the **VAT warehouse regulation** from 1 January 2026.

• Extension of the VAT exemption for the granting and brokering of loans to the **management of loans and loan collateral** by lenders from 1 January 2025.

• Revision of the regulations on the exemption of **school and educational services** and other services in connection with **sport** from 1 January 2025.

Issuing invoices: Introduction of a new mandatory invoice information in the event that the invoice issuer is subject to actual taxation; corresponding information on low-value invoices and tickets; entry into force on 1 January 2026.

Input tax deduction:

• **Time of input tax deduction:** Differentiation between the different possible points in time of an input tax deduction from the invoice of a person who applies ”accrual taxation”(upon performance of the service), from the invoice of a person who applies ”cash accounting” method (upon payment) or from an advance payment invoice (upon payment).

Content

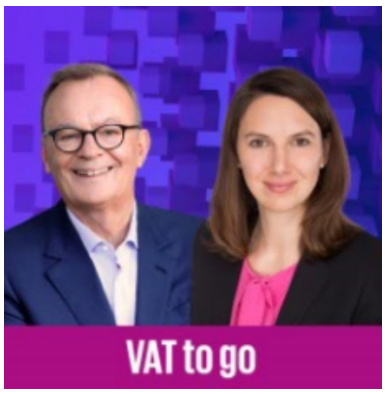
Firsttime application to invoices issued after 31 December 2025.

• **Input VAT apportionment:** "clarifying" regulation on the subordination of the calculation method according to the total turnover key; entry into force on the day after promulgation.

One-stop shop procedure: Application for foreign companies that carry out cross-border occasional passenger transport services at the borders of the Federal Republic of Germany with third countries; entry into force on the day after promulgation.

New regulation of the taxation of small businesses to adapt to EU requirements, including Increase in turnover limits to EUR 25,000 in the previous calendar year and EUR 100,000 in the current calendar year; application also for entrepreneurs based in the rest of the EU; special notification procedure for entrepreneurs based in Germany to claim tax exemption in another Member State; entry into force on 1 January 2025.

Brexit: VAT treatment of Northern Ireland after 31 December 2020 for the purposes of the movement of goods (intra-Community supplies and distance sales as well as intra-Community acquisitions) as a EU Member State.



Listen in soon: VAT podcast "VAT to go"

On January 1, 2025, e-invoicing will be gradually introduced in Germany. The obligation affects almost all domestic B2B transactions.

Our tax experts Kathrin Feil, Nancy Schanda and Christopher Böcker talk about this in the special edition of our VAT podcast "VAT to go" - listen to it soon on Spotify and SoundCloud.

NEWS FROM THE CJEU

Taxation of vouchers

CJEU, judgment of 18 April 2024 - Case C-68/23 - M-GbR

In Case C-68/23 (M-GbR v Finanzamt O), the CJEU has ruled on the VAT treatment of vouchers under the EU VAT rules applicable from 2019. This is only the second case in which the CJEU has dealt with these new rules and thus contributes to greater clarity on how they are to be applied. In particular, this ruling clarifies when a voucher is considered a single-purpose voucher - which is taxable on each (re)sale - and the VAT consequences of the resale of a multi-purpose voucher - which is taxable on redemption. However, the ruling leaves some room for interpretation, which may lead to differences in application between Member States and the need for further referrals to the CJEU in the future. In the meantime, we recommend that all parties involved in the issue, resale or redemption of vouchers review the VAT treatment of their activities on the basis of this judgment.

Facts of the case
M-GbR is a German reseller of so-called X-cards to end consumers. The X-cards are issued by a British company and can be used to top up the user account in the X-shop. From this account, the user can purchase digital content (i.e. electronically provided services). The X-Card is country-locked, i.e. it may only be used by end users who are resident or ordinarily resident in a country (in this case, Germany). M-GbR acquires the card from intermediaries based in countries other than the United Kingdom and Germany.

M-GbR argued that the X-cards are multi-purpose vouchers and therefore no VAT is charged on the resale of the cards. M-GbR gave two reasons for this classification. It argued that the distribution of the X-cards by the UK company to resellers outside Germany fell within the scope of VAT in those other countries (and therefore the VAT treatment of the X-card was not clear from the outset). Alternatively, it argued that, in practice, the card was also used by end-users not living in Germany who had created a German user account in breach of the X-Shop's terms and conditions (leading to an uncertain place of supply for the services provided in exchange for the X-Card).The German tax authorities disagreed with M-GbR's argumentation and argued that the X-cards were single-purpose vouchers as they could only be redeemed by German end consumers for services taxable in Germany. Accordingly, they argued that German VAT was payable on the resale of the X-Cards by M-GbR. Furthermore, even if the X-cards were multi-purpose vouchers, M-GbR would still have to pay VAT

on a distribution service that was provided independently of the resale of the voucher.

The case was brought before the BFH, which referred the matter to the CJEU for a preliminary ruling.

First question: Qualification as a single-purpose voucher?

From the reasons for the decision
The CJEU states that two conditions must be met at the time the voucher is issued in order to be classified as a single-purpose voucher:
(i) the place of supply of goods or services for which the voucher can be redeemed must be known; and
(ii) the VAT payable on those goods or services (i.e. the taxable amount and the VAT rate) must be known.
For the classification of the voucher as a multi-purpose or single-purpose voucher, it is irrelevant whether the voucher is distributed via intermediaries established in other countries, as the relevant conditions must be checked at the time the voucher is issued.

The use of the X-Card by users in other countries in breach of the terms and conditions of the card is irrelevant. Rather, only the intended or permitted use at the time of issue should be taken into account. In this case, it is clear that the X-card can only be used in Germany and the digital services for which the X-card is redeemed are generally taxable at the destination (i.e. the customer's place of residence).
The CJEU leaves it to the referring court to determine whether all services for which the X-card can be redeemed are taxed at the same VAT rate (and on the same basis of assessment). If the digital services offered are subject to a tax rate in Germany, the X-Card is a single-purpose voucher. Any transfer of this voucher in the taxable person's own name would then be a supply subject to VAT as if the underlying supply for which the voucher could be redeemed had been provided.

Please note:
In practice, the distinction between single-purpose and multi-purpose vouchers is not always easy to make. In particular, if it is overlooked that single-purpose vouchers exist, this can lead to problems because the transfer of multi-purpose vouchers is not subject to VAT in accordance with Art. 30b para. 2 subpara. 1 of the VAT Directive (exception: distribution or sales promotion services of the vouchers). It is to be welcomed that the CJEU has clarified in the dispute that the elements of a single-purpose voucher are to be examined on the basis of the definition in Art. 30a no. 2 of the VAT Directive and that Art. 30b para. 1 subpara. 1 of the VAT Directive does not call into question a classification as a single-purpose voucher. It therefore remains the case that it must be examined at the time of issue whether the place of supply of goods or services has been established. If, as in the case in dispute, the vouchers (X-Cards) are intended for German end customers, it is clear that the digital content is to be supplied to German end customers. According to the CJEU, use by other end customers in breach of the contract is then irrelevant. Furthermore, if the VAT owed is established at the time the vouchers are issued, the X-Card must be treated as a single-purpose voucher. The question of what type of voucher exists therefore depends exclusively on the time of the first issue of the voucher.

The CJEU ruling thus clarifies that even if the marketing takes place in a chain, this does not change its classification as a single-purpose voucher if the relevant elements (place of performance: place of delivery or service, VAT owed) are present at the time of issue. When the X-Cards were marketed, it was clear that they were intended for German end consumers due to the special identifier. According to the CJEU, if the BFH were now to find that the tax due was established when the voucher was issued (which is all the indications), a single-purpose voucher existed.

This is likely to have been the case in practice. In this case, a single-purpose voucher was assumed in a supply chain and the reverse charge mechanism according to Art. 196 of the VAT Directive was applied to the supply of services to another EU trader in accordance with the place-of-receipt principle under § 3a (2) UStG (Art. 44 of the VAT Directive), because neither the § 3 (14) UStG nor Art. 30a of the VAT Directive made any other stipulation for the transfer of vouchers which, as in this case, had electronic content as their object. In practice, it has therefore not been taken into account between traders where a voucher was ultimately handed over to the end consumer, as there was no legal basis for this. It is therefore surprising that the CJEU apparently believes that the original qualification as a single-purpose voucher can be called into question if these are distributed in a supply chain. This is because trade does not prevent qualification as a single-purpose voucher (voucher is for German end customers) after the voucher has been issued. The interposition of an entrepreneurial trade does not change the fact that the voucher is intended for an electronic service of a German private customer. It is irrelevant whether the voucher passes

through a chain of traders whose place of supply is determined in accordance with Art. 44 of the VAT Directive. However, it appears conceivable that the CJEU - contrary to the place of supply provisions in the VAT Directive - has interpreted Art. 30b (1) of the VAT Directive to the effect that it has assumed a uniform place of supply for the distribution chain, which in the case in dispute is to be in Germany. The point is not, as the CJEU seems to assume in para. 43, that different places of supply restrict the scope of application of the single-purpose voucher. This is because trade in the chain with different (business) recipients does not change the fact that the content of the voucher was only intended for an end user in Germany. This does not change the fixed place of delivery according to the content of the voucher.

Should the CJEU actually assume in its ruling that Art. 30a of the VAT Directive contains a place of supply provision for all transfers in a supply chain to the effect that the place of supply is decisive for all further transfers in a supply chain, this would have an enormous impact on the German procedure. A German entrepreneur selling vouchers for German end customers to an entrepreneur in the EU would then either have to settle with German VAT or, in the case of comparable regulations in other countries (such as § 13b UStG), settle net.

This may also have the consequence that a foreign entrepreneur who transfers a single-purpose voucher to another entrepreneur, whereby the voucher includes a service to a German end customer, establishes a place of performance in Germany. The seller would then have to charge German VAT, which in turn could trigger a registration obligation in Germany, unless the reverse charge mechanism under § 13b UStG applies.

The situation would be different if the reseller does not act in his own name when transferring the voucher, because then Art. 30b para. 1 subpara. 2 of the VAT Directive applies, with the consequence that the transfer of the single-purpose voucher is to be attributed to the represented party in whose name the taxable person is acting. It therefore plays a major role whether the vouchers are transferred in the taxable person's own name or in the name of a third party.

The second question: Distribution services in the provision of multi-purpose vouchers

From the reasons for the decision

The CJEU also answers the second question of the BFH in the event that it comes to the conclusion that the X-card was a multi-purpose voucher because the digital content provided is subject to different tax rates in Germany, which the CJEU did not have to assess.

The question here was whether and how VAT can nevertheless be triggered for other transactions between the parties when a multi-purpose voucher is transferred. Art. 30b para. 2 subpara. 2 of the VAT Directive in conjunction with Art. 73a of the VAT Directive is intended to prevent determinable services, such as distribution or sales promotion services, from being subject to VAT when a multi-purpose voucher is transferred. This is to ensure that sales or sales promotion services remain untaxed.

According to the CJEU, this means that, in the event of a dispute, the BFH must examine whether such a sales promotion service has been provided, which must be examined taking all circumstances into account. Finally, the CJEU points out that its judgment of 3 May 2012 (C-520/10) was issued on single-purpose vouchers and is therefore not helpful for the assessment of sales promotion services in the case of multi-purpose vouchers.

Please note:

In the case of multi-purpose vouchers, it should always be borne in mind that the transfer of vouchers may also include a distribution or sales promotion service that is subject to VAT. If such a distribution or sales promotion service exists, the remuneration must be calculated according to the trade margin.

In this context, it is therefore generally necessary to check whether the agreements made show that this margin actually represents consideration for a sales promotion or distribution service.

In practice, the question therefore arises as to whether and when such a profit margin in the case of multi-purpose vouchers has the effect of triggering turnover taxation in the amount of the trade margin. It can therefore be assumed that this issue will continue to occupy the CJEU in the future.

In this context, it is worth mentioning that the European Commission - as confirmed at the meeting of the VAT Expert Group on 26 October 2023 - is preparing an evaluation report on the functioning of the new rules for vouchers (from 2019). This report may provide further indications on how the rules are currently applied in the EU and whether the stated objective of harmonizing the rules

for vouchers across the EU has been achieved.

It is clear that all parties involved in the distribution chain of vouchers should take measures to ensure whether single-purpose or multi-purpose vouchers are marketed in the supply chain. The VAT consequences must be determined on the basis of this qualification.

If the voucher is a single-purpose voucher, attention must be paid to which conditions (in particular which place of performance) result from the issue of the voucher. If the voucher is a multi-purpose voucher, all circumstances of the resale - including any agreements made with other parties in the distribution chain - should be examined to determine whether an independent supply is being made and, if so, the amount of VAT payable on this supply.

Your KPMG VAT advisor can assist you with such a review to determine the VAT consequences of your role in the distribution chain and whether this can be amended to better reflect your preferred VAT treatment.

Cash register receipts alone are sound proof of too high VAT

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

The reference for a preliminary ruling was made in the context of a dispute between the Polish tax authorities and B, which requested a reduction of the tax, which the Polish tax authorities rejected because B had originally issued no invoices and only cash register receipts to customers for visits to the sports club.

The case

B is active in the provision of recreational services and services to improve physical fitness, namely the sale of multi-use passes giving access to the premises of a sports club as well as unrestricted use of the facilities of that club. 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 corrected VAT returns.

The tax authorities refused to find that B had overpaid VAT, stating 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 taxpayer was not entitled to correct its records or returns.

The director of the Tax Administration Chamber Bydgoszcz upheld this assessment. He stated that there were no legal provisions governing the possibility of adjusting the taxable amount and the tax payable as indicated in the VAT return, in respect of 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. B could not issue corrected invoices because no invoices had been issued at the time of those sales. Therefore, B was required to pay to the Polish treasury, after account was taken of the input VAT deduction provisions, the full amount received from final consumers as tax owed.

The Regional Administrative Court Bydgoszcz set aside this assessment. It ruled in particular, that § 3 (3) to (6) of the Regulation of the Minister for Finance on Cash Registers did not cover all events capable of constituting a ground for adjustment, with the result that such an adjustment was also possible in other situations. Therefore, the taxable person was entitled to adjust 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 that is to be corrected due to an error made by the taxable person.

An appeal on a point of law was brought before the Supreme Administrative Court Poland, which referred the case to the CJEU for a preliminary ruling.

From the reasons for the decision

Art. 1 (2) and Art. 73 in conjunction with Art. 78 (a) of the VAT Directive must be interpreted as follows in light of the principles of tax neutrality, effectiveness and equal treatment: These provisions preclude a practice on the part of the tax authorities of a Member State pursuant to 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 ground that cash register receipts rather than invoices were issued in respect of those transactions.

Even in those circumstances, a taxable person that incorrectly applied a VAT rate that is too high is entitled to submit an application for a refund to the tax authorities of the Member State concerned. In this respect, the tax authorities may only rely on unjust enrichment on the part of that taxable person if they have

established, following an economic analysis which takes account of all the relevant circumstances, that the economic burden that the incorrectly levied tax imposed on that taxable person has been completely neutralised.

Please note:
The CJEU's decision did not concern a case under Art. 203 of the VAT Directive (Section 14c of the German VAT Act), because the registration vouchers issued were not proper invoices under Polish law. In this respect, it was not a question of an incorrect tax statement, but only of the recognition of the correct tax. In the opinion of the Polish authorities, however, a correction of the tax always requires an invoice correction; if there was no invoice, the tax could not be reduced by taking into account the correct tax rate of 8 percent (instead of 23 percent). A very formalistic approach, which the CJEU has now put an end to. Accordingly, a correction of the tax assessment can be made even if no invoice was previously written, but only cash register receipts were issued.

NEWS FROM THE BFH

Requirements for the person of recipient of the supply within the meaning of § 13b (5) sent. 1 UStG

BFH, ruling of 31 January 2024, V R 20/21

This BFH ruling concerns the question of which requirements a trader – domiciled outside of Germany and within Union territory – providing supplies in Germany to traders and non-traders in accordance with § 3a (2) or (5) German VAT Law (UStG), needs to satisfy such that they can assume that their commercial recipients of supply are liable to pay VAT in accordance with § 13b UStG.

The case
X is a corporation under foreign law and domiciled in Union territory outside Germany. In 2015 (the year under dispute), X operated an online marketplace on which both traders and non-traders (end consumers) offered items for sale. X's services comprised granting those offering goods access to and use of the online marketplace, for which X charged fees to the users, the amount of which primarily related to the sales proceeds.

Up to 31 December 2014 X treated as traders solely those recipients of the supplies providing a valid VAT identification number. On 1 January 2015, X changed the procedure. As before, customers providing a valid VAT identification number were treated as traders. If a VAT identification number provided was confirmed to no longer be valid, or the recipient of the supply registered as a commercial user but did not give any VAT identification number, or gave an invalid one, X now checked and affirmed that the recipient of the supply had the characteristics of being a trader, if they had one of three criteria for the affirmation of the characteristic of being a trader. In this respect, X relied on whether the recipient of the supply had, in the current or previous year, either effected more than … sales or (in the same time period) fees for services ("sales fees") in the amount of at least EUR … were created, or if the recipient of the supply had registered on a particular platform (commercial platform), reserved only for commercial dealers. If, according to the details provided by the recipient of the supply, they were located in Germany and, in the case of that person one of the three criteria was present, X assumed they were liable to pay VAT as a recipient of the supply in accordance with § 13b (5) sent. 1 UStG.

As part of a special VAT audit performed at X for the first calendar quarter of 2015, the auditors held the view that only those recipients of supplies for which a valid VAT identification number was given were to be treated as traders. The three criteria used by X were, according to the auditor, not appropriate for assuming a recipient of the supply possessed the characteristic of a trader. The legal suit before the lower tax court was only partially successful.

From the reasons for the decision
The BFH took the view that the appeal was justified. The Lower Tax Court's ruling must be set aside, and the case returned to the Lower Tax Court (§ 126 (3) sent. 1 no. 2 Code of Procedure before Finance Courts (FGO)). While the Lower Tax Court correctly ruled that the use of a valid VAT identification number by the recipient of the supply is not a requirement to consider that recipient of the supply as being a trader within the meaning of § 13b (5) sent. 1 clause 1 in conjunction with § 2 (1) UStG, and that the person of the recipient of the supply must be sufficiently known, i.e. identifiable, the Lower Tax Court did not – in breach of its underlying duty to investigate the facts set out in § 76 (1) sent. 1 FGO – deny the transfer of liability to pay tax in line with § 13b (5) sent. 1 clause 1 and (1) UStG without investigating the correctness of the details given by the plaintiff with regard to the person of the recipient of the supply. On the basis of this error of law, it assumed a power of appraisal in accordance with § 162 (1) sent. German Tax Code

(AO). The case is not yet ripe for a decision.

Please note:
According to the decision of the BFH, there is no legal principle according to which only the VAT ID number determines the entrepreneurial status of services. Both § 13b para. 5 sentence 1 half-sentence 1 UStG and Art. 196 of the VAT Directive are based on the fact that the recipient of the service is an entrepreneur (taxable person). To this end, the recipient must fulfill the requirements of § 2 para. 1 UStG and Art. 9, 10 of the VAT Directive. This does not presuppose that a valid VAT ID number has been issued or is being used.

Input VAT deduction in the case of health resorts

BFH, ruling of 18 October 2023, XI R 21/23 (XI R 30/19)

This BFH ruling concerns the question of whether a municipality carried out an economic activity as a trader in the years 2009 to 2012 (years under dispute) and is therefore entitled to deduct input VAT.

The case
The municipality in this case is a state recognized health resort. The health resort administration of the municipality is operated under municipal law as a so-called in-house operation and, from a corporate law perspective is a business of a commercial nature (referred to in the following as “Kurbetrieb” (health resort operation). Under municipal law the municipality levies a spa tax. Using this income, in the years under dispute the municipality financed the production, maintenance and renovation of health resort facilities (for example, a park, spa building (Kurhaus), pathways). These facilities are accessible to everyone, no health resort ticket is required for entry.

As part of the VAT returns for the years under dispute, the municipality considered the spa tax to be a fee paid for an activity subject to VAT (Kurbetrieb) and requested an input VAT deduction for all input supplies connected to the tourism sector. The tax authorities conducted an audit. The audit also assumed that the municipality had carried out an economic activity as a trader, however made extensive cuts to the input VAT deductions claimed. Input VAT amounts not connected to the Kurbetrieb were not recognized. Furthermore, input VAT deductions regarding the Kurhaus were only recognized to the extent that the Kurhaus was leased for a fee. Input VAT amounts arising from input supplies for pathways, cross-country ski trails, and other facilities outside of the park were not permitted an input VAT deduction by the auditor. The tax authorities followed these findings and issued the corresponding VAT amendment assessment notice. Following an unsuccessful objection process, the Lower Tax Court rejected the legal suit.

From the reasons for the decision
After obtaining a preliminary ruling from the CJEU, the BFH rejected an appeal as unjustified. The Lower Tax Court had ultimately correctly rejected allowing the deduction of the input VAT claimed. This is because the input supplies under dispute were not connected to a fee for a supply within the meaning of § 1 (1) no. 1 UStG, Art. 2 (1) (c) of the VAT Directive.

For the case under dispute, the CJEU, in its ruling Gemeinde A of 13 July 2023 - C-344/22, issued a binding ruling that the provision of health resort facilities by a municipality does not constitute a supply for a fee if the municipality levies a spa tax on visitors staying in the area for a certain amount per day of their stay, on the basis of a municipal statute, provided that the obligation to pay this tax is not tied to the use of those facilities but rather to the stay in the area of the municipality, and the facilities are readily and free of charge available to everyone.

On this basis, in the case at hand the existence of a supply by the plaintiff to health resort guests must be denied and the input VAT deduction for the input supplies at issue refused. To the extent the plaintiff is entitled to deduct the input VAT arising from the input supplies themselves to a smaller extent than previously, the Lower Tax Court proceedings may not lead to a worsening of the situation (reformatio in peius).

Please note:
An input tax deduction in accordance with § 15 UStG requires that the input services are in connection with a supply for consideration within the meaning of § 1 para. 1 no. 1 UStG or Art. 2 para. 1 lit. c of the VAT Directive. A service is only provided "for consideration" if there is a legal relationship between the supplier and the recipient of the service in which mutual services are exchanged, whereby the remuneration received by the supplier constitutes the actual consideration for an identifiable service provided to the recipient of the service. It is necessary that there is a direct connection between the service provided and the consideration received.

If, in the case of municipalities, the spa facilities may not only be used by guests subject to the tourist tax, but are also available to the

general public, there is no entitlement to input VAT deduction; according to the CJEU, this is due to the lack of an exchange of services between a service provided by the municipality and the tourist tax (according to the CJEU in its ruling of 13 July 2023). The tourist tax is not offset against the provision of a spa facility. Rather, the visitor's tax is levied on the basis of the municipal statutes - regardless of the specific use of the individual spa facilities. It is due even if the spa facilities are not used at all. In addition, the facilities are accessible to everyone, including residents and day visitors, free of charge. This means that those liable for the visitor's tax have no other consumable benefits than people who use these spa facilities and are not liable for the visitor's tax.

In future, spa communities will be able to claim input tax deduction if the spa facilities are not made available to everyone free of charge. In this respect, it is sufficient for the municipality to issue guest cards upon payment of the visitor's tax, which are then also checked.

The requirements of the tax authorities (sec. 15.19 para. 2 UStAE: accessible for public use through public-law dedication) are therefore obsolete.

VAT margin scheme for works of art

BFH, 22 November 2023, XI R 22/23 (XI R 2/20)

This BFH ruling concerns an art dealer who operates galleries in several German cities. During 2014 (the year under dispute) he also purchased works of art from artists domiciled in other parts of the Community. These supplies of goods were treated by the artists in their corresponding countries of domicile as intra-Community supplies of goods exempt from VAT. The VAT treatment on the part of the art dealer is disputed.

The CJEU, called upon by the BFH, decided, in its ruling of 13 July 2023 – case C-180/22 – Mensing II, that Art. 312, 315 and 317 of the VAT Directive must be interpreted to mean that the VAT, which a reseller subject to pay VAT has paid on the intra-Community purchase of a work of art, the later supply of which will be subject to margin taxation in accordance with Art. 316 of the VAT Directive, forms part of the basis of assessment for that supply of goods.

From the reasons for the decision

The BFH has indicated that for further proceedings, according to the CJEU ruling Mensing II, the VAT due on the intra-Community purchase belongs (contrary to the system) to the basis of assessment of the transactions within the context of margin taxation.

In § 25a UStG the national legislature regulated a provision that is not compatible with Union law. The non-application of margin taxation on intra-Community supplies of goods to a German reseller does not comply with Union law. In this respect, the BFH refers to the BFH resolution of 20 October 2021(Federal Tax Gazette (BStBl) II 2022, 503, no. 22 et seq) for the avoidance of repetitions. The art dealer may therefore make use of margin taxation, which is now also not a matter for dispute among the parties.

The VAT paid on the intra-Community purchase by the art dealer is however, according to the CJEU ruling Mensing II, part of the margin. To the extent that this result, in the view of the art dealer, the European Commission and the CJEU ruling Mensing II, is not compatible with the aims of these provisions or their regulatory context, the CJEU considers a deviation from the clear and unambiguous wording of the Directive as not permissible, so that it is necessary for the Union legislator to intervene.

From this assessment of Union law, to which the BFH is bound, the application of § 25a (3) sent. 3 UStG, which in the BFH's view would in itself allow the exclusion of the consideration of the VAT arising on the intra-Community purchase in compliance with Union law, does not come into consideration. The requirement for national law to be interpreted in line with Union law leads to the BFH needing to choose the interpretation that corresponds to the Directive (in the interpretation decided by the CJEU). Therefore, in national law, the VAT arising on the intra-Community purchase is also included in the basis of assessment.

The case is not ripe for a decision. The Lower Tax Court must determine, in a second set of legal proceedings, whether and if applicable in what amount the margin must be subject to the margin taxation, which the BFH goes into more detail on.

Considerations of equity do not form part of the proceedings. The BFH refers equally without binding that a legal consequence to the detriment of a taxpayer that the legislature knowingly enjoins or has accepted, does not justify any considerations of equity under national law, however, the CJEU appears to meanwhile accept the possibility of an entitlement to considerations of equity in such situations as well. In the case at hand, therefore, a partial decree for substantive considerations of equity could lead to the prevention

of a double taxation within the meaning of a “tax of purchase tax” being justified; because the VAT on the intra-Community purchase must be subtracted from the basis of assessment (and thus the sale is, so to speak, not to be taxed in this amount), corresponding to both the system of margin taxation and the principle of tax neutrality.

Please note:
The BFH has recognized that, according to the CJEU, the requirements of the VAT Directive (Art. 317) do not allow the tax paid by the claimant on the intra-Community acquisition to be disregarded when calculating the margin for the margin scheme, although this ultimately leads to double taxation. It helps the taxable person by referring him to an application for remission on equitable grounds. It is to be expected that the taxable person will take this route and that he will achieve a reduction in his tax burden in this way, which is difficult to understand with regard to the margin in the case of differential taxation. The EU legislator is called upon here to regulate the calculation of the margin when applying the margin scheme to the purchase of works of art from other EU Member States.

IN BRIEF

Stock corporation as a subordinate company

BFH, resolution of 13 March 2024, V B 67/22

According to § 2 (2) no. 2 UStG, a VAT group exists if a legal person, in light of the full picture of actual relationships is financially, economically, and organizationally integrated into the business of the controlling enterprise.

Subsequent to the BFH ruling of 18 January 2023 - XI R 29/22 (XI R 16/18), the BFH has ruled that § 2 (2) no. 2 UStG, according to BFH case law, requiring that the controlling enterprise of the VAT group can implement its will at the subordinate company, does comply with Union law.

The organizational integration by means of the interdependence of personnel over managing employees of the controlling enterprise (BFH ruling of 7 July 2011 - V R 53/10, BStBl II 2013, 218) is conditional, according to the BFH, on the controlling enterprise being able, as the majority shareholder in the Group-GmbH to exercise its authority to issue directives vis-à-vis its managing employees in its capacity of management body of the subordinate company as well as under corporate law at the subordinate company.

In the case at issue, the plaintiff did not demonstrate, according to the BFH, whether and if applicable how they could have exercised their will under company law with regard to their assumed authority in contractual employment to issue directives in respect of employees appointed in their capacity as board members of A-AG, or why it may be possible to waive this criterion in the case of an AG. In particular, there was a lack of explanation as to how this could be compatible with § 76 (1) Stock Corporation Act (AktG). According to this provision, as the body responsible for the management of an AG, the board manages the business of the AG under its own responsibility and is therefore exempt from direction. Statements in this regard would also have been necessary in light of the fact that neither the majority shareholder nor the supervisory board, the annual general meeting nor any third party is authorized to issue directives to the board. The fact that the supervisory board of an AG appoints the board and can – inter alia including as a result of a loss of confidence by the annual general meeting – dismiss it (§ 84 AktG), as well as overseeing its management (§ 111 AktG), does not for that matter provided the plaintiff with any – as exists in the case of a GmbH – authority to issue directives under corporate law vis-à-vis the board of A-AG, which would have enabled the plaintiff to exercise their will in the ongoing management of the dependent company.

Please note:
The VAT group requires the financial, economic and organizational integration of a legal entity into another company (see § 2 (2) UStG). In this respect, the German wording roughly corresponds to the VAT Directive (see Art. 11 of the VAT Directive: "closely linked by mutual financial, economic and organizational ties"). In 2011, the BFH ruled on the question of organizational integration through personnel integration via senior employees of the controlling company at the GmbH. This presupposes that the controlling company, as the majority shareholder of the controlled GmbH, can also enforce its authority to issue instructions to its executive employee in the latter's capacity as a management body of the controlled company at the controlled company under company law.

The case is different for the AG. Organizational integration can regularly be given in the case of a control agreement (§§ 291 AktG) or the integration of a stock corporation within the meaning of § 319 AktG, as the controlling or main company is entitled to issue instructions to the management board of the controlled or integrated company. However, the organizational integration should

only be established from the date of entry of the domination agreement in the commercial register.

Note: On 16 May 2024, Advocate General Rantos of the CJEU will deliver his opinion on the question referred by the BFH (Organschaft). The BFH's questions to the CJEU were:

(1) Does the grouping of several persons into one taxable person under the second subparagraph of Article 4(4) of Directive 77/388/EEC1 mean that supplies for consideration between those persons are not subject to VAT under Article 2(1) of that Directive?

(2) Are supplies for consideration between those persons in any event subject to VAT if the recipient of the supply is not (or only partially) entitled to deduct input VAT, since otherwise there is a risk of tax losses?

The Opinion on VAT groups will certainly be eagerly awaited throughout Germany, even if this does not mean that the CJEU will ultimately endorse this view.

Interest on arrears and Union law
BFH, resolution of 1 March 2024, V B 34/23 (AdV)

The BFH has issued a statement in the interim relief proceedings as to whether interest on arrears in accordance with § 233a AO are compatible with Union law.

In this summary review, there was no serious doubt regarding the compatibility of §§ 233a, 238 (1) AO with Union law for interest periods up to 31 December 2018. This applied in any case if, in the case of a change in the timing of the input VAT deduction and the resulting double application of § 233a AO with regard to several taxation periods that gave rise on the one hand to the creation of interest on a refund and on the other to interest on arrears, in which the interest on the refund significantly exceeded the interest on arrears.

Please note:
In its decision, the BFH dealt in detail with the question of the legality of an interest assessment and, in particular, with the question of whether the German regulation is in line with EU law. It answered this in the affirmative. However, this means that there are still all possibilities for an equitable remission of interest in accordance with §§ 163, 227 AO. Special circumstances that could speak in favor of a remission of interest must be asserted in these proceedings. The BFH has not conclusively ruled on such equitable cases. Other case constellations have already been positively decided to this effect (see BFH decision of June 28, 2022 XI B 97/21). In this case, the BFH has extended its case law on the so-called property developer cases to other transactions in accordance with § 13b para. 2 UStG.

Benefits in kind
CJEU, ruling of 25 April 2024 – C-207/23 – Finanzamt X

On April 25, 2024 (C-207/23), the CJEU ruled that the heat produced by an entrepreneur, which he provided to another entrepreneur free of charge, is subject to value added tax free of charge. It is a withdrawal of goods by a taxable person from his business as a gratuitous supply, equivalent to a supply of goods for consideration, if the taxable person supplies heat produced by him to other taxable persons free of charge (Art. 16 of the VAT Directive).
In para. 68 of the judgment of 16 September 2020, Mitteldeutsche Hartstein Industrie (C 528/19), the CJEU ruled that work carried out for the benefit of a municipality to improve a municipal road that is open to the public but is used by the taxable person and the public as part of the economic activity of the taxable person who carried out this work free of charge does not constitute a transaction that is to be treated as a supply of goods for consideration.
On the one hand, this work was for the benefit of the taxable person making the donation and had a direct and immediate connection with his overall economic activity. Secondly, the costs of the input services received in connection with this work were cost elements of the output transactions carried out by this taxable person. On the other hand, there was no indication that the heat withdrawn and supplied free of charge in the case in dispute had also been used by the transferor.

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EVENTS

Recent European Court of Justice (ECJ) VAT cases: How they impact your business on 7 May 2024

This practical webcast discusses key themes arising from a selection of important recent ECJ VAT cases. The themes to be covered will include:

- improvement of cashflows by making use of bad debt relief in a timely manner (e.g. ECJ dated 29 February 2024);
- opportunities to recover overcharged VAT from the tax authorities in various circumstances (e.g. ECJ dated 30 January 2024, ECJ dated 7 September 2023);
- structuring cross-border supply chains in a way that VAT exemptions are available and VAT registrations abroad are avoided (e.g. ECJ dated 29 February 2024, ECJ dated 8 December 2022)
- managing the risk for multinational businesses of creating a fixed establishment (e.g. ECJ dated 29 June 2023, opinion of advocate general dated 1 February 2024)

This webcast will show in a practical and easy way how complex decisions of the ECJ impact your business by providing you with insights from the countries the ECJ referrals were made from, sharing experiences from different member states views and by providing some hands-on recommendations for aligning your business with the VAT trends as set out by the ECJ so that you can strive to minimize risks and maximize opportunities.

Register here.

The eInvoice is coming!

On 1 January 2025, eInvoicing will be gradually introduced in Germany. The obligation affects almost all domestic transactions in the B2B sector. In the webcast, our experts summarize for you what you should know and do now to be ready for eInvoicing in good time.

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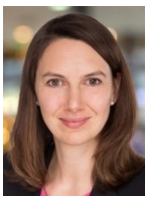

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