March 2014

NEWS FROM THE CJEU

Denial of input tax deduction in cases of tax evasion in the supply chain

CJEU, ruling of 13 February 2014 – case C-18/13 – Maks Pen EOOD

With this present ruling, the Court of Justice of the European Union (CJEU) has confirmed and enhanced its previous rulings on the denial of input tax deduction where there is a connection to tax evasion.

The case

Maks Pen EOOD is a company incorporated under Bulgarian law. It conducts wholesale business with office and advertising materials. It is in dispute as to whether there is a right to input tax deduction for services invoiced. These services were indeed supplied, but they were not supplied by the suppliers and subcontractors stated in the invoices. Maks Pen EOOD claimed that it had proper invoices and contracts. It further stated that the invoices had been paid by regular bank transactions and had moreover been entered into the books of the suppliers. Therefore, the proof that the services in question had indeed been provided was established and, apart from that, it was not denied that Marks Pen EOOD had used the input services for the subsequent output transactions.

Ruling

The CJEU first comments that the services supplied in the main proceedings to Maks Pen EOOD were indeed not supplied by the suppliers or his subcontractors stated in the invoices since they did not have the staff and material or assets. The costs of their supplies were not documented in their books, and/or the signature of the supplying persons on certain documents turned out to have been falsified. According to the CJEU, these facts taken alone are insufficient to rule out the application of the right to input tax deduction by Maks Pen EOOD.

With this, the CJEU confirms its now settled CJEU case law according to which the input tax deduction is not solely denied in cases of tax evasion by the recipient of the supply. Further, the right to deduct input tax must be denied if the recipient of the supply knew, or ought to have known, that in making his purchase he was participating in a transaction involved in tax evasion (see e. g. ruling from 6 December 2012 – case C-285/11 – Bonik, VAT Newsletter February 2013).

The CJEU emphasizes that, in accordance with the national rules of evidence, the national court is obliged to conduct a comprehensive examination as to whether these objective circumstances of the involvement in a tax evasion are given. By applying all methods of interpretation permitted by the national law, the court must do its utmost to allow for an examination of the denial of input tax deduction. This even applies if the detection of the tax evasion as criminal act is subject to the criminal jurisdiction.

Furthermore, the CJEU comments on Art. 242 of the VAT Directive, according to which every taxpayer is obliged to keep records, which are detailed to the extent that the application of the VAT and its review by the tax authorities is provided for. Although the Member States may, in general, align themselves on the international accounting standards, the formal obligation to

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keep records imposed insofar may not result in undermining the substantial VAT law. Therefore, a national legislation is not permitted according to which a service is deemed to have been performed at a point in time at which its returns may be recognized in compliance with the applicable accounting rules.

Please note:
Since the denial of input tax deduction is an exception to the fundamental principle of the right to input tax deduction, according to the CJEU the competent tax authorities are obliged to establish, to the legal standard, the objective evidence that there was a connection to tax evasion. It is for the competent national courts to check whether the relevant tax authorities have fulfilled these duties. Ultimately, the tax authorities retain the burden of proof as to when the case remains unsolved despite the comprehensive clarification required by the CJEU. In its guidance from 7 February 2014, the German Ministry of Finance (BMF) has also commented on the denial of input tax deduction in cases where there is a connection to tax evasion. It wants to shift the burden of proof to the taxpayer (see item in this Newsletter).

NEWS FROM THE BFH

Restriction of pre-financing obligation for standard VAT accounting

BFH, ruling of 24 October 2013 – V R 31/12

The ruling considers the issue of whether as part of standard VAT accounting – in contrast to cash accounting – a business is obliged to provide pre-financing of VAT over a number of years.

In principle, businesses must pay tax on their supplies by the end of the accounting period in which the supplies were provided, even if they are yet to receive consideration for such supplies (standard VAT accounting). If a pre-payment or advance payment is made before the supply has taken place (in full), tax falls due at an earlier point in time (restricted cash accounting).

By contrast, smaller businesses and businesses that are not obliged to prepare a balance sheet, such as freelancers, are entitled to pay tax after they have received consideration. Irrespective of the time of the supply, the tax liability does not arise until the end of the accounting period in which full or partial consideration has been received (cash accounting).

The case

A limited partnership (GmbH & Co. KG) operates in the field of surface technology and is subject to standard VAT accounting. The matter at issue was whether the security deposits made by its clients to cover any potential construction defects constituted consideration that is subject to tax at the time of supply. Security deposits amounted to 5 to 10 % of the order total as a security for warranty periods of two to five years. The Financial Court declined a correction on the grounds of uncollectability in accordance with § 17 (2) no. 1 of German VAT Law (UStG) holding that uncollectability is only to be assumed if a specific complaint is lodged, which was not the case in the matter at hand. It went on to explain that under the agreements entered into, the limited partnership was at least entitled to collect the full consideration having assumed the warranty guarantees. The Financial Court did not make any statements as to whether it was possible for the limited partnership to provide such guarantees.

The ruling

The German Federal Tax Court (BFH) found that the limited partnership is entitled to correct the tax claim relating to the supplies if the agreed consideration is not collectible (§ 17 (2) no. 1 UStG). An amount is deemed to be uncollectible if, when viewed objectively, it can be anticipated that the supplier cannot, whether in law or in fact, recover the consideration (wholly or in part) within the foreseeable future. The BFH stated that if the business is unable to collect consideration for its supplies for a period of two to five years due to reasons that existed at the time of the supply in question, it must be assumed that such amounts are uncollectible.

The BFH believes that pre-financing VAT across a period of several years is not compatible with the principle of equality with respect to the taxation of businesses that are subject to cash accounting. Furthermore, the BFH refers to the business's duty as a collector of taxes to collect public funds on behalf of the State. In this regard, the obligation to pre-finance VAT across a number of years would be disproportionate. The BFH also states that if amounts are assumed to be uncollectible due to circumstances that were in place at the time of the supply, this would lead to a correction for the accounting period in which the supply was made. According to the BFH, this does not breach the legislative framework specified in Art. 90 (1) of the VAT Directive. To the extent that it is then necessary to allow for a correction "after the supply takes place", according to the BFH, it is sufficient if an amount is deemed to be uncollectible after the supply has been made because no guarantee can be provided. The Financial Court is to examine this on second review.

Please note:
The BFH expressly left open whether the principles that it put in place to restrict pre-financing are to apply to other cases, such as supplies of goods made under lease arrangements. In the case of installment sales, successive tax liabilities may conceivably arise. In this respect there is still the issue of whether this would not apply until a certain period has passed, for example, two years. If an amount is uncollectible, this also has an impact on the input tax deduction of the recipient, which is

accordingly reduced. If an amount is deemed to be uncollectible but then is subsequently paid, the tax amount and the input tax deduction of the recipient must be readjusted for this later accounting period (§ 17 (2) no. 1 sent. 2 UStG).

Requirements for a separate, VAT exempt loan

BFH, ruling of 13 November 2013, XI R 24/11

In its ruling the German Federal Tax Court (BFH) has commented on the financial service of companies within the scope of a public private partnership project (PPP project) which is a contractual collaboration between the public sector and private companies bringing in resources needed to realize a project.

The case
Within the scope of a PPP project, a business was involved in the renovation of a student residence. Thereby, the Association for Student Affairs was not to legally act as a building contractor and take out a credit loan. Against a one-off payment, the business as a works concessionaire received the sole right to use the residence in form of a usufruct for 20 years. However, it was obliged to renovate the student residence, to ensure the financing for the project, and to rent the property to the Association for Student Affairs for the full duration of the contract. After the renovation, the total funding was determined on the basis of the fixed construction costs and funding terms which in turn formed the basis for the calculation of the monthly rent. In doing so, it was assumed that the rent contained a VAT exempt financing proportion pursuant to § 4 No. 8 a) UStG. It was not disputed that the business supplied a taxable work and material supply. However, the tax authorities took the view that the financing proportion as consideration was also subject to VAT.

Ruling
The BFH did not object to the assessment of the Finance Court, according to which there was a separate financial service. The Financial Court referred to the separate regulation of the rent, which may be derived from the building costs, and the separate rent calculation substantial for the financial shares. The contracting parties had clearly stated, with the express regulation of the VAT exemption for the financing proportion, that the financing was aimed to be a separate supply. Only if the financing service was separate, a tax exemption could be considered at all. For the Association for Student Affairs, the pre-financing of the construction work has had the own significant purpose of avoiding raising of credit, which would have been necessary otherwise. From the point of view of an average consumer, granting a credit for consideration for work and material supply up to the last payment after 20 years is of special importance. He could not assume that the supplier granted him such timeframes for the payment of the agreed consideration without claiming any interest of any kind.

Given the circumstances of the individual cases, if the granting of the credit for consideration for work and material supply is to be assessed as a separate supply, then contrary to the section 3.11 (2) sent. 2 no. 2 of the German VAT Application Decree (UStAE), no dependence may exist on whether a numerically fixed annual interest is stated in the concluded agreement on the granting of credit. In addition, in the dispute, the amount of the interest rate and the final determination of the interest could be assessed specifically enough.

Please note:
If supplies of goods and/or services are offered to clients as an overall package, usually each supply contained therein is to be considered as a separate supply. However, this does not apply if the supplies are not independent from each other and therefore need to be considered as a single supply, which is the case when several elements form an inseparable, economically single supply or when a principal supply is supplemented. The decisive factor for the assessment is an overall consideration from the point of view of the average consumer. The pure subjective view of the contracting parties is irrelevant (cf. BFH, ruling of 4 March 2011, V B 51/10).

Higher VAT rate under EU law – effect on the input tax deduction

BFH, ruling of 24 October 2013, V R 17/13

The BFH ruling concerns the question whether a business may rely on the EU law within the scope of the right to input tax deduction if the tax due and invoiced is higher than under the national law.

The case
The claimant purchased a show jumper. The supply was subject to the reduced tax rate (§ 12 (2) no. 1 UStG in conjunction with Annex 2 no. 1 (a) in the version applicable in the case year). Nevertheless, the seller calculated the VAT in accordance with the standard VAT rate in compliance with the EU law.

Although the Member States have the right to adopt a reduced VAT rate for the supply of living animals (Art. 98 of the VAT Directive in conjunction with Annex III No. 1 of this Directive), this Article is only partially applicable pursuant to the CJEU ruling of 12 May 2011 (case C-453/09 – Commission/Germany). A reduced VAT rate may only be applied for animals, which are usually or generally intended to enter the human or animal food chain. Show jumpers are therefore excluded from the reduced VAT rate.

The claimant applied the input tax deduction in the amount of the standard VAT rate arising from the purchase of the

show jumper. However, the tax authorities recognized the input tax deduction only on the basis of the reduced VAT rate. It argued that only the VAT due by law may be deducted as input tax within the meaning of § 15 (1) sent. 1 no. 1 UStG, which is subject to national law.

Also the Finance Court confirmed that the input tax deduction may only apply on the basis of a reduced VAT rate. The Finance Court argued that the regulation of the VAT Directive regarding the application of reduced VAT rates only affects the tax law relation between the supplier and its tax authority. The recipient of the supplier was not involved in this tax law relation. The claimant could therefore not rely on the EU law. He could also neither claim that the supplier relied on the EU law, as the national law was more favorable for the supplier than the EU law.

Ruling
The BFH considered the appeal lodged by the claimant as well-founded. Whether the VAT due by law is within the meaning of § 15 (1) sent. 1 no. 1 UStG, has to be determined by taking into account the EU law. A taxpayer may rely on the primacy of the provision of the EU law if the tax he is liable for under the national law is thereby reduced. This also comes into question if a reduced VAT rate for a supply applies under the national law while a standard VAT rate applies under the EU law. If the recipient of the supply entitled to input tax deduction may exercise his right to a higher input tax deduction in accordance with the standard VAT rate more favorable for him – provided the additional requirements, such as a proper invoice, are fulfilled – the tax he is liable for is thereby reduced.

The legal consequences of the primacy of the provision relied upon by the claimant are limited to himself. Therefore, they only affect the taxation of the supplier when he could claim the primacy of the provision. However, the primacy of the provision may not lead to a reduced VAT given the relation of the case.

Please note:
In the present case, the recipient of the supply was entitled to rely on the primacy of the provision of the EU law in favor of a higher input tax deduction, because this resulted in a lower VAT liability. On the other hand, the supplier may also rely on the primacy of the provision of the EU law if his VAT liability may be reduced by a lower taxation of his output transactions. In particular, this may be taken into consideration for VAT exempt transactions such as those of professional gaming machine operators before 6 May 2006. The supplier may even retrospectively rely on this primacy and thereby create an event with retroactive effect (§ 175 (1) sent. 1 no. 2 of the General Tax Code (AO)) which is to the disadvantage of the recipient of the supply, who loses the right to input tax deduction within the assessment period (cf. BFH ruling of 24 April 2013, XI R 9/11). Only in exceptional cases it is possible to rely on a lower VAT rate under the EU law, because the Member States have a right to choose to introduce a reduced VAT rate, but must consider the principle of neutrality for the specific arrangement and impose equal taxes to equal supplies. The CJEU recently addressed the different treatment of the reduced VAT for local passenger transport services (taxis vs. rental cars) in its ruling of 27 February 2014 (case C-454/12 – Pro Med Logistik GmbH; case C-455/12 – Pongratz) – regarding reference of the BFH see VAT Newsletter November 2012. We will present the CJEU ruling in our next Newsletter.

In the present case, the supplier did not correct his invoice for the period in question. For this reason, the BFH did not have to comment on whether a higher VAT statement under the EU law leads to an incorrect VAT statement within the meaning of § 14c (1) UStG which has to be corrected for the recipient of the supply in order to reduce the own tax amount he is liable for. In practice, the question also arises whether, and possibly how, a repayment of (or an obligation to repay) the amount paid in excess by the recipient of the supply will affect the legal situation in terms of VAT. Therefore, the parties involved should try to address these questions when drawing up the contract by including tax-related clauses.

NEWS FROM THE BMF

Supply and input tax deduction in cases of fraud by the supplier

BMF, guidance of 7 February 2014 – IV D 2 – S 7100/12/10003

In its guidance of 7 February 2014, the BMF commented on the facts in case of a supply with the intention to commit fraud and on the right to input tax deduction of the recipient of the supply.

Supply with the intention to commit fraud
The BMF follows the ruling of the BFH of 8 September 2011, V R 43/10 according to which a supply is also possible in cases where the supplier intends to commit fraud. According to the BFH, the fact that the supplier is not the owner of the supplied good by civil law and further intends to supply the already supplied item again to another purchaser does not preclude the provision of the power of disposition. The ruling of the BFH will now be published in the Federal Tax Gazette (Bundessteuerblatt) and Section 3.1 (2) UStAE will be amended accordingly.

Input tax deduction of the recipient of the supply
Furthermore, the BMF addresses the question regarding the right to input tax deduction of the recipient of the supply when the supplier has delivered the goods fraudulently. In such a case the right to input tax deduction of the recipient of the supply should only be permissible in exceptional

cases after the specific case has been examined. The comments of the BMF do not result in changing or amending the UStAE.

According to the BMF, the business seeking to deduct the input tax should also have the burden of proof for the knowledge or possible knowledge about the upstream supplier's plan of action. If the tax authority establishes substantiated, objective evidence according to which the business knew, or ought to have known, that the transaction was involved in fraud committed by the supplier or by another trader, it is for the business to refute it. In doing so, it has to rebut the findings of the tax authority by providing substantiated arguments and evidence. As a result, it has to prove that it has taken all measures, which may reasonably be required from it, to ensure that its transactions do not involve any fraud (whether VAT evasion or any other fraud).

The measures to be taken by the recipient of the supply shall particularly include a documented confirmation of the entrepreneur status of the supplier. In addition, if the device ID usually passed on in the supply chain has not been recorded this may be an indication that the supply may not have been executed. Moreover, if the ID has not been recorded, this may be an indication that a party is knowingly being included into a VAT or another kind of fraud. Whether the business in question ought to know or should have known about the fraud, it is considered to be equal to actually know about it.

Please note:
The right to input tax deduction is denied if the taxpayer knew, or ought to have known, that the input transaction into a supply chain was connected to a tax evasion. It is for the tax authorities to establish, to the requisite legal standard, the objective evidence (cf. CJEU ruling of 6 December 2012 – case C-285/11 – Bonik EOOD, see VAT Newsletter February 2013). In principle, the BMF seems to assume this requirement to provide evidence too. However, this also means that the tax authorities ultimately retain the burden of proof when a business has supplied evidence to rebut the substantiated proof by the tax authority and the facts remain unsolved despite comprehensive obtaining of evidence (see CJEU ruling of 13 February 2014 – case C-18/13 – Maks Pen EOOD, presented in this Newsletter).

According to the BMF, the measures to be taken by the recipient of the supply shall particularly include a documented confirmation of the entrepreneur status of the supplier. In contrast, according to the case-law of the CJEU (ruling of 21 June 2012 – case C-80/11 and C-142/11 – Mahagében Kft. and Péter Dávid, VAT Newsletter August/September 2012) it has to be distinguished whether there are any indications for irregularities or tax evasion. The tax authorities must therefore – at least according to the understanding of the CJEU – provide evidence that the business should have taken measures due to specific given indications, but in fact did not take them. Possibly, the wording of the BMF ruling goes too far in this respect.

Adjustment payments upon termination of lease arrangements

BMF, guidance of 6 February 2014 – IV D 2 – S 7100/07/10007

In its guidance of 6 February 2014, the BMF expressed its position on the VAT treatment of adjustment payments upon the termination of lease arrangements.

If under the lease agreement, the lessee must subsequently pay an end-of-lease payment for any damages to the leased item caused by non-contractual use, this payment constitutes – to counter the line taken to date by the authorities – compensation to the leasing company and is therefore not subject to VAT. As such, the BMF is aligning itself with the BFH's view of the law of 20 March 2013, XI R 6/11 as well as the civil courts' view of the law (see VAT Newsletter August 2013).

The BFH was not required to express a position regarding how, from a VAT perspective, to treat adjustment payments that are structured so that claims arising from the lease arrangement are to be adjusted by the leasing company in line with the actual use of the leased item up to now. The BMF stated that the following cases are not deemed to be compensation:

- excess or unused kilometer agreements under vehicle lease arrangements. Excess kilometres represent an additional consideration and unused kilometres a reduced consideration,
- payments to adjust for differences in residual values in lease agreements containing a residual value adjustment; and
- usage payments if the leased item is not returned on time.

The rules laid down in the BMF guidance must be applied in all pending cases. In this respect, the statements in the BMF guidance dated 22 May 2008 no longer apply. No objections are to be raised for lease agreements that end before 1 July 2014 if the contracting parties, when paying an end-of-lease payment, have invoiced a taxable supply.

Please note:
The BMF guidance contains not only statements on the VAT treatment of the end-of-lease payment, but also on other adjustment payments upon termination of the lease agreement. In this regard, for example, payments to adjust for differences in residual values in lease agreements containing a residual value adjustment are not deemed to represent compensation. To date, the BFH

has not been required to express its position on this matter. The civil courts have thus far viewed this differently, meaning that an appeal is pending at the Federal Court of Justice under ref. no. VIII ZR 241/13. While the Higher District Court (OLG) of Düsseldorf (ruling of 4 June 2013, 24 U 148/12) found that such payments are not subject to tax, the OLG of Hamm (ruling of 29 May 2013, I-30 U 166/12) and the OLG of Saarbrücken (ruling of 10 July 2013, 2 U 35/13) ruled the opposite.

Tax liability of the recipient of construction work and building cleaning services

BMF guidance of 5 February 2014 – IV D 3 – S7279/11/10002

In its guidance of 5 February 2014, the BMF expressed its position on the impact of the BFH ruling of 22 August 2013, V R 37/10, see VAT Newsletter from December 2013.

Tax liability of the recipient of construction services
If construction services are performed by a business domiciled in Germany, the recipient has a tax liability if it is a business and itself performs construction services (§ 13b (5) sent. 2 in conjunction with (2) no. 4 UStG). Section 13b.3 (1) UStAE previously specified that the recipient of the supply must perform or have performed such construction services over a sustained period of time. Instead of that, it is now the case that the recipient of the supply must make use of the construction service provided to it to supply such a service. It does not depend on the proportion of the construction services performed by the recipient in relation to the total taxable revenues generated by the recipient (in contrast to the previous section 13b.3 (2) UStAE).

Pursuant to the newly formulated section 13b.3 (2) UStAE, the business supplying the service is free to proof fulfillment using all appropriate receipts and forms of evidence. These forms of evidence must show that the recipient is a business that has made use of the construction service supplied to it to supply such a service for its part. If, at the time the construction work is performed, the recipient provides the business performing the work with a valid certificate of exemption pursuant to § 48b Income Tax Law (EStG) expressly for VAT purposes for this work, this has the following consequence: The certificate of exemption is deemed to be an indication that the recipient is to use the service supplied to it, in turn, for construction work. The deletion of Section 13b.3 (3) to (5) means there is no further impact of the certificate of exemption.

Sections 13b.3 (6) and (7) UStAE on the participation of work groups (ARGE) and VAT groups have been amended in line with the principles set out above. In contrast to the previous section 13b.3 (8) UStAE, no tax liability arises for property developers with respect to the construction services supplied to them pursuant to § 13b UStG. The recipient of the supply only has a tax liability if it uses the construction services supplied to it to directly provide its own construction services. This, for example, is not the case if a construction company assigns a business to install a heating system in its office buildings. Section 13b.3 (10) UStAE has been amended accordingly.

If a recipient applied the tax liability for construction services for a supply that it has received, although the requirements in this regard were questionable or it would subsequently emerge that the requirements for this were not in place, simplification rules for construction services would have applied under the previous section 13b.8 UStAE. As such, no objections could be raised against this treatment for those making and receiving the supply if both contracting partners agreed on the application of § 13b UStG and the revenues of the recipient were adequately taxed. These simplification rules no longer apply.

Liability of the recipient of building cleaning services
According to the BMF, the decision of the BFH has an impact not only on the tax liability of the recipient of the supply of construction services, but also directly on the tax liability of the recipient of the supply of services related to the cleaning of buildings and parts of buildings (§ 13b (5) sent. 5 in conjunction with (2) no. 8 UStG). In this respect, the BMF guidance contains a number of amendments to the UStAE. It is to be assumed that the recipient of the supply makes use of the building cleaning services it receives to, in turn, supply further building cleaning services provided the business providing the services has evidence of this in the form of an original or copy of Form USt 1 TG that is valid at the time of the supply of the service. The sample recently provided with the BMF guidance of 10 December 2013 (see VAT Newsletter January/February 2014) continues to apply. Now, however, it is not possible to provide evidence using the sample Form USt 1 TG if the recipient of the supply does not make use of the building cleaning services it receives to, in turn, supply further building cleaning services and the business providing the service is aware of this.

Please note:
The BMF guidance was published in the Federal Tax Gazette (Bundessteuerblatt) on 14 February 2014. The principles in the BMF guidance apply to transactions carried out since 15 February 2014. In all cases that are still pending, the BFH ruling of 22 August 2013, V R 37/10, applies. The BMF guidance also contains separate rules of application on when the parties involved, contrary to the BFH, may assume that the recipient has a tax liability in accordance with the previous line taken by the authorities. Other issues surrounding the application of the BFH ruling are addressed in special BMF guidance. It is particularly important to consider that with respect to the future invoicing of construction services, a certificate of

exemption only has an indicative effect in accordance with § 48b EStG. As this indicative effect can rebutted by the authorities in individual cases, the parties involved should take this into consideration.

OTHER

Extension of the EU consultation for review of the VAT regulations of the public sector

European Commission of 24 January 2014, matter TAXUD/C1

Last October, the EU Commission initiated a public consultation with regard to the present VAT regulation for the public sector. Citizens, businesses and public entities and other stakeholders may participate in this consultation. Furthermore, they are asked to share their view on the various reform options discussed in this area. The survey is part of the more extensive work on the basic reform of the EU VAT system that is currently performed in order to make the regulations simpler, more efficient and robust (see VAT Newsletter November 2013).

On 24 January 2014 the Commission informed that the consultation documents are now available in all languages (in addition to English, German and French) on the consultation page of the Commission. To allow all stakeholders to participate in the consultation, the consultation period has been extended by 10 weeks and ends on 25 April 2014.

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For further information please visit:
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