KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

August/September 2024

NEWS IN LEGISLATION

Ordinance of the Federal Government on the Assignment of Tax Business Identification Numbers (WIdV)

Federal Law Gazette 2024 I, No. 293, 2 October 2024

The Federal Government has presented an ordinance on the allocation of tax-related business identification numbers (Business Identification Number Ordinance - WIdV) on the basis of Section 139d Nos. 2 and 3 of the German Fiscal Code (AO).
According to Section 1 (1) WidV, the business identification number (W-IdNr.) will be introduced on 24 October 2024. The W-IdNr. consists of the capital letters "DE" followed by nine digits. It corresponds to the structure of the VAT identification number (VAT ID no.). The W-IdNr. also has the distinguishing feature 00001 at its end (§ 1 Para. 5 WIdV). For further economic activities, businesses and permanent establishments of an economic operator, the distinguishing features will be assigned (from 1 March 2026).

The Federal Central Tax Office (BZSt) assigns a VAT ID no. in accordance with Section 27a UStG to economic operators who have been issued a VAT ID no. by 30 November 2024 (Section 1 (2) WIdV). In accordance with Section 3 WIdV, the BZSt publishes in the Federal Tax Gazette in these cases that the VAT ID no. is also valid as a W-IdNr. from the effective date to be specified in this announcement.
The initial allocation and notification of the W-IdNr. to those economic operators who have not been allocated a VAT ID no. by 30 November 2024, is carried out according to a separate procedure and will start on 1 December 2024.

The W-IdNr. is a unique identification number that is assigned to all economic operators in Germany. This applies to companies of all legal forms. The prospective goal of introducing the W-IdNr. is to simplify communication between economic operators and authorities as well as between the authorities themselves.

Taxpayers (and third parties who transmit data to tax authorities) are obliged to use the W-IdNr. for applications, declarations or notifications to tax authorities (after completion of the initial allocation). For a transitional period, a non-objection rule is planned if the tax number is given instead.

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This applies accordingly if a third party is required by law to provide tax data for the beneficial owner (reporting entity). After the initial allocation of the W-IdNr. has been completed, an automatic query procedure (in accordance with Section 154 (2b) AO) is to be made available to the bodies required to provide information. The W-IdNr. is also the basis for participation in the special reporting procedure for small businesses from 1 January 2025.

In future, the W-IdNr. will be stored in the register of basic company data. It will be used to identify companies uniquely and across registers.

The WIdV regulates various details of the W-IdNr., for example the time of introduction of the W-IdNr., guidelines for issuing and deadlines for deletion.

According to the explanatory memorandum of the ordinance, detailed regulations on the allocation of the W-IdNr. as well as on the effects of changes to the legal entity representing the economic entity (e.g. transformations, mergers, contributions, etc.) as well as further organizational details such as transitional regulations are to be published in BMF letters.

Please note:
The Federal Council approved the ordinance on 27 September 2024. The Ordinance therefore enters into force (with the exception of Section 3 (4) WIdV) on 3 October 2024, the day after promulgation in accordance with Section 4 (1) WIdV.

Note from the Federal Central Tax Office for taxes from 13 September 2024:
For technical reasons, company data will not be able to be updated for a short period. This will impact the issuance of VAT identification numbers.

In November 2024, therefore, the processing times for the issuance of a VAT identification number may be longer than usual, especially in the case of applications by VAT groups for a VAT identification number.

NEWS FROM THE CJEU

The limits of direct claims

CJEU, ruling of 5 September 2024 – case C-83/23 – H

The CJEU ruling was issued in the context of a legal dispute between H , a company based in Germany, and the tax office M (Germany) regarding the reimbursement of VAT on equitable grounds, which H had already paid to the supplier due to an incorrect invoice and wanted to recover from the tax office.

The case
H, the plaintiff in the lawsuit (in the following: KG), is the legal successor of a KG, established in Germany, the purpose of which was the leasing of movable property to other companies by means of, inter alia, sale and leaseback agreements. The case concerns six sale-and-leaseback transactions carried out by the KG for the benefit of E-GmbH, another company established in Germany, in 2007, 2008, 2010 and 2012.

In each of those transactions, E-GmbH purchased a new motor boat from E-sr, a company established in Italy. The corresponding invoices bore the reference “intra-Community supply of goods” and did not contain any VAT. The purchase price of each boat was paid in full by E-GmbH.

Following each of these purchases, E-GmbH and the KG concluded a sale-and-leaseback agreement providing, first, for the sale of the boat to the KG at the net purchase price plus German VAT, and second, an agreement to conclude a leasing contract transferring the right to use that boat to E-GmbH. Subsequently, E-GmbH sent an invoice to the KG for the sale of the boat, on which German VAT was expressly mentioned, declared VAT in its tax returns and paid it to the competent tax authorities, Finanzamt X (Germany). This invoice gave no details on the location of the boat at the time of sale. The KG deducted the VAT shown in this invoice as input VAT in its VAT return. Finally, E-GmbH and KG entered into a leasing agreement concerning the boat for a period of 36 months.

As part of an audit at E-GmbH for the year 2008, the tax authorities found that, at the time when E-GmbH had sold the boats to the KG, those boats were not in Germany but in Italy. In October 2012, E-GmbH informed the KG that it had incorrectly shown German VAT on two invoices issued in April and October 2008, and that those invoices would be corrected.

Following a VAT audit at the KG, the auditor concluded that the supplies of boats had to be classified as supplies without transport which, according with Art. 31 of the VAT Directive in conjunction with § 3 (7) UStG, were subject to VAT not in Germany, but in Italy, the location of those boats at the time of their sale. The VAT invoiced by E-GmbH to the KG is owed under Art. 203 of the VAT Directive and § 14c UStG, but could not be deducted by the KG as input VAT.

Finanzamt M concurred with this assessment and, in accordance with § 173 (1) no. 1 AO, issued

KG with a VAT adjustment assessment notice reducing the amount of VAT deducted by that company for 2008, the year in which two invoices for the sale of boats were issued. Finanzamt M subsequently rejected as unfounded the appeal lodged against that amended assessment notice.

Four other invoices for the sale of boats were issued in 2006, 2010 and 2012. Finanzamt M also issued amended VAT assessment notices for the years 2007 and 2010, relating to the deduction of input VAT paid in respect of the invoices issued in 2006 and 2010. As the appeal lodged against those VAT adjustment notices was rejected as unfounded by the Finanzamt M, the KG paid that VAT back to Finanzamt M. Ultimately, KG did not deduct VAT in respect of the sales of the boats mentioned in its annual VAT return for 2012.

In 2014, E-GmbH became subject to insolvency proceedings. The court-appointed insolvency administrator responsible for the liquidation of the company corrected the six invoices relating to the supply of the boats by deleting the entry regarding VAT which the invoices had incorrectly included. Finanzamt X stated that the court-appointed insolvency administrator submitted the adjusted invoices on 10 December 2014 and submitted an application for a correction on 8 January 2015. Finanzamt X granted that application, refunded the corresponding VAT to the insolvency estate and informed the court-appointed insolvency administrator's tax representative that it was required to subject the transactions to VAT in Italy. According to the plaintiff in the main proceedings, the insolvency administrator refused, however, to issue invoices containing Italian VAT. The KG did not bring a lawsuit against E-GmbH with a view to obtaining such invoices.

On the basis of § 163 AO, the KG applied to Finanzamt M for a recalculation, on the grounds of equity, of the VAT for the years 2007, 2008, 2010 and 2012. The tax authorities rejected that application and subsequently also dismissed KG's appeal against that decision as being unfounded.

KG's lawsuit before the Düsseldorf Lower Tax Court was dismissed on the grounds that Finanzamt M was not required to refund to it the VAT which had been incorrectly invoiced, since that VAT had been repaid to the insolvency estate of E-GmbH. In addition, the plaintiff in the main proceedings has no civil law entitlement to a refund of that VAT from E-GmbH, but merely a right to be issued with an invoice containing Italian VAT. KG lodged an appeal at the German Federal Tax Court (BFH).

The BFH is uncertain whether the Court case law, in particular with regard to the ruling of 15 March 2007 - C-35/05 - Reemtsma Cigarettenfabriken, grants the recipient of an invoice containing VAT that is not actually owed a "direct claim" to a refund of this VAT from the tax authorities. Therefore, it presented the case to the CJEU for a preliminary ruling. The CJEU decided on this request on 5 September 2024 with the present ruling.

Reasons for the decision

In the Reemtsma Cigarettenfabriken ruling, with regard to the question of whether a recipient of services is entitled to request a refund of VAT from the supplier who has invoiced that VAT in error and could in turn seek a refund from the tax authorities, or whether such a recipient must be able to address its request directly to those tax authorities, the CJEU ruled that, in principle, a system in which, first, the supplier who has paid the VAT to the tax authorities in error may seek to be refunded and, second, the recipient of the services may bring a civil law action against that supplier for recovery of the sums paid but not due does observe the principles of neutrality and effectiveness. Such a system enables the recipient who bore the tax invoiced in error to obtain a reimbursement of the sums unduly paid.

The CJEU further noted that, if a refund of the VAT becomes impossible or excessively difficult, in particular in the case of the insolvency of the supplier, those principles may require that the recipient of the services be able to address its application for reimbursement to the tax authorities directly. Thus, the Member States must provide for the instruments and the detailed procedural rules necessary to enable the recipient of the services to recover the incorrectly invoiced tax in order to respect the principle of effectiveness (ruling of 15 March 2007, Reemtsma Cigarettenfabriken, C-35/05).

While it is true that the dispute in the main proceedings concerns claims for a refund of VAT which was incorrectly invoiced and paid, it is however clear that, in case at hand, Finanzamt X has already repaid the VAT incorrectly paid by the recipient of the services to the insolvency estate of the supplier of the services.

Under these circumstances, the case law arising from the Reemtsma Cigarettenfabriken ruling of 15 March 2007 cannot be transposed to a situation such as that at issue.

If, in the case of incorrectly invoiced and paid VAT, the tax authorities, at the request of the supplier of services, had already refunded the VAT in accordance

with the case law resulting from the Reemtsma Cigarettenfabriken ruling, and also had to refund that VAT to the recipient of the services, the tax authorities would be required to refund that VAT twice.

In this case, the supplier, who is not yet registered in the Member State in which the VAT is legally due, has the possibility to register for VAT purposes in that Member State, so that they could then, by indicating a tax identification number of that Member State, send the recipient of the service an invoice showing that Member State's VAT, enabling the recipient of the service to deduct the input VAT paid in that Member State. Consequently, as the referring court noted, in the case at hand, H could, in order to not have to bear the cost of the VAT concerned, have brought a civil action against the insolvency administrator of the supplier of the services with a view to having an invoice including Italian VAT issued, which H did not do.

Please note:
As a rule, the recipient of the service must first assert their claim for reimbursement of incorrectly invoiced and unjustifiably paid VAT against the service provider under civil law. A direct VAT claim is to be decided within the framework of equity proceedings pursuant to §§ 163, 227 AO (see BFH rulings of 30 June 2015, VII R 30/14 and VII R 42/14). The tax office responsible for the VAT assessment of the service recipient is responsible for deciding on this equity measure.

In its letter dated 12 April 2022, BStBl. I 2022, 652, the BMF commented in detail for the first time on the issue of a direct claim against the tax authorities. However, parts of the letter are already outdated. The CJEU (judgment of 7 September 2023 C-453/22, Schütte) did not share the view that the direct claim is excluded if the claim of the recipient of the service against the service provider can no longer be enforced due to a limitation period under civil law for this claim (e.g. in accordance with § 195 BGB). It held that it would be disproportionate if the purchaser, who had paid too much VAT to their supplier, no longer received it back because the supplier no longer needed to correct the invoice due to the statute of limitations. Accordingly, the VAT already paid by the supplier can be reclaimed directly from the tax office.

In its letter dated 12 April 2022, the BMF stated the following on the issue of insolvency: "A decision cannot be made on a direct claim as long as it is still legally possible for the tax authorities to make a claim against the supplier due to an adjustment of the tax amount in accordance with § 14c (1) sentences 2 and 3 UStG. Therefore, in insolvency proceedings, for example, a decision on the direct claim can generally only be made after the insolvency proceedings have been concluded. This is because the debtor (in this case the supplier) remains the tax debtor as a result of the insolvency proceedings. He merely loses the right of disposal and administration over his assets, but he retains the legal ownership and, in the event of an adjustment, he is the legal owner of the refund claim."

In the present BFH case, in addition to the insolvency issue, there was also the particularity that the wrongly invoiced VAT had already been paid to the supplier prior to his insolvency.

In its ruling of 5 September 2024, the CJEU stated that the tax authorities could not be obliged to refund the VAT twice. The insolvency of the supplier does not change this.

The CJEU ruled that the supplier (E-GmbH) had the option of registering for VAT in the other Member State (Italy) and then issuing an invoice with Italian tax. The plaintiff could therefore have brought a civil action against the insolvency administrator of E-GmbH for the issue of an invoice showing Italian tax. If it had failed to do so, a German direct claim was ruled out.

Change of Jurisdiction and procedure at the CJEU

The CJEU is divided into two courts:

- The Court of Justice previously dealt with all requests for preliminary rulings from national courts, certain actions for annulment and appeals.

The Court of Justice employs one judge from each EU country and eleven Advocates General. How many judges are involved in the case: three, five or 15 (the entire court), depending on the importance and complexity of the case. Most cases are dealt with by five judges; it is extremely rare for the whole court to be involved;

- The General Court (EGC) has so far ruled on actions for annulment brought by individuals, companies and, in some cases, EU countries. In practice, it has therefore mainly dealt with competition law, state aid, trade, agriculture and trademarks. Jurisdiction at the General Court of the European Union is exercised by 54 judges. Each member state of the

European Union is now represented by two judges. Cases before the General Court are decided by chambers of three or five judges or, in certain cases, by a single judge. The General Court may also sit as a Grand Chamber (15 judges) if the legal complexity or importance of the case so justifies.

The European Parliament and the Council of the European Union amended the Statute of the Court of Justice of the European Union by Regulations (EU, Euratom) 2024/19 of the European Parliament and of the Council of 11 April 2024 amending Protocol No 3. As a result, the Court of Justice and the General Court amended their Rules of Procedure in order to implement the requirements of the Parliament and the Council (see Rules of Procedure of the Court of Justice of 12 August 2024, 2024/2094; Rules of Procedure of the General Court of 12 August 2024, 2024/2095).

These are, in particular, provisions that are necessary to enable the partial transfer of jurisdiction for preliminary rulings from the Court of Justice to the General Court, which will take effect on 1 October 2024.

The Court of Justice has also adopted a new version of the Practice Directions to the parties in cases before the Court of Justice and the General Court has adopted a new version of the Practice Rules for the implementation of its Rules of Procedure.

As of 1 October 2024, jurisdiction for preliminary rulings in six specific areas will no longer lie with the Court of Justice of the European Union (CJEU), but with the General Court of the European Union (General Court). This also applies to preliminary rulings on value added tax.

The change to the CJEU's statutes and the new jurisdiction of the CFI applies to six specific areas: the common system of VAT, excise duties, the customs code, the tariff classification of goods in the Combined Nomenclature, compensation and assistance services for air passengers and passengers in the event of denied boarding, delay or cancellation of transport services and the system for trading greenhouse gas emission certificates.

All requests for preliminary rulings must continue to be submitted to the CJEU so that it can examine, in accordance with the modalities laid down in its Rules of Procedure, whether the request falls exclusively within one or more of the specified special subject areas and whether it should consequently be referred to the General Court.

In future, all requests for preliminary rulings will also be notified to the European Parliament, the Council and the European Central Bank so that they can assess whether they have a particular interest in the questions raised and therefore wish to exercise their right to submit written pleadings or written observations.

It is also provided that, in all preliminary ruling cases, written pleadings or written observations lodged by a party referred to in Article 23 of the Statute are to be published on the Court's website within a reasonable period after the conclusion of the proceedings, unless the party concerned objects to the publication of its pleading or observations.

Please note:
Overall, there have been some significant changes at the CJEU.

NEWS FROM THE BFH

The use of margin taxation on “coffee trips”

BFH, resolution of 20 June 2024, V R 30/23

This BFH submission to the CJEU for a preliminary ruling concerns the application of margin taxation to travel services.

The case
The plaintiff, a GmbH & Co. KG, organized excursions from 1997 to 1999 (the years under dispute) with the goal of promoting sales of the goods it offered. During one of these excursions, generally called “coffee trips”, participants were collected by buses and brought to interesting tourist destinations. As part of the excursion, the plaintiff carried out sales presentations away from business premises, at which it offered the participants in the excursion goods that they could purchase from the plaintiff at a separate cost.

The plaintiff used various bus companies for transporting the participants. The bus costs invoiced by the bus companies to the plaintiff exceeded the amount of travel expenses received from the participants. For example, in 1999 the rate at which costs were covered was around 60 per cent. The participants also received, as part of the excursion – in each case without paying separately – food and could take part in a tourist program (for example boat trips). The plaintiff acquired these services partly from other taxpayers. With regard to these costs, the tax authorities raised no objection to the deduction of input VAT, to the extent it was claimed.

Following an external audit, the tax authorities issued amended VAT assessment notices for the years under dispute, in which the travel costs in the amount declared by the plaintiff were made subject to VAT. The plaintiff

appealed against these amended VAT assessment notices and unsuccessfully applied for a full input VAT deduction for the bus costs. The suit brought by the plaintiff before the Lower Tax Court in this respect was also not successful. The Lower Tax Court's ruling was dismissed by the BFH in the appeal brought by the plaintiff and the case was referred back to the Lower Tax Court. During the case of the second instance, the tax authorities issued amended VAT assessment notices in proceedings before the Lower Tax Court for the years under dispute, which, in accordance with § 68 Code of Procedure of Fiscal Courts, became the subject of the proceedings, and in which the desired input VAT deduction from the bus costs was granted, to the extent that these amounts were connected to the free-of-charge excursions.

In its ruling in the second instance, the Lower Tax Court then dismissed the lawsuit as without justification. The plaintiff appealed this.

Resolution
The BFH suspended the proceedings and presented the following questions to the CJEU on 20 June 2024 for a preliminary ruling:

1. In the case of "an excursion organized by the trader away from his business premises" within the meaning of Art. 1 (1) first indent of the 85/577/EEC Directive, does this mean "transactions performed by the travel agent in respect of a journey" within the meaning of Art. 26 (2) sent. 1 of the 77/388/EED Directive?

2. If the first question is affirmed: Does the special provision for travel agents according to Art. 26 of the 77/388/EEC Directive also apply if the margin used as the basis of assessment in accordance with Art. 26 (2) sent. 3 of the 77/388/EEC Directive is negative, as the actual costs exceeded the travelers' "total amount without VAT"?

3. If the first and second questions are affirmed: Does Art. 12 (1) sent. 1 of the 77/388/EEC Directive also apply to the basis of assessment applying to the margin within the meaning of Art. 26 (2) sent. 3 of the 77/388/EEC Directive if the margin is negative, so that a negative margin leads to a refund to the taxpayer?

Please note:
It is noteworthy that the BFH is only referring questions to the CJEU in the second instance. The case is based on facts from the years 1997 to 1999 and a special VAT audit from 2003, in which the amendment notices were also issued. The appeals lodged against the tax amendment notices from the same year were rejected with the objection decision from 2014. The first judgment of the tax court dates back to 2017. By the time the case is decided by the CJEU, the year 2026 is likely to have already arrived. By then, almost 30 years will have passed since the coffee trips were carried out.

In this case, it should be interesting to see how the "coffee trips" are to be classified, because although a coach trip is organized and carried out for every excursion, this is only a means to an end in order to carry out a sales event. Viewed in isolation, the coach trips are also loss-making because they cannot cover the costs due to the low ticket price. The CJEU will now have to solve the problem of whether the negative margin leads to the exclusion of input VAT or whether the principle of neutrality of VAT requires the opposite.

No retroactive correction of invoices in the absence of a reference to an intra-Community triangular transaction

BFH, ruling from July 17, 2024, XI R 35/22 (XI R 14/20)

In the above-mentioned ruling, the BFH comes to the conclusion that the subsequent correction of invoices does not have retroactive effect with regard to the requirements of § 14a para. 7 UStG (following the CJEU ruling Luxury Trust Automobil of 8 December 2022 - C-247/21).

Facts of the case
In the years 2008 to 2013 (years in dispute), the Plaintiff operated a wholesale business with agricultural machinery.

The machines were ordered by the plaintiff from the manufacturers and delivered directly from there to customers in various Member States, in particular Poland. The dispatch was carried out either by the plaintiff or the manufacturer, in each case using the VAT identification number (in Germany: VAT ID no.) of their country of residence, whereby the plaintiff never transferred the power of disposal of the machines to its customers prior to the movement of goods. The end customers also used the VAT identification numbers of their country of residence.

For the deliveries from other Member States to Poland, the plaintiff declared intra-Community acquisitions subject to VAT in Germany on the input side in his German VAT returns for the years in dispute and at the same time claimed the input VAT deduction

in accordance with § 15 (1) sentence 1 no. 3 UStG. He declared the onward deliveries in Poland as VAT-exempt intra-Community supplies from Germany to Poland within the meaning of § 4 no. 1 letter b in conjunction with Section 6a UStG. § 6a UStG. Neither the plaintiff's recapitulative statements for the years in dispute nor the plaintiff's invoices to its customers initially contained any indication of an intra-Community triangular transaction. The tax office initially approved the declarations.

The tax office for large and group tax audits ... carried out an external audit at the plaintiff's premises regarding VAT 2008 to 2013, among other things. With regard to the deliveries between the manufacturers based in the rest of the Community, the plaintiff and the customers based in Poland, the auditors came to the conclusion that intra-Community chain transactions within the meaning of § 3 (6) sentence 5 UStG (old version) existed. However, the transportation or dispatch could only be allocated to one supply in each case. According to § 3 para. 6 sentence 6 half-sentence 1 of the old version of the German VAT Act, these were the supplies from the manufacturers to the plaintiff. The place of supply of the plaintiff to its customers was in accordance with § 3 para. 7 sentence 2 no. 2 UStG in Poland, where the transportation or dispatch ended. The plaintiff would have had to register there for VAT purposes and declare his turnover from the supplies to the customers. The plaintiff would also have had to pay tax there on an intra-Community acquisition and at the same time be allowed to deduct input VAT. At the same time, the claimant had acquired the goods within the Community in Germany in accordance with § 3d sentence 2 half-sentence 1 UStG.

The auditors further assumed that the plaintiff had not made use of the simplification rule of § 25b UStG (intra-Community triangular transaction). This was because, in order to apply this provision, the claimant would have had to make reference to the triangular transaction and the transfer of tax liability in the invoice to the last customer (§ 25b para. 2 no. 3 in conjunction with § 14a para. 7 UStG). However, the plaintiff had not done this. He had noted the tax exemption of an intra-Community supply in the invoices and submitted the corresponding recapitulative statements.

Since the taxation of the second supply in Poland had not been carried out to date, the taxable intra-Community acquisition of the Plaintiff was deemed to have been carried out in Germany in the years in dispute in accordance with § 3d sentence 2 clause 2 UStG, since the Plaintiff had not proven in individual cases that the acquisition had been taxed in Poland or was deemed to have been taxed in accordance with § 25b para. 3 UStG. The plaintiff was also not entitled to deduct input VAT in accordance with § 15 para. 1 sentence 1 no. 3 UStG.

The claimant then issued corrected invoices within the meaning of § 25b UStG in December 2015 and submitted corrected recapitulative statements to the Federal Central Tax Office in June 2016.

In May 2016, the tax office issued amended VAT assessment notices for the years in dispute, in which, among other things, it did not take into account the input tax deduction from the declared intra-Community acquisitions. In addition, the tax office also reduced the declared tax-free intra-Community supplies by the sales that were not taxable in Germany. The tax office rejected the objections lodged against this as unfounded. The tax court upheld the appeal. It took the view that the intra-Community acquisitions had already ceased to exist in the years in dispute in accordance with § 3d sentence 2 half-sentence 2 UStG because the plaintiff had corrected the invoices to the customers with retroactive effect and submitted a corrected recapitulative statement, so that the acquisitions were already deemed to have been taxed at this time in accordance with § 25b para. 3 UStG. The tax office's appeal was successful.

Reasons for the decision
Pursuant to § 25b para. 1 sentence 1 UStG, an intra-Community triangular transaction is deemed to exist if three traders conclude transactions for the same goods and these goods are supplied directly from the first supplier to the last customer (§ 25b para. 1 sentence 1 no. 1 UStG), the traders are each registered for VAT purposes in different Member States (§ 25b para. 1 sentence 1 no. 2 UStG), the goods are supplied from the territory of one Member State to the territory of another Member State (§ 25b para. 1 sentence 1 no. 3 UStG) and the goods are transported or dispatched by the first supplier or the first customer (§ 25b para. 1 sentence 1 no. 4 UStG).

For the transfer of the tax liability to the last customer, § 25b para. 2 UStG requires that the supply was preceded by an intra-Community acquisition (§ 25b para. 2 no. 1 UStG), the first customer is not established in the Member State in which the transportation or dispatch ends and uses a VAT ID number that does not originate from the Member State of the first supplier or last customer (§ 25b para. 2 no. 2 UStG), the first customer issues the last customer with an invoice within the meaning of § 14a para. 7 UStG in which the tax is not shown separately (§ 25b

para. 2 no. 3 UStG), and the last customer uses a VAT ID no. of the Member State in which the transportation or dispatch ends (§ 25b para. 2 no. 4 UStG).

If the requirements of § 25b para. 1 and 2 UStG are met, the intra-Community acquisition of the first customer is deemed to be taxed in accordance with § 25b para. 3 UStG.

However, according to the BFH, the requirements of § 25b para. 1 and 2 UStG were not met in the years in dispute. This applies in particular to the disputed requirement that the first customer must have issued an invoice to the last customer within the meaning of § 14a para. 7 UStG, in which reference must be made to the existence of an intra-Community triangular transaction and the tax liability of the last customer. This reference was missing in the original invoices. Insofar as the corrected invoices from 2016 met these requirements, the correction of these invoices had no retroactive effect (following the CJEU ruling Luxury Trust Automobil of 8 December 2022 - C-247/21). According to the CJEU, proof that the recipient of the supply has been designated as the person liable to pay VAT in accordance with Art. 197 of the VAT Directive is a material prerequisite for the fiction of taxation. The subsequent fulfillment of a necessary condition is not a correction, but the first issue of the required invoice and only with a corresponding invoice, which is received by the recipient, would the legal consequences of the administrative simplification regulation be triggered ex nunc.

Insofar as the plaintiff argues that it must be assumed that the customers have declared intra-Community acquisitions in the country of destination and that taxation in the country of destination is therefore given, so that § 3d sentence 2 UStG has lost its protective function, Art. 41 para. 1 and Art. 42 of the VAT Directive do not provide for any exceptions. A deviation from the clear and unambiguous wording of the Directive presupposes an intervention by the Union legislator.

Insofar as the plaintiff also contests the assessment of interest on VAT for 2008 to 2013 and, in the alternative, claims a different assessment of VAT for 2008 to 2013 and interest on VAT for 2008 to 2013 on grounds of equity, the tax court, in its view, logically did not rule on this. The case has therefore been referred back to the tax court.

Please note:
In the years in dispute from 2008 to 2013, this case concerned the requirements for the recognition of a triangular transaction in accordance with § 25b UStG and the place of intra-Community acquisition in accordance with § 3d sentence 2 UStG if a German entrepreneur receives goods from another EU country, but these are transported directly from the supplier (entrepreneur A) to another EU country, for example.

In the case of a triangular transaction, it can be particularly advantageous for the middleman (intermediary) if he recognizes that a triangular transaction according to § 25b of the German VAT Act exists and he then also complies with the requirements for this.

§ 25b UStG is a special case of reverse charge because, under certain conditions, the last customer becomes the tax debtor for the supply made to him by the intermediary (see § 13a para. 1 no. 5 UStG). This special legal consequence requires, among other things, that the intermediary issues an invoice with reference to the reverse charge mechanism and the triangular transaction (cf. § 14a para. 7 UStG).

In the case in dispute at the BFH, it was a triangular transaction that was not initially discovered, which is why the required invoice with the two necessary additions was not issued. It was only years later (2016), during an audit by the tax office, that the middle entrepreneur corrected his invoice. The main point of contention in the legal dispute was therefore the question of whether the invoice issued in 2016 could have retroactive effect.

The dispute specifically concerned the supply of machines that had been ordered from A by the German company (B) in Belgium and then delivered directly from Belgium by A to the last customer C in Poland. The German entrepreneur B, who used his German VAT ID number when purchasing from A and selling to C, received an invoice from the manufacturer A for an intra-Community supply and declared an intra-Community acquisition in Germany and also claimed input VAT deduction in this respect.

This is where § 3d sentence 2 UStG comes into play because B used his German VAT ID number vis-à-vis A and the transportation did not end in Germany but in Poland. The purchase is then deemed to have been made in Germany until the B proves that the purchase was taxed in Poland or is deemed to have been taxed in accordance with § 25b para. 3 UStG, provided that the B has also corrected the recapitulative statement accordingly.

If the parties A, B and C had properly carried out a triangular transaction in accordance with § 25b UStG, it would not have been

possible to derive the right of taxation for Germany in accordance with § 3d sentence 2 UStG.

However, this would have required that proper invoices had already been issued by the plaintiff B to C in the years 2008 to 2013 (with the additions: "intra-Community triangular transaction and reverse charge", cf. § 14a para. 7 UStG).

As this was not done, the claimant (B) then tried to salvage this with the invoice corrections in 2016.

However, at the latest since the CJEU ruling of 8 December 2022 (C-247/21, Luxury Trust Automobile) - with a fraudulent last customer C - it has been clear that the CJEU considers the additions to the invoice from B to C to be a material prerequisite for the existence of a triangular transaction. The BFH has now followed this in the present case (even without a fraudster at the end of the chain).

Accordingly, the invoice cannot be corrected or supplemented with retroactive effect. According to the BFH ruling, it therefore remains the case that B has to pay tax on an intra-Community acquisition in Germany and cannot claim an input VAT deduction for this (§ Section 15 para. 1 no. 3 UStG).

For the old years in dispute (here: 2008 to 2013), in such cases, a subsequent registration in another EU country (here: Poland) is then required as a consequence of the undiscovered triangular transaction, which can lead to further acquisition taxation and taxation of the domestic delivery (if no reverse charge procedure applies to the domestic delivery) for B. However, this procedure in the country of destination of the goods can then lead to relief from acquisition taxation in Germany if entrepreneur B can prove that the acquisition taxation was carried out in Poland (see § 3d.1 para. 4 UStAE: if the transaction was included in a tax return in this Member State).

However, this procedure could be dispensable if the requirements of § 25b para. 3 UStG are fulfilled ex nunc due to a later invoice correction (here: in 2016) and can trigger the legal consequences of this standard. In this case, German taxation jurisdiction (in this case in 2016) could cease to apply. This could be achieved via § 17 para. 2 no. 3 and 4 UStG by correcting the taxation of the intra-Community acquisition, which in this case would leave the years 2008 to 2013 untouched, but could reverse the acquisition taxation in 2016. This would only leave the middle entrepreneur with an interest problem.

The Advocate General also appears to argue in this direction (subsequent invoice meets the requirements of the triangular transaction at the time of receipt of the invoice) in her Opinion of 14 July 2022 in the Luxury Trust case (C-247/21, para. 59) ("therefore, a corresponding invoice can also be issued later"). Accordingly, the legal consequences are triggered ex nunc with such an invoice (para. 61).

These considerations are also supported by the wording of the BFH in the almost identical parallel decision of 17 July 2024 (XI R 34/22), in which the BFH literally states "The taxation fiction does not yet apply in the case in dispute ...as the requirements of § 25b (1) and (2) UStG were not yet met in the year in dispute. These formulations also show that the taxation fiction of § 25b para. 3 UStG can be fulfilled in later years, which would mean that the acquisition taxation according to § 3d sentence 2 UStG would no longer apply.

It remains to be seen whether the German tax authorities share this view of the Advocate General and the BFH.

For triangular transactions declared to the tax office by the intermediary (B), care must be taken in future to ensure that the invoice to the last customer C contains the two aforementioned additions so that the material requirements for a triangular transaction are met.

If, in the case of open assessments, invoices have already been issued with reference to a triangular transaction but without the addition "reverse charge", the first priority in practice is to clarify whether the last customer - despite the incorrect invoice - declared the tax himself because he assumed that a triangular transaction existed and he himself became the tax debtor due to the reverse charge procedure.

If C has therefore behaved in a way that is only intended to be triggered by the addition on the intermediary's invoice ("reverse charge"), such an incomplete invoice cannot rule out the existence of a triangular transaction. The aim of the addition to request C to declare the tax has already been achieved without the addition, so that the defect in the incomplete invoice is only an insignificant formal error that does not argue against the existence of a triangular transaction in accordance with § 25b UStG.

Input VAT deduction for the supply of tenant electricity

BFH ruling from 17 July 2024, XI R 8/21

The supply of electricity, which the landlord of residential space generates himself via a photovoltaic system and supplies to his tenants for a fee, is not a dependent ancillary service of the VAT-exempt (long-term) rental of residential space, but an independent service subject to VAT, which entitles the tenant to deduct input tax from the input services, since by law the tenant is free to choose the electricity provider and the electricity supply is billed separately and according to individual consumption (differentiation from the BFH ruling of 7 December 2023 - V R 15/21, BStBl II 2024, 503, on input tax deduction for the supply of a heating system).

NEWS FROM THE BMF

VAT treatment of supplies of fuel within the context of a fuel card system

Draft of BMF guidance of 19 August 2024

The BMF has published the draft of a BMF guidance of 19 August 2024 on the VAT treatment of supplies of fuel within the context of a fuel card system.

In its ruling of 10 April 2003, V R 26/00 the BFH, subsequent to the CJEU ruling of 6 February 2003, case C-185/01, Auto Lease Holland, ruled on the VAT assessment of the service relationship in the case of supplies of fuel to those leasing motor vehicles. In the BMF guidance of 15 June 2004 - IV B 7 - S 7100 - 125/04, the tax authorities commented on this case law. This guidance contained criteria for the boundaries between chain transactions and financial services in the area of motor vehicle leasing.

In its ruling of 15 May 2019 C-235/18, Vega International Car Transport and Logistic, the CJEU addressed the VAT treatment of transactions in the fuel card business. In this respect, it has carried over the considerations underpinning its ruling of 6 February 2003, case C-185/01, Auto Lease Holland to the VAT treatment of the transactions at issue.

With reference to the results of discussions with the highest tax authorities in the states, the following applies:

The criteria contained in the BMF guidance of 15 June 2004 on the VAT treatment of supplies of fuel in the motor vehicle leasing business with regard to the boundary between chain transactions and financial services must also be applied to the VAT treatment of transactions in the fuel card business.

The VAT Application Decree will be amended accordingly.

The provisions of the BMF guidance must be used in all open cases.

BMF note in its guidance to the associations of 19 August 2024:
The guidelines of 22 September 2023 adopted by the VAT Committee on the VAT treatment of transactions in the fuel card business make it possible to continue to treat those transactions generally as being supplies within the context of a chain transaction. Against this background, the highest tax authorities of the federal government and the states agreed to carry on using the treatment set down in the BMF guidance of 15 July 2004 - IV B 7 – S 7100 – 125/04 for supplies of fuel in the area of motor vehicle leasing.

In addition, it must be clarified that the administrative view in this guidance also applies for the VAT treatment of transactions in the fuel card business.

IN BRIEF

Cut-off period for input VAT deductions

CJEU, ruling of 12 September 2024 – case C-429/23 – NARE BG

This ruling concerns the refusal of Bulgarian tax authorities to allow NARE-BG to exercise its right to deduct input VAT for transactions subject to VAT that were carried out before its registration for VAT. The CJEU did not object to a cut-off limit, regardless of the circumstance that, in connection with the COVID-19 pandemic, national measures for the extension of time limits for the declaration and remittance of certain taxes were issued, in which VAT was not included.

Reduction of the basis of assessment in the pharmaceutical industry

CJEU, ruling of 12 September 2024 – case C-248/23 – Novo Nordisk

According to the CJEU, Art. 90 of the VAT Directive precludes national legislation under which a pharmaceutical company that has an obligation to pay to the State health insurance agency a portion of the revenue it obtains from its sales of publicly funded pharmaceutical products, is not entitled to a subsequent reduction in the basis of assessment for tax, as those payments are made ex

lege, could be deducted from the basis of assessment for the taxpayer both for payments made as part of a price volume agreement and expenses incurred by the company for investments in research and development in the health sector, and the amount due collected by the tax authorities, which immediately transfers them to the State health insurance agency.

Please note:
The Court of Justice was asked to interpret whether certain payments prescribed by Hungarian law, which are calculated on the basis of the price of subsidized medicinal products, are to be treated as a price reduction or a tax. The ECJ held that a national provision which precludes a company's claim to a subsequent reduction in the taxable amount is not a provision which clearly, definitely and foreseeably establishes that the payment in question is due as a tax.

Adjustment of the input VAT deduction

CJEU, ruling of 12 September 2024 – case. C- 243/23 - Drebers

Art. 190 in conjunction with Art. 187 of the VAT Directive, interpreted in light of the principle of tax neutrality must be interpreted to mean:

1. that it precludes national legislation on the adjustment of VAT deductions under which the extended adjustment period laid down in accordance with Art. 187 for immovable property acquired as capital goods does not apply to construction works, subject to VAT as a supply of services within the meaning of the VAT Directive, which involve a significant extension and/or substantial renovation of the building related to the building works and the legal effects of which have an economic life corresponding to that of a new building.

2. that it has direct effect with the result that the taxable person may rely on it before the national court against the competent tax authorities in order to have the extended adjustment period laid down for immovable property acquired as capital goods applied to the construction works which were carried out for that taxable person, subject to VAT as a supply of services within the meaning of that directive, where those authorities have refused to apply the extended adjustment period to those goods by relying on national legislation such as that referred to in the first question.

Please note:
The CJEU had to decide whether the correction period for buildings of 15 years in the case in dispute or the regular correction period of 5 years should be applied for the input VAT correction in the case of construction work on land. This question is based on the fact that national law in Belgium assumes the application of the longer adjustment period only if conversion work on an existing building leads to a new building within the meaning of Art. 12 of the VAT Directive. If the construction work does not result in a new building in this sense, a five-year correction period is to be applied, although the depreciation period is 33 years. The CJEU therefore did not approve of the procedure in Belgium.

MISCELLANEOUS

VAT exemption of intra-Community supplies of goods

Hessen Lower Tax Court, ruling of 1 July 2024, 1 K 1247/21, appeal against denial of appeal (NZB) filed, BFH ref. V B 33/24

The ruling concerns the question of the protection of legitimate expectations pursuant to § 6a para. 4 UStG in the case of an intra-Community supply if the entry certificate is not returned by the customer in the event of collection

The case
In 2018, a tax advisor offered his car for sale using an online ad. A Romanian company reacted to this ad. The sale and collection of the vehicle took place on 20 July 2018. The purchase price of EUR 66,500 was paid in cash.

The document signed over with the sale/purchase agreement, which the tax advisor created, contained a reference, in line with § 14 (4) sent. 1 no. 8 UStG, to the VAT exemption of the supply of goods as an intra-Community supply in accordance with § 4 no. 1 (b) in conjunction with § 6a UStG. The VAT identification numbers of both the tax advisor and the purchaser were contained in the document.

In the purchase agreement, the purchaser's managing director undertook to export the vehicle to Romania and deregister the vehicle on 23 July 2018. Furthermore, the tax advisor provided the purchaser's managing director with a confirmation of arrival, which they were to send back to him following their arrival with the vehicle in Romania. The tax advisor reminded the purchaser to return the confirmation of arrival more than once. However, despite these requests, the confirmation of arrival was never provided by

the purchaser. Nevertheless, the tax advisor treated the transaction as exempt from VAT in his annual VAT declaration 2018.

As a result of a query from the Romanian tax authorities in January 2020, from which it also emerged that the purchaser had not declared an intra-Community purchase of the goods, the German tax authorities took up the case. Based on information from the central vehicle registry, the tax authorities learned the car was initially deregistered in accordance with the agreement, however on 1 August 2018 was again registered to a Romanian citizen in German, and on 22 August 2018 already deregistered again. After that, according to a EUCARIS query, the car was licensed in the Netherlands on 28 September 2018.

The tax authorities redesignated the VAT exempt intra-Community supply of goods as a transaction subject to VAT (EUR 55,882.35).

Ruling
The tax advisor's lawsuit was not successful. Due to a lack of proof by means of the confirmation of arrival or any other objective proof that the car arrived in Romania, the supply of the car was fundamentally subject to VAT. The tax advisor could ultimately not rely on the protection of legitimate expectation in accordance with § 6a (4) UStG. The trader may treat the supply as zero-rated for reasons of the protection of legitimate expectations only if he has complied with the existing requirements of the German VAT Operating Regulation on the documentary and accounting proofs of this kind. In this respect, it does not matter if the taxpayer can be subjectively accused.

To the extent the tax advisor claims that this legislation has been invalid since the introduction of the confirmation of arrival, as it is inevitable that the confirmation of arrival could not yet exist at the time the transaction is concluded, and at that point only the existence of good faith plays a role, this was not convincing.

It would have been possible for the tax advisor to effect the business in a legally watertight manner. The purchase agreement should have contained a passage stating that a VAT exemption only applies at the point in time at which a confirmation of arrival is provided. In the case of a payment in cash, the VAT could have been withheld as a deposit until the confirmation of arrival had been provided and then paid back. The invoice showing no VAT could have been issued after the supply of goods, as soon as the confirmation of arrival had been received.

Please note:
The single judge of the Hessian tax court came to the conclusion, without allowing an appeal, that protection of legitimate expectations in accordance with § 6a (4) UStG cannot be considered if the confirmation of receipt is not returned by the customer in collection cases. The supplier could demand the retention of a security if he wanted to sell conscientiously. This alternative of the tax court does not work because it ignores the context. In particular, the buyer of the goods must be taken into account. If, for example, an EU foreigner buys a car in Germany, they will not agree to pay a deposit to an unknown German dealer, but will look for the next dealer who sells the goods without a deposit because the risk is too great that they will not get the deposit amount back.

The retention of a deposit unilaterally shifts the risk from the state to the traders involved in the transaction, which should not be the purpose of a functioning regulation and is unlikely to be confirmed by the CJEU. The comments show that the case would not have been worth dismissing as a single-judge case without leave to appeal. It is to be hoped that the BFH will take up the matter and upholds the appeal against denial of leave to appeal because it recognizes the far-reaching consequences of the dispute for practice.

FROM AROUND THE WORLD

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

You can find these and further articles here.

13 Sep – Italy: VAT on transaction costs incurred by special purpose vehicle recoverable post merger

12 Sep – Saudi Arabia: Proposed amendments to VAT regulations, including expansion of VAT obligations of marketplaces

12 Sep – Spain: Implementation of corrective self-assessment in the field of VAT

12 Sep – Netherlands: Consultation on updated draft bill VAT adjustment on services to immovable property

12 Sep – Greece: Implementation of electronic delivery notes and digital tracking of goods shipment

4 Sept – Saudi Arabia: E-Invoicing requirement extended to 15th group of taxpayers from March 1, 2025

EVENTS

Cologne VAT Congress

on 5 and 6 December 2024 in Cologne

Topics:

- Current developments in VAT groups
- Electronic interfaces for those owing VAT - VAT law and criminal tax law related risks
- Impacts of customs law on (import) VAT - news from CJEU and BFH case law
- News in legislation and from the tax authorities
- Introduction of eInvoicing from 1 January 2025 in German and a look at the EU

You can find additional information and the registration form for this event here.

Webcast Live: Internal Compliance Program - Export control with a system

on 8 October 2024

Further information and the registration form for the event can be found here.

Contacts

KPMG AG
Wirtschaftsprüfungs-
gesellschaft

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Munich
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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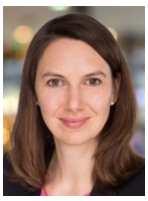
Imprint

Issuer***

KPMG AG
Wirtschaftsprüfungsgesellschaft
THE SQUAIRE, Am Flughafen
60549 Frankfurt/Main

*** Responsible according to German Law (§ 7 (2) Berliner PresseG)

Editor



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

Rainer Weymüller
Of-Counsel

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

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