KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

February 2025

LEGISLATION

Parliament gives green light to update VAT rules to make them fit for digital times
European Parliament, press release from February 12, 2025

The update will notably require that VAT be paid for services provided through online platforms, putting an end to an unfair distortion of competition. It will also fight VAT fraud.
On Wednesday, Parliament's plenary approved the changes to the rules that the Member States indicated in November they wished to make to the VAT Directive. MEPs voted in favor with 589 votes in favour, 42 against and 10 abstentions.

These changes will require that by 2030 online platforms must pay VAT for services provided through them in most of the cases where the individual service providers do not charge VAT. This will put an end to a distortion of the market because similar services provided in the traditional economy are already subject to VAT. This distortion has been most significant in the short-term accommodation rental sector and the road passenger transport sector. Member states will have the possibility of exempting SMEs from this rule, an idea which Parliament had also pushed.

The update will also fully digitalise VAT reporting obligations for cross-border transactions by 2030 with businesses issuing e-invoices for cross-border business-to-business transactions and automatically reporting the data to their tax administration. With this, tax authorities should be in a better position to tackle VAT fraud.

To simplify the administrative burden for businesses, the rules beef-up online VAT one-stop-shops so that even more businesses with cross-border activity will be able to meet their VAT obligations through a single online portal and in one language.

Background

This update to the VAT rules has been over two years in the making. On 8 December 2022, the Commission presented the 'VAT in the digital age' package (ViDA package) which consisted of three proposals. One of these was the update to the VAT directive of 2006.

The Commission has calculated that the Member States will will recoup up to €11 billion in lost VAT revenues every year for the next 10 years. Businesses will save €4.1 billion a year over the next 10 years in compliance costs, and €8.7 billion in registration and administrative costs over a ten-year period.

Content

NEWS FROM THE *CJEU*

Subsidies in local public transport

Opinion of the Advocate General of February 13, 2025 - Case C-615/23- P

The Advocate General deals with the question of how the subsidy of a taxable person by a local authority in the public interest is to be treated under VAT law. The question is whether the subsidy must be regarded as part of the consideration for the taxable person's supply to the grantor or its customers and is therefore subject to VAT.

Facts of the case

P. S.A., a public transport company, receives subsidies to cover losses which are not calculated according to the number of users but on a flat-rate basis according to the vehicle kilometers offered. The question is whether these subsidies must be included in the tax base.

From the Opinion

The VAT Directive and the Polish VAT Act regulate the taxable amount and the inclusion of subsidies in it. Article 73 of the VAT Directive states that the taxable amount includes everything that constitutes the value of the consideration, including subsidies directly related to the price.

The Advocate General states that not every state subsidy is to be regarded as a consideration relevant under VAT law. The decisive factor is whether the subsidy is directly linked to the price of the transactions. A subsidy that merely compensates for losses and has no influence on the price of the services provided does not constitute taxable consideration.

Art. 2 para. 1 lit. c and Art. 73 of the VAT Directive are to be interpreted to the effect that a subsequent compensation payment for financial losses, which is not based on the number of users but on the vehicle kilometers offered at a flat rate, does not constitute consideration for a service to the paying local authority. Such a compensation payment has no direct influence on the price calculation of the subsidized company and is therefore not subject to VAT.

Please note:
The present Opinion of the Advocate General touches on the often underestimated topic of grants, on which a BMF circular was issued on June 11, 2024 (BStBl. I 2024, 979). Payments under the term "grant" can either be remuneration for a service to the grantor (payer), additional remuneration from a third party or a genuine grant. The BMF circular stipulates that the distinction between a payment for a service to the payer and a non-taxable genuine grant must be made primarily according to the person receiving the grant and the objective of the grant.

In the case of grants, the decisive factor is whether a specific service is to be provided to the grantor or whether the activity of the grant recipient is not intended for the payer as the recipient of the service, whereby the purpose pursued by the payer serves as an indication (see BFH ruling of 18.11.2021 - V R 17/20, BStBl II 2024, 492).

Payments that are primarily granted to the payee to support them for structural, economic or general policy reasons are genuine grants. In its ruling of November 18, 2021, to which the BMF letter of June 11, 2024, refers, the BFH came to the assumption of a genuine and therefore non-taxable grant because the purpose pursued with the payments was decisive. The purpose of the payments was to promote the recipient's objectives in general and to enable them to carry out their charitable activities.

It remains to be seen whether the *CJEU* ruling in case C- 615/23 will provide further insights into the topic of subsidies.

NEWS FROM THE BFH

Margin-scheme in the used car trade

BFH, decision of December 11, 2024, XI R

According to the BFH ruling, it is at the expense of the taxable person who requests the application of margin-scheme taxation if the existence of the requirements of Section 25a of the VAT Act has not been proven and he has not taken all reasonable measures available to him to investigate irregularities in relation to his respective business partner.

Facts of the case

The plaintiff, a used car dealer, only reported sales for 2014 using the margin scheme in accordance with Section 25a UStG. During an external audit, the tax office discovered that the plaintiff had purchased 29 motor vehicles from alleged "private sellers" who were not identical to the last registered vehicle owners. In addition, the plaintiff provided false chassis numbers for 22 other motor

vehicles. The tax office partially denied the margin-scheme taxation and applied the standard taxation.

From the reasons for the decision

The Federal Fiscal Court (BFH) dismissed the plaintiff's appeal against the ruling of the Düsseldorf Fiscal Court (FG).

In accordance with Section 1 (1) No. 1 UStG, supplies of goods and services carried out by an entrepreneur in Germany are subject to VAT. A transaction shall be assessed according to the consideration (Section 10 (1) UStG, Art. 73 of the VAT Directive).

Pursuant to sec. 25a para. 1 UStG, the margin scheme applies to supplies of movable tangible goods if the conditions set out in sec. 25a para. 1 no. 1 to 3 UStG are met. The tax court found that the existence of the criteria of sec. 25a para. 1 no. 2 UStG remained unproven. The plaintiff could not prove that the sellers were actually private individuals, as in no case was the respective seller identical to the last owner of the vehicle. The tax court correctly assumed that it is to the detriment of the plaintiff if the existence of the constituent elements remains unproven and he has not taken all reasonable measures to investigate irregularities.

The *CJEU* only protects the good faith of the taxpayer if he has taken all reasonable measures to ensure that he is not involved in tax evasion. In the case in dispute, the claimant was unable to prove that he had acted in good faith. The tax court found that the plaintiff entered into one-off business relationships with unknown persons for the purchases and that the last owner of the vehicle was not the same as the seller. The plaintiff should at least have had the power of attorney to sell presented to him. Any reliance by the plaintiff on the fact that the seller was a small business owner or entrepreneur who had applied the margin scheme was not based on the contracts for private sales. The fulfillment of the record-keeping obligations pursuant to § 25a para. 6 UStG does not replace the proof of the elements of margine-scheme taxation.

The BFH therefore came to the conclusion that the tax office had rightly subjected the transactions in question to standard taxation.

Please note:
The legal basis for the margin scheme is Art. 311 et seq. of the VAT Directive. According to Art. 313 para. 1 of the VAT Directive, Member States shall apply a special scheme for the taxation of the margin obtained by the taxable dealer to the supply of second-hand goods, works of art, collectors' items and antiques by taxable dealers. According to Art. 311 Para. 1 No. 1 of the VAT Directive, second-hand goods are movable tangible property other than works of art, collectors' items or antiques and other than precious metals or precious stones as defined by the Member States and which is suitable for further use in their current condition or after repair. According to Art. 311 Para. 1 No. 5 of the VAT Directive, a taxable dealer is any taxable person who, in the course of his business activity, purchases, applies for the purpose of his business or imports second-hand goods, works of art, collectors' items or antiques with a view toresale, irrespective of whether he acts on his own account or on the basis of a purchase or sales commission contract for the account of a third party.

According to previous case law (BFH ruling of April 23, 2009 V R 52/07), it was still assumed that Section 25a UStG does not protect the buyer's trust in the seller's information. The *CJEU* (judgment of May 18, 2017, C-624/15, Litdana) did not follow this view. While the Federal Fiscal Court denied the purchaser margin-scheme taxation in the case of an invoice from the upstream supplier that did not meet the requirements of Art. 314 of the VAT Directive, the *CJEU* granted an acquiring reseller the option of margin-scheme taxation in 2017, even if the invoice was contradictory in itself and referred both to a tax exemption (as an intra-Community supply) and to Margin-scheme taxation being carried out, provided that the acquiring reseller was only acting in good faith. The Federal Fiscal Court has now complied with the *CJEU* case law with its present ruling of December 11, 2024; remarkably, the administration did not mention the *CJEU* ruling of 2017 in the UStAE and thus did not provide any indications of protection of legitimate expectations with regard to Section 25a UStG.

In contrast, the BFH now expressly states that, in certain cases, there can also be a protection of legitimate expectations with regard to sec. 25a of the German VAT Act. However, in the case in dispute, it leaves it open whether the protection of legitimate expectations is to be granted in the assessment procedure or in the assessments on grounds of equity , as the requirements for this were not met on the merits.

In practice, it is important to note that a protection of legitimate expectations may also be possible in

the case of sec. 25a of the German VAT Act.

VAT assessment basis in the case of criminal confiscation of proceeds of crime

BFH, judgment of September 25, 2024, XI R 6/23

In the present ruling, the BFH commented on the VAT assessment basis in the case of criminal confiscation of proceeds of crime.

Facts of the case

The plaintiff, a graduate engineer, worked in the real estate sector and was convicted of bribery and tax evasion. In the context of the criminal confiscation of bribes, the question arose as to whether the payments made to the state justice fund reduced the VAT assessment basis.

From the reasons for the decision

The BFH ruled that the VAT assessment basis in the case of the criminal confiscation of proceeds of crime should be reduced to the amount reduced by the confiscated amounts by means of a teleological reduction of sec. 10 para. 1 sentence 1 UStG.

Please note:
The decision dealt with the question of whether the criminal asset recovery of bribes should be taken into account when assessing VAT. The question to be clarified was whether, in the case of a criminal asset recovery, an (analogous) application of the correction mechanism pursuant to sec. 17 para. 1 German VAT Act (UStG) could be considered in the event of a subsequent reduction in consideration.

The plaintiff was of the opinion that he no longer had to pay tax on the bribes received due to the repayment. The tax court ruled that a reduction in the taxable amount due to a reversal of the mutual exchange relationship between the supplier and the recipient, however this may occur, is only provided for in the cases stipulated by law in Section 17 UStG. The plaintiff's payment to the state treasury did not affect the consideration for his services to the contractors. The BFH took a different view and referred the dispute back to the tax court for further clarification.

A reduction of the assessment basis is required under EU and constitutional law, as otherwise the principle of equal treatment (Art. 3 Para. 1 of the German Basic Law, Art. 20 of the Charter of Fundamental Rights of the European Union) would be violated, as according to the case law of the Federal Constitutional Court, the offender must not be doubly burdened by asset recovery and taxation (see BVerfG decision of January 23, 1990 - 1 BvL 4-7/87; see also BFH ruling of May 14, 2014 - X R 23/12). The plaintiff had received monetary benefits for the commissioning of a specific engineering firm. The amounts received were the "consideration" within the meaning of sec. 10 para. 1 sentence 1 UStG for the taxable supply of the claimant. In accordance with the case law of the BVerfG on the criminal law skimming off of compensation in income tax law and the case law of the *CJEU* on Art. 73, 90 of the VAT Directive, the taxable amount was to be reduced by the amount successfully collected by way of an interpretation of §§ 10 para. 1 sentence 1, 17 para. 1 sentence 1 UStG in conformity with EU law. The tax court would only have to examine whether the payments made were actually for amounts within the meaning of Section 73 StGB.

NEWS FROM THE BMF

Barter-like transactions in the waste disposal sector

BMF, letter dated January 15, 2025 - III C 2 - S 7119/00004/002/027

The following applies to a barter-like transaction in the waste disposal industry:

Principles of the BFH ruling of April 18, 2024, V R 7/22

A barter or barter-like transaction exists if there is a legal relationship between the entrepreneur and the recipient of the service that establishes a direct connection between the service and the remuneration, so that the consideration is to be regarded as the equivalent value for the service and the consideration consists of a supply of goods or a supply of service by the recipient of the service.

In its ruling of April 18, 2024, V R 7/22, the BFH decided that a waste disposal service provided by the entrepreneur only exists if an entrepreneur takes over hazardous waste for the sole purpose of statutory prescribed disposal in accordance with a recovery process for the reclamation/regeneration of waste specified in Annex 2 of the German Closed Substance Cycle Waste Management Act.

The waste owner must provide a service or delivery to the waste disposal company in order for a barter-like transaction to be assumed. The assumption of a barter-like transaction is out of the

question due to the lack of delivery of the hazardous waste to the entrepreneur. The transfer of the contaminated chemicals does not constitute a supply to the waste disposal company. This is not altered by the fact that the entrepreneur takes into account a possible sales price of materials that he can obtain and resell through the subsequent recycling of the hazardous waste as a discount in favor of the customer.

Please note:
With its present decision, to which the BMF letter refers, the BFH has somewhat restricted the barter - like transaction in certain cases of waste disposal. If an entrepreneur takes over hazardous waste in accordance with a statutory prescribed procedure for the recovery of waste, this merely constitutes a disposal service provided by the entrepreneur. The VAT application decree has been amended accordingly. The principles of the BMF letter are to be applied in all open cases.

NEWS FROM THE FINANCIAL COURTS

VAT and the competing relationship between tax exemption regulations for input VAT deduction

Lower Saxony tax court, judgment of November 14, 2024, 5 K 17/24; case reference of the Federal Fiscal Court: XI R 33/24

If the conditions for both the tax exemption under sec. 4 no. 19 letter b UStG (workshops for the blind) and for an intra-Community supply under sec. 4 no. 1 letter b UStG are met, the tax exemption under sec. 4 no. 1 letter b UStG takes precedence in the opinion of the tax court. This does not exclude the input tax deduction pursuant to sec. 15 para. 3 no. 1 lit. a UStG.

Facts of the case

The claimant, owner of a recognized workshop for the blind, supplied goods for the blind to Austria and declared these as VAT-exempt intra-Community supplies. The tax office denied the input VAT deduction as it considered the VAT exemption under Section 4 no. 19 letter b UStG to take precedence. The plaintiff lodged an appeal and argued that the intra-Community supply took precedence and did not exclude the input VAT deduction.

From the reasons for the decision

The principles of the BFH ruling of 22 August 2013 V R 30/12 (on the supply of blood plasma from Germany to the rest of the Community) and the *CJEU* ruling of 7 December 2006 C-240/05 (Eurodental; on the supply of dental prostheses by a Luxembourg company to dentists based in Germany) are not transferable to the present dispute in the opinion of the tax court, as they relate to specific, harmonized tax exemptions.

§ Section 4 no. 19 UStG is a non-harmonized, national regulation. Union law does not provide for a tax exemption for workshops for the blind but allows it under Art. 371 of the VAT Directive as a transitional provision, since the tax exemption was already enshrined in the German VAT Act on January 1, 1978.

There is no legislative will that gives § 4 no. 19 letter b UStG priority over § 4 no. 1 letter b UStG and thus excludes the input tax deduction.

The genuine tax exemption pursuant to § Section 4 no. 1 letter bUStG has priority in order to avoid multiple VAT charges that are contrary to the system.

The priority application of the genuine tax exemption avoids multiple taxation and shifts taxation to the Member State of destination.

An appeal has been lodged (case reference of the BFH: XI R 33/24).

Please note:
It is astonishing that the provision (§ 4 No. 19 UStG) has not yet led to a legal dispute involving the issue at hand since its introduction in 1967. This is the question of whether a workshop for the blind can claim tax exemption for intra-Community supplies. If the answer is yes, this also leads to an input tax deduction for the relevant input supplies. On the other hand, one can also find reasons for the opposite opinion (such as the administration in sec. 4.19.2 para. 3 UStAE, sec. 6a.1 para. 2a UStAE and sec. 15.13 para. 5 UStAE), according to which sec. 4 no. 19 UStG as a special provision takes precedence over the exemption for intra-Community supplies. The Lower Saxony tax court found good reasons for not treating a workshop for the blind less favorably than other companies. This is because such a view is not associated with a distortion of competition, but with equal treatment of all companies. The reference to the option under Section 9 (1) UStG does not change this.

OTHER

European Commission - Infringement proceedings

The European Commission has decided to send a letter of formal notice (the first stage of an infringement procedure) to Bulgaria, Cyprus, Greece, Ireland, Lithuania, Portugal, Romania and Spain for failure to transpose the amending directive to the VAT Directive (2020/285) on the special VAT scheme for small enterprises (SMEs). The infringement proceedings were initiated because the Member States concerned did not transpose the directive into national law by December 31, 2024.

Validity of certificates for the purposes of tax exemption pursuant to Section 4 no. 21 UStG

LfSt Bavaria, ruling dated January 17, 2025 - S 7179.1.1.-21/4 St33

With effect from January 1, 2025, the Annual Tax Act 2024 adapted the tax exemption for educational services in Section 4 no. 21 UStG to the EU legal requirements of Art. 132 para. 1 letters i and j of the VAT Directive. With this amendment to the law, the previously VAT-exempt services are to remain VAT-exempt.

The tax exemption in Section 4 no. 21 letter a double letter bb UStG for services provided by institutions still requires a certificate from the competent state authority. Under the old law, the content of the certificate was the proper preparation for a profession or for an examination to be taken before a legal entity under public law.

Under current law, however, the content of the certificate should be the provision of school education, higher education, training, further education or vocational retraining.

According to BayLFSt, the certificates issued before the Annual Tax Act 2024 came into force in accordance with Section 4 no. 21 letter a double letter bb UStG should continue to meet the requirements of Section 4 no. 21 sentence 1 letter a double letter bb UStG, which will apply from January 1, 2025, even after December 31, 2024 and will continue to be valid until the expiry of any validity period or any revocation. It is therefore generally not necessary for educational institutions to apply for a new certificate as of January 1, 2025.

Note
A detailed BMF circular on this topic is expected soon.

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29 Jan - Hungary: Mandatory e-invoicing for energy sector postponed to July 1, 2025

29 Jan - Hungary: Stricter import VAT deduction requirements effective March 2025

23 Jan - Poland: EU council approves extension of split payment mechanism

23 Jan - Slovakia: Guide on new VAT rates for energy supplies effective January 1, 2025

23 Jan - Philippines: Application of VAT on digital services

22 Jan - Italy: Budget law introduces new VAT reverse charge mechanism for logistics sector

16 Jan - UAE: VAT exemption does not apply to cryptocurrency mining

15 Jan - Czech Republic: Amendments in VAT law 2025

EVENTS

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on May 22, 2025

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Contacts

KPMG AG
Auditing
company

Head of Indirect Tax Services
Kathrin Feil
Munich
T +49 89 9282-1555
kfeil@kpmg.com

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

Bielefeld
Linda Barth
T +49 5219631-1035
lindabarth@kpmg.com

Düsseldorf
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 am 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 9587-1278
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

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

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

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

Minster
Jonathan Eßer*
T +49 25159684-8983
jonathanesser@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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Niklas Sattler
T +49 711-9060-41196
nsattler@kpmg.com

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Publisher

KPMG AG
Auditing company
THE SQUAIRE, At the airport
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Editorial office

Dr. Oliver Buttenhauser (V.i.S.d.P.)
T +49 911 5973-3176
obuttenhauser@kpmg.com

Rainer Weymüller
Of-Counsel

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

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