KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

June 2024

NEWS IN LEGISLATION

German Annual Tax Act 2024 – government draft

On 5 June 2024, the German Ministry of Finance (BMF) published the government draft of the German Annual Tax Act. In particular, the following VAT law related changes have been proposed:

Definition of a delivery of work (implementation of BFH ruling V R 37/10): Only in the case of treating or processing a "third-party" item (§ 3 (4) sent. 1 Draft German VAT Law (UStG-E)); shall enter into effect on the day following promulgation.

Place of supply in the case of virtual supplies (§ 3a UStG), entering into effect on 1 January 2025:

- In the case of **events / activities**, in particular in the areas of culture, arts, sports, science, teaching, and entertainment, which are made available virtually (e.g. via streaming), the place of supply shall be deemed to be the place in which the recipient is resident (§ 3a (3) no. 3 UStG-E).
- **Right of entry** to cultural, artistic, scientific, teaching, sporting, entertainment, or similar events: Exemption clause in the case of virtual participation, § 3a (2) (§ 3a (3) no. 5 sent. 2 UStG-E) shall apply.

Please note:
In a letter dated 29 April 2024, the Federal Ministry of Finance (III C 3 - S 7117-j/21/10002 :004) commented in detail on the VAT classification of supplies of online event services and other online services in the B2C sector and amended the VAT Circular (BMF 024 - III C 3 - S 7117-j/21/10002 :004). According to this, a pre-produced recording of an event is a service provided electronically that is taxable at the recipient's location and is always subject to the standard VAT rate. In the case of live streams, however, the BMF deviates from sec. 3a para. 3 no. 3 UStG, which determines the place of performance for such services and does not depend on the place of residence of the recipient of the service. However, the BMF now believes that from 1 July 2024, the place of residence of the end customer should be decisive, which corresponds to the new Art. 54 para. 1 of the VAT Directive, but which was only introduced with effect from 1 January 2025.

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Listen in soon: VAT podcast "VAT to go"

Many sales are no longer made over the counter, but via the internet. There are many pitfalls lurking here, especially in VAT, as the new CJEU ruling on the marketing of vouchers in the supply chain and the new BMF circular on events in the B2C sector via live streaming or recording show.

Our tax expert Kathrin Feil and Rainer Weymüller, Of-Counsel at KPMG, talk about this in the upcoming new episode of our VAT podcast "VAT to go" - on Spotify and SoundCloud.

VAT exemptions (§ 4 UStG):

- Abolition of the **VAT stock provision** (repeal of § 4 no. 4a UStG), entering into effect from 1 January 2026.
- Expansion of VAT exemption on the granting and arranging of loans to the **administration of loans and loan guarantees** by the issuer of the loan (§ 4 no. 8 (a), (g) UStG-E), entering into effect from 1 January 2025.
- Revision of the provisions on the VAT exemption of **school and educational supplies** (§ 4 no. 21 UStG-E) and other supplies in connection with **sport** (§ 4 no. 22 (c) UStG-E), entering into effect from 1 January 2025.

Issuing of invoices (§ 14 UStG): Introduction of a new mandatory detail for invoices if the issuer of the invoice is subject to cash accounting (§ 14 (4) sent. 1 no. 6a UStG-E); corresponding details on bills for small amounts and travel tickets (§ 33 sent. 1 no. 3a, § 34 (1) no. 2a Draft German VAT Operating Regulation (UStDV-E)); entering into effect on 1 January 2026.

Unwarranted showing of VAT on credit notes (§ 14c UStG) (reaction to BFH ruling V R 23/19): VAT owed also in cases where it is shown in a credit note, and also when shown by a non-trader (§ 14c (2) sent. 2 UStG-E); entering into effect on the day following promulgation.

Input VAT deduction (§ 15 UStG):

- **Timing for a VAT deduction** (reaction to CJEU ruling C-9/20): Differentiation between the different possible points in time for a VAT deduction from the invoice of a trader subject to taxation on receipts (upon execution of a supply), from the invoice of a trader subject to cash accounting (upon payment), or from an invoice for advance payment (upon payment) (§ 15 (1) sent. 1 no. 1 sent. 2 UStG-E). First application to invoices issued **after 31 December 2025**.
- **Division of input VAT (§ 15 (4) UStG)**: “clarifying” provision on the subordination of the calculation using a total sales key (§ 15 (4) sent. 1, 3 UStG-E); entering into effect on the day following promulgation.

One stop shop procedure: Application for foreign companies that carry out occasional cross-border passenger transportation services at the borders of the Federal Republic of German with non-EU countries (§ 16 (5c) UStG-E); entering into effect on the day following promulgation.

New regulation on the taxation of small traders to come in line with EU provisions, inter alia: raising the sales threshold to EUR 25,000 in the previous calendar year and EUR 100,000 in the current calendar year; application also for traders resident in the rest of the Union territory; special reporting procedures for traders resident in Germany to make use of a VAT exemption in another Member State (§ 19, § 19a UStG-E); entering into effect on 1 January 2025.

VAT obligation of legal entities under public law (§ 2b UStG): Extension of the transition provision for an additional two years up to and including 2026 (§ 27 (22a) UStG-E).

Brexit: VAT treatment of Northern Ireland following 31 December 2020 for the purposes of the transport of goods (intra-Community supplies of goods and distance sales as well as intra-Community purchases) continues to be as for a Member State (§ 30 UStG-E).

NEWS FROM THE CJEU

Concept of a fixed establishment

CJEU, ruling of 13 June 2024 – case C-533/22 – Adient

This CJEU ruling concerns Romania’s submission regarding the concept of a fixed establishment within the meaning of Art. 44 and 192a of the VAT Directive.

The case

Adient Germany and Adient Romania both belong to the Adient group, which is an automotive equipment supplier specializing in the manufacture and marketing of seats and other components for motor vehicles.

On 1 June 2016, Adient Germany concluded a contract with Adient Romania for the provision of services, including both services

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for the manufacturing of upholstery components for those seats and ancillary services. The manufacturing services consist, for Adient Romania, in cutting and sewing raw materials provided by Adient Germany for the manufacture of seat covers. The ancillary services carried out by Adient Romania consist, inter alia, in taking delivery of, storing, inspecting, and managing the raw materials and in storing the finished products. Adient Germany remains the owner of the raw materials, semi-finished products, and finished products throughout the manufacturing process.

Adient Germany has a VAT identification number in Romania, which it uses both for its purchases of goods in that Member State and for the supply to its customers of the products manufactured by Adient Romania. For the services provided to it by Adient Romania, it used its German VAT identification number.

Adient Romania held the view that its supplies of services, under the contract concluded with Adient Germany, were provided at the place where that company, the recipient of those services, was domiciled and issued invoices excluding VAT, as in its view, those supplies should be taxed in Germany.

However, the tax authorities took the view that the recipient of the supplies of services by Adient Romania was a fixed establishment of Adient Germany located in Romania, consisting in two of Adient Romania's branches, that is the branches in Pitești and Ploiești (Romania). The tax authorities thus concluded that Adient Romania was required to collect VAT on those supplies, and issued a tax assessment notice against that company, which was challenged by the company in proceedings separate from those at issue in the main proceedings.

Furthermore, the tax authorities considered that as Adient Germany had a fixed establishment in Romania, it could not be identified by the VAT identification number issued to it by the German authorities and that it was required to register as a taxable person established in Romania. They therefore issued a notice registering that company automatically.

Adient Germany lodged a complaint against that notice, which was rejected in a further notice.

Adient Germany brought an action for annulment of both of these decisions to the Regional Court Argeș, Romania, the referring court.

The referring court states that the outcome of the dispute before it depends on whether Adient Germany has, through Adient Romania's branches Pitești and Ploiești, the necessary human and technical resources to carry out regular taxable transactions in Romania. With regard to the human resources of Adient Germany, the court has doubts with regard to the tax authorities' position that this is the case.

From the reasons for the decision

1. Art. 44 of the VAT Directive and Art. 11 (1) Implementing Regulation No. 282/2011 must be interpreted to mean that a company subject to VAT, having its business in one Member State, which receives services provided by a company established in another Member State, **cannot** be regarded as having a fixed establishment in that other Member State for the purposes of determining the place of supply of those services, solely because the two companies belong to the same group or a contract for the provision of services is concluded between those two companies.

2. Art. 44 of the VAT Directive and Art. 11 Implementing Regulation No. 282/2011 must be interpreted to mean that that **neither** the fact that a company subject to VAT having its business in one Member State, which receives manufacturing services provided by a company established in another Member State, has in that other Member State a structure which intervenes in the supply of the finished products arising from those manufacturing services, **nor** the fact that those supply transactions are carried out mostly outside that Member State and that those that are carried out in there are subject to VAT are relevant to establishing, for the purposes of determining the place of supply of services, that that company has a fixed establishment in that other Member State.

3. Art. 44 and 192a of the VAT Directive and Art. 11 and 53 Implementing Regulation No. 282/2011 must be interpreted to mean that a company, having its business in one Member State, which receives services provided by a company subject to VAT established in another Member State, **does not have a fixed establishment** in that other Member State if its technical and human resources in that Member State are not distinct from those by which the services are supplied to it or if those human and technical resources are used only for preparatory or auxiliary activities.

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In the case at hand, subject to the evaluation of all the relevant circumstances which the referring court will need to carry out, it appears from the evidence before the CJEU, as presented in the request for a preliminary ruling, that activities such as the taking delivery, management or inspection of the raw materials and finished products, quality control support or the placing of orders for the dispatch of the finished products constitute preparatory or auxiliary activities in relation to the manufacturing activity carried out by Adient Romania.

Please note:
The CJEU has recently had to rule quite frequently on requests for preliminary rulings on the concept of a fixed establishment (see judgments of 29 June 2023, Cabot Plastics Belgium, C-232/22; of 7 April 2022, Berlin Chemie, C-333/20) and stated that the classification as a fixed establishment must not depend solely on the legal form of the entity concerned and that the fact that a company has a subsidiary/group company in a Member State does not in itself mean that it has a fixed establishment there. The present CJEU ruling also fits into this series of rulings, which also does not come to the affirmation of a fixed establishment in the case in dispute.

NEWS FROM THE BFH

CJEU submission on the division requirement in the case of the reduced VAT rate for dependent ancillary supplies of accommodation

BFH, resolutions of 10 January 2024, XI R 11/23, XI R 13/23, XI R 14/23

On 10 January 2024, the German Federal Tax Court (BFH) ruled on three CJEU submissions on the division requirement in the case of the reduced VAT rate for dependent ancillary supplies of accommodation:

The cases

<u>XI R 11/23</u>

The plaintiff operated a hotel and restaurant. In addition to an overnight stay, guests also received breakfast, offset in the amount of EUR 4.50 each, to the extent that a guest, upon request, only wanted to avail of an overnight stay without breakfast. The hotel and restaurant used their own car park, which could be used free of charge. The plaintiff showed the overnight stay, breakfast, and car park as a single supply subject to the reduced VAT rate of 7 per cent. The tax authorities, however, held the view that **supplies for breakfast and the car park** must be subject to VAT at the standard VAT rate of 19 per cent. The suit was not successful.

<u>XI R 13/23</u>

The plaintiff operated a guesthouse. She offered her guests solely overnight stays including breakfast for a lump sum. For overnighting guests, there was no possibility to forego **the breakfast**. The plaintiff issued invoices for the services provided showing gross amounts for the overnight stay including breakfast. No VAT rate or amount of VAT was shown. She unsuccessfully applied to have the reduced VAT rate of 7 per cent applied to all sales achieved by the guesthouse. The Lower Tax Court rejected the suit, holding the view that the breakfast services provided by the plaintiff were not subject to the reduced, but rather to the standard VAT rate.

<u>XI R 14/23</u>

The plaintiff operated two hotels. Both hotels had car parks. These could be used by overnight guests as well as other visitors to the hotel and the public, without a separately calculated fee. In addition, in both hotels the plaintiff provided a **wireless local network (Wi-Fi)** for the hotel guests. In one hotel the guests could also avail of **fitness and wellness facilities**. The plaintiff did not charge a separate fee for these facilities either.

To the extent that guests made use of the solarium, table tennis table, darts machine or massages, they were invoiced the fees arising therefore separately and the standard rate of VAT was shown. The plaintiff also issued invoices showing separate VAT at the standard VAT rate for the use of the phone in their room for external phone calls, as well as for cleaning services, supplies from the in-house restaurant, and the supply of alcoholic drinks from the minibar. The plaintiff did not offer any paid services for the television sets in the guest rooms.

The tax authorities held the view that the provision of Wi-Fi, car parks, fitness, and wellness facilities should also have been subject to the standard VAT rate. The suit was not successful.

From the reasons for the decision

<u>Differentiation of principal and ancillary supply</u>

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In the case of short-term rentals for the accommodation of third parties within the meaning of § 12 (2) no. 11 UStG the following must be differentiated:

aa) A supply must not be considered to be an ancillary supply for a short-term rental (accommodation of third-parties) but rather a principal supply, if the renter (here: the hotel guest) can add or deselect this supply individually – as for example the number of breakfasts or the length of parking – thus correspondingly increasing or reducing the fee for themselves. In such a case, supplies provided in addition to the rental of short-term accommodation must be fundamentally treated as separate.

bb) If, conversely, the service provided in addition to the short-term rental of accommodation is so tightly connected that the recipient of the supply can neither add nor deselect it, an ancillary supply that is dependent must be assumed that shares the same outcome as the principal supply.

cc) In the proceedings XI R 11/23, the Lower Tax Court correctly assumed in line with the aforementioned principles that, with regard to the breakfast, which could be deselected by a guest in return for an offsetting amount of EUR 4.50, the supply is independent. As this independent supply does not fall within the remit of § 12 (2) no. 11 sent. 1 UStG (and in the period under dispute § 12 (2) no. 15 UStG – current version – did not apply), in the case at hand the standard VAT rate must be applied to the breakfast, regardless of the answer to the question submitted to the CJEU in these proceedings. Recourse to the division requirement of § 12 (2) no. 11 sent. 2 UStG is therefore not needed.

dd) In contrast, the other supplies to hotel and guesthouse guests under dispute in these cases are supplies ancillary to the supply of accommodation, as they cannot be selected or deselected. In the cases at issue, they are inextricably linked to the principal supply (accommodation) and, in these cases, served no purpose of their own for the hotel and guesthouse guests.

<u>Division requirement not compliant with Union law?</u>

The BFH holds the view that its case law, according to which § 12 (2) no. 11 sent. 2 UStG does comply with Union law to the extent that it standardizes a division requirement for supplies that do not directly serve the purposes of a rental (cf. in this regard BFH ruling of 24 April 2013, XI R 3/11), following the issue of the CJEU rulings Stadion Amsterdam of 18 January 2018 - C-463/16, and Finanzamt X of 4 May 2023 - C-516/21, is no longer beyond doubt within the meaning of Art. 267 TFEU. An “acte clair”, in its view, no longer exists.

However, especially in light of the CJEU ruling The Escape Center of 22 September 2022 - C-330/21, the BFH continues to hold the view that § 12 no. 11 sent. 2 UStG does comply with Union law in the case of single supplies.

In this ruling, the CJEU ruled that with regard to the transfer of sports facilities, Art. 98 (2) of the VAT Directive in conjunction with its Annex III Category 14 of the VAT Directive must be interpreted to mean that a supply of services consisting in the transfer of a gym’s sports equipment and an individual or group lesson, can be subject to a reduced rate of VAT, if this lesson is connected with the use of the facilities and is necessary to carry out the sport and physical training, or if the lesson is an ancillary supply to the transfer of these sports facilities or their actual use -thus a single supply (cf. CJEU ruling The Escape Center of 22 September 2022 - C-330/21, ref. 41).

However, the CJEU emphasized in ref. 34 of this ruling – having reference to the CJEU rulings Commission/France of 6 May 2010 - C-94/09, ref. 28 and Phantasialand of 9 September 2021 - C-406/20, ref. 25 – that a Member State can limit the application of this reduced VAT rate to concrete and specific aspects of this category, if in doing so the principle of neutrality is respected. This is the case for the division requirement of § 12 (2) no. 11 sent. 2 UStG.

In favor of the BFH’s view that § 12 (2) no. 11 sent. 2 UStG is also in compliance with Union law in cases of a single supply is the fact that in the meantime – before the reasons for this decision were set down – the CJEU ruling Valentina Heights of 8 February 2024 - C-733/22 has been handed down. The CJEU confirmed that Member States have the possibility to selectively apply the reduced VAT rate under the dual condition that, on the one hand, for the purposes of the application of the reduced rate only concrete and specific aspects of the category of supplies in question are triggered and, on the other, that the principle of neutrality is respected (cf. CJEU ruling Valentina Heights of 8 February 2024 - C-733/22, ref. 44). As the national legislature has done so in the case of § 12 (2) no. 11 sent. 2 UStG, Union law does not conflict with the division requirement in the case of a single supply arising from this provision.

Please note:
Following the CJEU rulings from 2018 (CJEU of 18 January 2018, C-463/16) and from 2023 on

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operating equipment in Section 4 no. 12 UStG (CJEU of 4 May 2023, C-516/21), the German regulation in § 12 para. 2 no. 11 became questionable because the CJEU stated here that a uniform supply consisting of two components - a main and an ancillary component - for which different VAT rates apply if provided separately, can only be charged at a uniform VAT rate or an ancillary supply must also be treated as such (CJEU C-516/21).

In the case of the rental of a hotel room as the main component, this would then be an invoice with a reduced VAT rate, even for ancillary services such as breakfast, if it is not assumed that there are two main services.

In addition, the BFH ruled (BFH of 17 August 2023, V R 7/23) that § 4 no. 12 sentence 2 UStG does not apply to the lease of permanently installed equipment and machinery if this is an ancillary service to the lease of a building as the main service, which is tax-exempt under a contract concluded between the same parties in accordance with § 4 no. 12 sentence 1 letter a UStG, so that there is a single supply.

It is therefore to be welcomed that the Federal Fiscal Court has put the apportionment requirement pursuant to § 12 para. 2 no. 11 of the German VAT Act to the test of EU law and has referred three cases to the CJEU for a preliminary ruling on almost all conceivable services (parking, WiFi, fitness and wellness facilities as well as breakfast) that are related to an overnight stay in a hotel and has asked for an answer as to how the German apportionment requirement should be assessed.

VAT on a dinner show within the time limits of § 12 (2) no. 15 UStG

BFH, resolution of 29 May 2024, XI B 3/23

This BFH resolution concerns the VAT on a dinner show within the time limits of § 12 (2) no. 15 UStG.

In agreement with the parties involved, the Lower Tax Court has presented a binding recognition of the case for the Senate dealing with the issue (§ 118 (2) Fiscal Court Procedural Code) that the plaintiff's dinner show, in which she offered to guests a multi-course menu with entertainment provided by performers and musicians, comprised a single complex supply.

This type of transaction nominally exists if the supply provided by the taxable person consists of two or more elements that are so tightly interwoven that they objectively constitute a single inseparable economic supply, the splitting up of which would not be economic (cf. CJEU ruling BGŻ Leasing of 17 January 2013 - C-224/11, Rz 30). If – as the Lower Tax Court says in the case under dispute – the elements that make up a single complex supply, no principal element and one or more ancillary elements be determined, the elements making up that supply must be viewed as being equivalent (CJEU ruling Baštová of 10 November 2016 - C-432/15, Rz 72).

If – contrary to the case under dispute – only one of several equivalent components is subject to the reduced rate of VAT and another is not, the reduced rate of VAT cannot be applied to the single complex supply (cf. CJEU ruling Baštová of 10 November 2016 - C-432/15, ref. 75; BFH rulings of 13 June 2018 - XI R 2/16, Rz 14; of 14 February 2019 - V R 22/17, ref. 30).

In the case under dispute, however, the reduced VAT rate applies for both elements of the single complex supply provided by the plaintiff in line with § 12 (2) no. 7 (a) UStG and § 12 (2) no. 15 UStG with the resulting implication for the rulings mentioned, that the single complex supply itself is subject to the reduced VAT rate.

The BFH rejected the tax authorities' complaints regarding the denial of leave to appeal the Lower Tax Court's ruling as being unfounded.

Please note:
The BFH already dealt with dinner shows in 2013 (BFH, ruling of 10 January 2013, V R 31/10), in 2014 (BFH, ruling of 28 October 2014, V B 92/14) and in 2018 (BFH, ruling of 13 June 2018, XI R 2/16) and subjected the transactions to the standard VAT rate as a complex supply. In the year in dispute, there was the particularity that both service components of this complex service were subject to the reduced tax rate, so that taxation at the reduced tax rate seemed obvious, although not necessarily with the reasoning of the Leipzig tax court. It must be borne in mind that the Leipzig tax court (judgment of 6 December 2022, 1 K 281/22), in order to arrive at the reduced tax rate for a complex service, chose the unintended legal loophole as the decisive justification. It is therefore very surprising how briefly and succinctly the BFH dismissed the FA's appeal against denial of leave to appeal. Basically, it did not provide any reasoning, but merely stated that the uniform, complex supply is subject to the reduced tax rate. The result is to be agreed with; however, it would have been important in practice to know the legal basis on which it came to this conclusion.

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NEWS FROM THE BMF

VAT treatment of grants; importance of the purpose connected with the payments

BMF, guidance of 11 June 2024 – III C 2 - S 7200/19/10001 :028

In its guidance of 11 June 2024, the BMF has ruled on the boundary between a payment for a supply to the person paying a grant (payer) and a non-taxable "true" subsidy.

According to the BMF, the boundary between a payment for a supply to the payer and a non-taxable true grant must be drawn above all on the basis of the person to be considered and the goal of the grant. Accordingly, in the case of grants it is decisive whether the grant donor is intended for use for a specific supply, or rather the activity of the grant receiver is not intended for the payer as the recipient of a supply, whereby the goals pursued by the payer serve, inter alia, as an indication, cf. BFH ruling of 18 November 2021 – V R 17/20.

The BMF has illustrated the boundary using two examples:

Example A:

The municipality G, as part of a management service agreement transferred the management and maintenance of a sports center in its district to the sports club V. According to this contract, G transferred the authority to V to rent the sports center for the regular or one-off exercising of club or company sports and for the commercial and non-commercial private use for the purposes of sports in the name and for the account of G. As a result of this management service agreement, G paid a certain amount to V annually. The management service included the collection of rents including potential payment reminder and enforcement procedures.

As a result of G relinquishing the administration of the sports center to V, as well as the collection of rents including payment reminder and enforcement procedures by V, the boundary to an exchange of services is crossed (cf. BFH ruling of 5 August 2010 – V R 54/09, and of 18 November 2021 – V R 17/20). V provides – taking into consideration the overall goal pursued by G – a supply that is subject to and liable for VAT (management and maintenance of the property) to G. The fee includes G's grants.

Example B

In accordance with a license agreement with the municipality G, the club V is provided with sports facilities for its own long-term use free of charge. V does not have to provide to G such as the provision of certain sports offerings. V receives a lump-sum refund of costs from G for the management.

G's payment constitutes a true, non-taxable grant. With these payments G is pursuing the purpose of generally supporting V's activity and placing V in the position of conducting its non-profit activity (cf. BFH ruling of 18 November 2021 – V R 17/20).

The VAT Application Decree (UStAE) has been amended accordingly. The principles of the BMF guidance must be applied in all open cases.

Please note:
According to the BMF letter dated 11 June 2024, the distinction between a payment for a benefit to the payer and a non-taxable genuine grant must be made primarily on the basis of the person receiving the benefit and the objective of the grant.

Accordingly, in the case of grants, the decisive factor is whether the grantor is to receive a specific benefit or whether the activity of the grant recipient is not intended for the payer as the recipient of the benefit, whereby the purpose pursued by the payer serves as an indicator, among other things.

According to the (previous) administrative opinion, there was an exchange of services if the contracting parties had committed themselves to services in a mutual contract. According to the BMF, this should not apply if the recipient only receives the payments in order to be able to take action at all or to be able to fulfill the tasks incumbent on it according to the purpose of the company or if contractually agreed payments are primarily granted to the payee making the payment to promote it for structural, economic or general policy reasons.

VAT treatment of public authorities – § 2b UStG; input VAT deduction in the case of legal entities under public law being active in business

BMF guidance of 12 June 2024 – III C 2 - S 7300/22/10001 :001

In its guidance of 12 June 2024, the BMF has ruled on the input VAT deduction in the case of legal entities under public law (LEPL) active in business, which are liable to VAT in accordance with § 2b UStG.

Scope of application of § 2b UStG

The provisions of § 2b UStG entered into effect on 1 January 2017. The new provisions were accompanied by a transition provision in § 27 (22) UStG, on the basis of which LEPL could declare to the tax authorities that they wished to continue to apply the law valid up to 1 January 2017

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for all supplies carried out before 1 January 2021.

In the Corona Tax Relief Law of 19 June 2020 this transition provision was expanded by § 27 (22a) UStG so that this declaration was also valid for all supplies carried out after 31 December 2020 and before 1 January 2023, unless the declaration was rescinded.

The German Annual Tax Act 2022 of 16 December 2022 introduced an optional transition limit for the application of § 2b UStG by a further two years up to 31 December 2024.

Please note:
The government draft of the German Annual Tax Act 2024 stipulates an extension of the optional transition provision by an additional two year up to and including 2026.

Allocation of input supplies to the company and input VAT deduction

For the input VAT deduction of LEPL, according to the BMF, the general provisions must be initially and primarily applied (e.g. direct allocation and appropriate division of input VAT in accordance with Section 15.17 UStAE). In this respect, a VAT relevant activity in a business (economic) area must be distinguished from a non-business activity.

The non-business activity may consist in an activity external to the company (e.g. withdrawals for the personal needs of staff) or a broadly interpreted non-economic activity (e.g. jurisdiction, to the extent that this is a non-business activity in accordance with § 2b UStG) (cf. Section 2.3 (1a) UStAE). In practice, the non-business area is determined primarily by the broad interpretation of non-economic activities.

In the case of input supplies, it must be distinguished if they relate to business or non-business activities. According to § 15 (1) UStG, among the other requirements, only input VAT amounts from input supplies for the company of the LEPL are deductible. Input supplies relate to the company if and to the extent the LEPL intends to use these as part of its business activities for the provision of supplies for payment. A direct and immediate connection must exist between the input and output supplies according to the objective contents of the supply purchased. If there is no direct and immediate connection between a specific input transaction and output transaction, the LEPL may be entitled to deduct input VAT if the costs for the input supply belongs to its general expenses and – as such – forms part of the price of the taxable supplies provided by it.

An input VAT deduction is precluded if and to the extent the LEPL purchases supplies for its non-business areas, especially for non-economic activities in the broader sense.

If a supply is executed for both the business and also the non-business area of the LEPL (partial business utilization), it may – with the exception of cases of an external use, cf. Section 15.2b (2) sent. 7 and 15.2c (2) sent. 1 no. 2 (b) UStAE – not be fully allocated to the company. The right to deduct input VAT only exists within the scope of the intended use for the business activity (cf. CJEU ruling of 12 February 2009, C-515/07, VNLTO, and Section 15.2b (2) UStAE). The VAT arising on the input supply must be divided according to the (intended) purpose into a deductible and non-deductible portion. To this extent, there is a division requirement (e.g. in the case of the purchase of single items for a partial business, non-economic use in the broader sense, in the case of a common purchase of heating materials or availing of the services of a lawyer, who as a result of a comprehensive consultancy mandate provides continuing legal consulting services for both areas). In the case of a division, the principles of § 15 (4) UStG must be applied analogously (cf. BFH ruling of 3 March 2011 – V R 23/10, Federal Taxation Gazette II 2012 p. 74).

The supply, import or intra-Community purchase of an item that the LEPL uses less than 10 per cent of for the company is considered to not be executed for the company (§ 15 (1) sent. 2 UStG).

For the input VAT deduction in the case of the purchase of single items that are used for both business and non-economic (in the broader sense) purposes, a fairness provision applies, deviating from the abovementioned material legal situation (division requirement) (cf. Section 15.2c (2) sent. 1 no. 2 (a) UStAE). According to this, the LEPL can leave the item in full in its non-business area, no input VAT deduction is then possible. In this respect, a corresponding allocation decision is required (cf. Section 15.2c (14) sent. 4 UStAE). A later amendment to the input VAT for the benefit of the LEPL on the grounds of fairness in accordance with Section 15a.1 (7) is precluded.

The use of the purchased items and other supplies in the overall activities of the LEPL is relevant. In this respect, the coherence of the company must be generally

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taken into account (§ 2 (1) sent. 2 UStG).

Special provisions for the division of input VAT amounts

In ref.10 et seq, the BMF guidance contains special provisions for the division of input VAT amounts in the case of LEPL, in particular, an income key for supplies purchased for partial business use (ref 14 et seq), provisions for property (ref. 28) and a lump-sum input VAT rate for LEPL with a limited business area (ref. 29 et seq).

Furthermore, the BMF guidance contains particular specifics in the case of the decentralized taxation of organizational units of regional authorities at both state and federal level (ref. 35 et seq) and leads to an amendment of Sections 2b.1 and 15.19 (5) UStAE.

Application provision

The principles of this BMF guidance shall apply for the first time for taxation periods within the scope of § 2b UStG, that are not subject to a declaration in accordance with § 27 (2) sent. 3 UStG.

IN BRIEF

DRAFT BMF guidance: Issuing invoices in accordance with § 14 UStG; introduction of mandatory electronic invoices for transactions between domestic companies from 1 January 2025

From 1 January 2025 – accompanied by transition provisions – transactions between domestic companies will be obliged to use electronic invoicing (e-invoices). The BMF plans, in consultation with the highest tax authorities of the federal states, to publish a BMF guidance in this respect. The draft was sent to the associations on 13 June 2024, providing an opportunity for their comments. The associations can offer their opinions up to 11 July 2024. The final publication of the BMF guidance is planned for the start of the 4th Quarter 2024.

Agency supplies subject to VAT

BFH, ruling of 18 January 2024, V R 4/22

In its ruling of 18 January 2024, V R 4/22, the BFH ruled that a clearing agent (shipping agent), who – for the clearance of a particular ocean-going ship (ship clearance and supply) – had informed a port operator that the shipping company would commission him with the provision of supplies (which at that point in time had only been partially determined), made contact with a specific customer so that only one agency supply existed, but not several individual agency services with regard to a number of different supplies.

This agency supply is not zero-rated in line with § 4 no. 5 sent. 1 (a) in conjunction with § 4 no. 2 and § 8 (1) UStG, if as a result of brokering the business contact a number of different transactions arose, not yet finally determined at that point in time, some of which may be subject to VAT and some of which were zero-rated.

Please note:
The BFH makes interesting comments here on the concept of brokerage services and the associated specific transactions.

The annex consideration made by the Hamburg tax court (judgment of 25 February 2022, 6 K 134/20) on the incorrect basis of a number of brokerage services - as well as the assumption of a mere framework agreement - is incorrect. It could not be concluded from the fact that tax-free transactions were also carried out after a brokerage activity that there were independent brokerage services in this respect, which were separately aimed at brokering these tax-free services. This does not take into account the fact that the brokerage service is not identical to the brokered service, as the brokerage is an independent service that differs from the brokered service with regard to the contracting parties and the essential contents of the contract, which in the case in dispute is evident from the fact that it was primarily a matter of brokering a business contact for the provision of non-exhaustive services.

FROM AROUND THE WORLD

TaxNewsFlash Indirect Tax

KPMG articles on indirect tax from around the world

You can find the following articles here.

17 Jun - Poland: Draft legislation amending VAT for small enter-prises

11 Jun - Poland: Postponement of e-invoicing mandate signed by president

6 Jun - Senegal: Changes to VAT on cross-border provision of digi-tal services, now effective from 1 July 2024

4 Jun - Colombia: Increased e-invoicing audits

30 May - Poland: Intra-community VAT supply of construction mate-rials; issuance of invoice for bad debt relief (court decisions)

30 May - Poland: Lectures, courses, and trainings provided by universities subject to VAT

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30 May - Poland: Postponement of e-invoicing mandate and reporting obligations of digital platform operators (DAC7) passed by Parliament

28 May - Hungary: Rule requiring submission of information and documents for VAT refund claims within one month held contrary to EU law (CJEU judgment)

EVENTS

English-language webcast on the introduction of e-invoicing in Germany in 2025

On 4 July 2024 at 10 a.m., we will be hosting a free webcast on e-invoicing in English. You can register here: KPMG Webcast E-Invoicing.

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Contacts

KPMG AG
Wirtschaftsprüfungs-
gesellschaft

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

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

Duesseldorf
Olaf Beckmann*
T +49 211 475-7343
olafbeckmann@kpmg.com

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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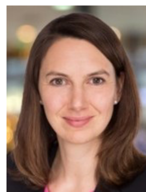

Kathrin Feil (V.i.S.d.P.)
T +49 89 9282-1555
kfeil@kpmg.com

Rainer Weymüller
Of-Counsel

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

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