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MwSt.VAT Newsletter

April 2014

NEWS FROM THE CJEU

Deduction of input tax by a founding partner in a partnership (GbR)

CJEU, ruling of 13 March 2014 – case C-204/13 – Heinz Malburg

The ruling of the Court of Justice of the European Union (CJEU) was in response to a question referred to it by the German Federal Tax Court (BFH) on 20 February 2013 (see VAT Newsletter May 2013). In it, the CJEU states its position regarding the conditions under which the founding partner of a partnership (GbR) is entitled to deduct input VAT.

The case

The question relates to a partner in a partnership of tax advisors (the "old partnership"). The partner purchased part of the client base from the old partnership when the assets were divided in specie. The sole purpose of the purchase was to immediately make available the client base free of charge to the newly-founded partnership of tax advisors (the "new partnership") for use in its business following the dissolution of the old partnership. The partner had a majority holding in this new partnership. The client base did not accrue to the assets of the new partnership. The matter in dispute is whether or not the partner is entitled to deduct the input VAT from the purchase of the client base from the old partnership.

The ruling

The CJEU ruled that the partner was not entitled to deduct the input VAT. The client base was made available to the new partnership free of charge, meaning that there is no direct and immediate link between a specific input transaction and one or more output transactions. It is the existence of such a link which gives rise to the right to deduct input VAT. A notable example of an instance in which input VAT deduction is possible is when it has been proven that the partner purchased the client base himself as part of his activities as manager of the newly-founded partnership and that the costs resulting from this purchase are general expenses stemming from his activities as manager. The CJEU made no further comment on this example, as the BFH has so far not examined the possibility of such a scenario.

The principles of the ruling of 3 March 2012 in case C-280/10 – Polski Trawertyn (see VAT Newsletter March 2012) cannot be applied to this case. This ruling relates to investment expenditure incurred by the partners in a company for the purposes of and with a view to the commencement of the company's economic activity prior to the official founding and registration of the company. According to this ruling, the principle of fiscal neutrality precludes national legislation that permits neither the partners nor their company to exercise a right to deduct the input VAT paid on their investment expenditure. In contrast to the recent decision in the main proceedings, the partners' output transaction, namely the contribution of immovable property to the company in the form of an investment expense for the purposes of the economic activity of that company, fell within the scope of VAT. However, the transaction was VAT exempt. In the recent decision, because the provision of the client base to the new partnership free of

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charge does not constitute an economic activity, the principle of fiscal neutrality does not apply either.

Please note:
The right to input VAT deduction does not apply in this case because the partner provided the client base to the partnership free of charge. However, the partner would have been able to exercise his right to deduct the input VAT if the client base had been handed over in exchange for an exceptional payment or if a contribution had been made in exchange for the transfer of rights in the company (see Section 1.6 (2) and (7) UStAE). The CJEU also pointed out that a managing partner, provided he is a VAT-registered entity, might be permitted to exercise his right to deduct input VAT. The BFH had not considered this in its submission. It remains to be seen whether it will address this in its follow-up ruling and, if necessary, refer it back to the Lower Tax Court for further clarification.

Different tax rates for passenger transportation services

CJEU, ruling of 27 February 2014 – case C-454/12 – Pro Med Logistik GmbH and C-455/12 – Karin Oertel

The ruling on the reference submitted by the BFH on 10 July 2012 (see VAT Newsletter November 2012) addresses the question of whether and to what extent different tax rates can be levied on passenger transportation services in Germany. Whilst a reduced tax rate of 7 % applies to transportation by taxi (for journeys within a single municipality or over a distance of no more than 50 km), the standard tax rate (currently 19 %) always applies for transportation by minicab.

The case

The issue under dispute was passenger transportation services provided by minicab, on which the tax authorities levy the standard tax rate. In case C-455/12, the passenger transportation consisted of ambulance transport (sitting), dialysis trips, transportation of school pupils, courier services and transportation of materials, hotel and airport transfers, sightseeing tours and the organization of transfers. In case C-454/12, the transportation services were performed on behalf of health insurance companies. The contract governing these journeys provided for special agreements with major customers at virtually the same conditions as the transportation services provided by taxi companies. In both cases, the business did not possess the licenses required for taxi transportation.

The ruling

Annex III (5) of the VAT Directive permits the application of a reduced tax rate to services for the transportation of passengers and their accompanying luggage. Germany has selectively opted to apply this reduced tax rate to transportation by taxi. This is compatible with EU law if, due to the different statutory requirements, transportation by taxi constitutes a concrete and specific aspect of the category of services defined in Annex III (5) of the VAT Directive and if the different statutory requirements have a decisive influence on the decision of the average user to use one such transportation service or the other. However, if a taxi company, as part of a special agreement, is not subject to the statutory requirements which otherwise apply to it and if the special agreement is also applied indiscriminately to minicab companies, then the levying of a different rate of tax is inadmissible. It is up to the referring court to examine whether or not this was the case in the main proceedings.

Please note:
How the BFH will rule on the tax rate for passenger transportation services supplied by minicabs after taking into account the specifications of the CJEU remains to be seen. A reduced tax rate comes into question for all special agreements which also apply to taxis. This can include ambulance transportation or the supply of replacement services for buses and trains.

NEWS FROM THE BFH

Referrals to the CJEU concerning VAT groups and input VAT deduction by a management holding company

BFH, ruling of 11 December 2013, XI R 17/11 and XI R 38/12

The BFH has referred to the CJEU three questions concerning VAT groups and input VAT deduction by a management holding company. The references are pending at the CJEU as cases C-108/14 and C-109/14.

The case

Two parent companies each had a shareholding as a majority limited partner in several limited partnerships. Each being what is known as a "management holding company", they supplied services to their subsidiaries in exchange for payment and actively intervened in the subsidiaries' daily business. Both holding companies requested that the full amount of input VAT be deducted from the invoices connected with the procurement of capital for the purchase of the shareholdings in the subsidiaries. The tax authorities, however, granted them only a partial input VAT deduction, stating that the input VAT had to be apportioned due to the purchase and holding of the shares in the subsidiaries (non-economic activity).

The ruling
Firstly, the BFH is asking the CJEU how the (pro rata) deduction of input VAT from the supply of input supplies in connection with capital procurement for the purchase of shareholdings in subsidiaries by holding companies is to be calculated if the holding company later (as intended from the outset) supplies various taxable services to these subsidiaries. The BFH basically has rejected a deduction of the full amount of input VAT. The input supplies would at least – if not primarily – also serve the non-taxable purchase and the holding of the shares. However, the BFH is doubtful as to whether the principles of the CJEU ruling of 27 September 2001 (case C-16/00 – Cibo Participations) preclude this. According to this CJEU ruling there is no direct and immediate link between the various services purchased by a holding company in connection with its acquisition of a shareholding in a subsidiary and any output transaction or transactions in respect of which VAT is deductible. Such services have a direct and immediate link with the taxable person's business as a whole.

Secondly, the BFH is asking the CJEU whether EU law precludes a national VAT group rule according to which

- only a legal person – but not a partnership – can be integrated into the company of another taxable entity (known as a controlling company) and whether this
- presupposes that this legal entity be financially, economically and organizationally (within the meaning of a superior-subordinate relationship) integrated into the controlling company's business.

The background to this question is the potential impact that the VAT group might have on the input VAT which can be deducted by the holding company. Where the VAT group is concerned, the companies would merge into one single taxable entity. It may be that the (non-taxable) purchase and the (non-taxable) holding of the shares in the subsidiaries do not have any adverse effect on the amount of input VAT which can be deducted. The purchase and the holding of shares in companies, like the admission of a new partner in order to procure additional capital, might be considered in general to be an economic activity and the holding company might have an unrestricted right to deduct input VAT from the supply of services related to it. However, in this respect the BFH has also not ruled out the absence of the right to deduct input VAT for a non-economic activity.

If the second question is to be answered in the affirmative, the third question arises, namely whether the taxable entity can seek application of the EU rules on VAT groups.

Please note:
The dispute concerns the deduction of input VAT by a holding company in connection with the purchase of shareholdings in its subsidiaries. If the CJEU rules against the deduction of the full amount of input VAT, even if the holding company only supplies taxable services, then the question will be whether also the deduction of the full amount of input VAT for the subsequent holding of the shares has to be denied given that the act of holding the shares, just like the purchase of the shares, constitutes a non-economic activity. This could potentially be precluded by the CJEU ruling of 6 September 2012 (case C-496/11 – Portugal Telecom) (see VAT Newsletter October 2012). In this case, the holding company's economic activity (taxable service supplied to the subsidiary) was only ancillary to its main activity (the management of its shareholding). According to the CJEU, this has no impact on the amount of input VAT which can be deducted. If the supply of the input service can be directly allocated to the purely economic activity, the input VAT cannot be apportioned and deemed partially non-deductible. If however, the supply of the input service can also be as allocated to a non-economic activity, the input tax has to be apportioned.

Liability of the recipient of construction work

BFH, ruling of 11 December 2013, XI R 21/11

With its ruling, the 11th Senate of the BFH adhered to the 5th Senate's legal opinion of 22 August 2013 (V R 37/10) regarding the liability of the recipient of construction works (see VAT Newsletter December 2013). In its ruling, the Senate particularly commented on the effect of the exemption certificate pursuant to § 48b Income Tax Law (EStG).

The case
The claimant was operating chiefly as a "developer". The structural work for a residential and office building was done by a limited liability company (GmbH). It is in dispute whether the claimant is liable for payment of the tax applicable to work provided as the recipient of the supply. The claimant provided to the GmbH an exemption certificate for VAT purposes in accordance with § 48b EStG. Equally, he claimed that less than 10 % of his sales in the previous year were generated from construction services. As a further alternative, he submitted that a VAT group existed between him and the GmbH.

The ruling
According to the BFH, § 13b (2) sent. 2 UStG must be interpreted as a restriction with regard to the fact that the tax liability for supplies of goods (as work and material supply – *Werklieferung*) or services within the meaning of § 13b (1) sent. 1 Nr. 4 UStG passes to the recipient of the supplies only when the recipient of the supplies in turn uses the construction work supplied to him to provide such a supply. The Lower Tax Court still needs to make its statements after remitting the case. The BFH's principles also apply to transactions made since 1 January 2007, because the present authorization under Article 199 of the VAT Directive

as the previous authorization under 2004/290/EC permits a transmission of the tax liability to the recipient of the supplies (reverse charge rule) (only) in specific cases. It is not decisive whether the parties originally agreed on how to deal with the tax liability and the recipient of the supplies had provided an exemption certificate in accordance with § 48b EStG to the supplier. In addition, statements have to be made after remitting the case to the Lower Tax Court as to whether a group exists between them.

Please note:
The BMF guidance of 5 February 2014 (see VAT Newsletter March 2014) includes an indicative effect if the recipient of the supplies provides the supplier with an exemption certificate in accordance with § 48b EStG that is valid at the time the construction work is supplied and is expressly indicated for VAT purposes with regard to the specific sales. The said indication as to the recipient of the supplies in turn using the supplies provided to him to provide construction work may be refuted by the tax authorities. Also, in the light of the BFH case-law the use of the exemption certificate does not guarantee that the way the parties have handled the matter is safe. Whether the entrepreneurs who have not invoiced any VAT to developers are entitled to any protection of legitimate expectations pursuant to § 176 AO for passed periods is currently checked by the tax authorities on a federal level (see OFD North Rhine-Westphalia of 24 February 2014 – short info VAT 2/2014, NWB DocID: WAAAE-59389).

VAT exempt or non-taxable supplies provided by travel companies

BFH, ruling of 21 November 2013, V R 33/10

The ruling refers to the taxation for travel companies with the regard to the sale of entrance tickets for theater events in Germany and hotel meals abroad. In each case, the recipients of the supplies are other travel companies.

The case
A travel company offered to a bus travel company hotel accommodation including breakfast, city tour and opera tickets in Germany. The opera offered the performance to the travel company as an event closed for the public at a lump sum. The entrance tickets contained a note saying that the event is presented by the travel company, which also carried the economic risk for selling the tickets. In addition, the travel company provided boarding services in connection with other hotel accommodation arranged for other travel companies abroad which made up 4 % to 4.5 % of the supply price. It is in dispute whether the sale of the entrance tickets for the event in Germany and the hotel meals abroad are subject to VAT in Germany.

The ruling
The BFH affirmed that in this case the sale of the entrance tickets is VAT exempt. If a travel company buys all entrance tickets for an opera performance and takes over the full economic risk of the performance and also acts as an organizer in its own name, it may be deemed a VAT exempt "organization of theater presentations" within the meaning of § 4 no. 20(b) of the German VAT Law (UStG). The appropriate assessment by the Lower Tax Court for the present case is possible and cannot be criticized in law. The VAT exemption also corresponds to the meaning and norm of the regulation according to which the entrance tickets for theaters as part of cultural institutions are not liable to VAT.

The place of supply for the boarding services provided in a hotel depends on the location of the hotel property (in the case year § 3a (2) no. 1 UStG). In accordance with the BFH case-law, the hotel meals are considered to be an ancillary supply for the hotel accommodation if the meals only make up a small proportion of the lump-sum fee in relation to the lodging and hence the hotel meal has the same place of supply as the principal supply. The hotel meals should be used for hotelier's principal supply under optimal conditions and are counted among the traditional tasks of the hotelier in accordance with the business practice. The BMF is sticking to this despite the opposing non-application order of the Federal Ministry of Finance of 4 May 2010 (IV D 2 – S 7100/08).

Please note:
The application of the margin scheme (§ 25 UStG) failed in this case due to the fact that the travel company's supply was not provided to individual travelers but to other companies. Although the CJEU has meanwhile decided in its ruling of 26 September 2013 (case C-189/11 – Commission/Spain) that according to the Union law the margin scheme is to be applied independently of the entrepreneur status of the recipient of the supply (see VAT Newsletter September/October 2013). According to the BFH, the travel company however has not referred to the Union law which means that the individual consideration of the supplies with regard to the place of supply and VAT exemption remains as it is.

NEWS FROM THE BMF

Place of services in connection with real estate (particularly wind parks)

BMF, guidance of 28 February 2014 – IV D 3 – S 7117-a/10/10002

The German Ministry of Finance (BMF) adjusted its principles on the determination of property-related services (§ 3a (3) no. 1 UStG, cf. Art. 47 VAT Directive) to the case law of the CJEU (ruling of 27 June 2013 – case C-155/12 – RR

Donnelley Global Turnkey Solutions Poland sp. z o.o., see VAT Newsletter July 2013).

Services are to be considered as property-related within the meaning of Art. 47 VAT Directive if they are expressly listed in this regulation or are sufficiently directly connected to a real estate. A sufficiently direct connection to a real estate is given under the following two provisions:

1. The service must be connected with an expressly determined real estate; and
2. The real estate itself must be part of the service. Among others, this is the case if an expressly determined real estate is to be considered as an essential (meaning central and indispensable) part of the service.

Logistics services
Accordingly, the storage of goods is property-related if the recipient of such service has been granted the right to use an expressly determined real estate wholly or partially (see changed version of section 3a.3 (9) no. 3 of the German VAT Application Decree (UStAE) with reference to the above-mentioned CJEU ruling of 27 June 2013). The BMF did not comment on the fact that according to the wording of the CJEU ruling the acceptance of a property-related service additionally requires that the client gets the right to access the storage area at any time.

Services in connection with wind parks
The BMF guidance contains a non-exhaustive list of property-related and non-property related services for the construction of wind parks. Property-related are only such services that are in connection with an expressly determined real estate. In particular, these are studies and examinations for the review of the provisions for the construction of wind parks as well as already approved wind parks, technical engineering services and expert opinions and planning services within the framework of the project certification. The BMF stated for example expert opinions in the approval process and site-related advisory, audit and monitoring services in project certifications. Furthermore, the cabling within the wind park, including transformer platform, and connections for power export on land outside the wind park, including conversion platform, is also property-related.

Please note:
The principles of the BMF guidance must be applied to all open cases. For supplies performed before 1 April 2014 a non-objection policy applies also for the purposes of input tax deductions on part of the recipient of the supplies. No objection may be raised if the supplier and the recipient of the supply did consider another place of supply for the services with regard to the wind parks, and thereby deviated from the principles of the BMF guidance, (pursuant to § 3a (2) UStG or pursuant to § 3a (3) no. 1 UStG) and stuck to this decision unanimously. In this context, the provision has to be met according to which the transaction of the supplier or recipient of the supply is taxed in the applicable amount. However, the BMF guidance contains no transitional arrangement for logistics services.

Electronic transmission of documentary evidence

Short info VAT 2/2014 for tax authorities of the Federal State of Schleswig-Holstein of 21 February 2014, NWB DocID: MAAAE-57220

The Ministry of Finance of Schleswig Holstein referred in its Short info VAT to a statement of the BMF on questions in connection with the transmission of documentary evidence with regard to the zero rating (VAT exemption with right of input VAT deduction) for intra-Community supplies of goods. The questions relate to section 6a.4 (6) UStAE which – among others – determines that the electronic confirmation of arrival, e.g. by email with a PDF or text file attachment may be transmitted via computer fax, fax or electronic data interchange or downloaded from the web. An entry certificate received electronically may also be stored in printed form for VAT purposes. If the confirmation of arrival is sent by email, the latter may be stored in order to be able to completely maintain the evidence of the document's origin. The email may also be stored in printed form for VAT purposes. The GOBS (see annex to the BMF guidance of 7 November 1995) and the GDPdU (see BMF guidance of 16 July 2001 and 14 September 2012) remain unaffected. These principles apply mutatis mutandis for confirmations of dispatch, carrier's confirmations and tracking-and-tracing reports.

The BMF makes it clear that the above-mentioned confirmations may be transmitted electronically for example by email e. g. as a Word or Excel file or in CSV format. Furthermore, the BMF points out that an email, a download report or e. g. a file being an email attachment must always be stored in the original electronic form as received or in printed form. According to the BMF, this is the only way to ensure the authenticity of origin and integrity of content.

Please note:
The BMF also pointed out that the goods receipt posting documented in the computer system of a foreign entity may not be accepted as a confirmation of arrival. Apart from the fact that the supplier needs to have a documentary evidence of an intra-Company supply, in this respect there was already a lack of completeness of information, which together would form a confirmation of arrival pursuant to § 17a (2) UStDV. Thereby, the BMF rejected also a petition of the leading industry associations in Germany dated 22 July 2013 with respect to the content, which was made for the draft of the BMF guidance of 19 September 2013.

IN BRIEF

Payments of health insurance companies as compensation from a third party

CJEU, ruling of 27 March 2014 – case C-151/13 – Le Rayon d'Or SARL

The CJEU ruling refers to the calculation of the split of the input taxes made by a retirement home in France, which had the view that the lump-sum maintenance compensation paid by the healthcare insurance company did not fall within the scope of VAT. As a result, these amounts were not to be considered in the calculation of the deductible proportion. On the other hand, the CJEU reached the conclusion that the lump-sum maintenance compensation is a consideration for the care services provided to the residents by their retirement home. A consideration may also be provided (only) by a third party as in the present case. The CJEU also referred to the fact that the care services supplied to the residents in the main proceedings were neither individualized nor determined in advance and the compensation was paid as a lump-sum. This does not affect the direct connection between the supplied services and the received consideration the amount of which is calculated in advance and in accordance with precisely specified criteria.

The CJEU on the VAT treatment of dispensing out-patient cytostatics

CJEU, ruling of 13 March 2014 – case C-366/12 – Klinikum Dortmund gGmbH

Due to the reference by the BFH of 15 May 2012, V R 19/11, the CJEU had to deal with the VAT treatment of dispensing out-patient cytostatics by a hospital pharmacy. The medications dispensed to the patients were prepared individually for each patient in the hospital pharmacy as prescribed by the physician. It was not disputed that the administration was VAT exempt insofar as it was done in the hospital within the scope of an inpatient treatment. However, it was disputed whether the dispensing by the hospital pharmacy was liable to VAT insofar as the administration was done by self-employed physicians in an outpatient setting in the hospital. According to the CJEU, such a supply may not be VAT exempt pursuant to Art. 13 part A (1) (c) of the Directive 77/388/EEC if it is not separable from the medical care as principal service with regard to the factual and economic aspect. It was held that it is for the referring court to determine this. If the BFH determines that the dispensing of cytostatics is liable to VAT, the question arises from the BFH ruling of 31 July 2013 (I R 82/12) whether for these supplies by non-profit hospitals a reduced tax rate of 7 % should apply.

Adjustments of the input tax deductions for advance payments

CJEU, ruling of 13 March 2014 – case C-107/13 – FIRIN OOD

In the Articles 184 to 186 of the VAT Directive, the provisions are stipulated according to which the tax authorities may demand the input tax deduction to be adjusted. Hereby, Art. 185 (1) MwStSystRL establishes the principle that an adjustment particularly needs to be done if the facts considered in the determination of the input tax deduction change after the VAT return has been filed. Among others, according to the CJEU this is the case if the supply was not provided after the advance payment had been done. This also applies even if the VAT due by the supplier itself is not adjusted. The supplier and recipient of the supply do not necessarily have to be treated equally. The recipient of the supply remains free to demand the repayment of the advance payment in accordance with the national (civil) law. Pursuant to Art. 186 VAT Directive, the member states determine the details for the application of the input tax adjustment. The CJEU did not comment on the given possible freedom to act in this respect. According to the German authorities' guidelines, the input tax adjustment needs to be done by applying § 17 (1) sent. 2 UStG mutatis mutandis (only) in the accounting period for the return of the advance payment.

Zero rated supply of goods for export within the scope of a chain transaction

Financial Court Münster, ruling of 16 January 2014, 5 K 3930/10; ref. no. of the BFH: XI R 12/14

The ruling refers to the allocation of the supply of goods in movement within the scope of a chain transaction to a non-member country when the transport of the supply is made by an intermediate entrepreneur. In such case, the rebuttable presumption in § 3 (6) sent. 6 UStG applies which stipulates that the supply in movement is provided to the intermediate entrepreneur. According to the Lower Tax Court, the allocation principles of the CJEU and BFH for intra-Community supplies may in general be transferred. An important indication for the supply in movement of the intermediate entrepreneur is given when the latter already communicated to his supplier before the transport or shipment that he had sold the goods to the end customer (see BFH ruling of 11 August 2011, V R 3/10). In contrast to the BFH ruling of 28 May 2013, XI R 11/09, it should not be important whether the purchaser had been granted the right to dispose of the goods as owner before their movement (see VAT Newsletter August 2013). In any case, the use or non-use of the VAT ID number by the intermediate entrepreneur for shipments involving non-member states should not play any substantial role.

OTHER NEWS

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The first edition looks at the current CJEU ruling on the application of anti-dumping duties, at the calculation of tariffs and at legislation governing the origin of goods and tariff preference. It also outlines the current changes to the restrictive measures in place against Iran. The newsletter also gives a brief overview of the key amendments to the new service regulation on the energy tax treatment of energy production facilities (service regulation on energy production).

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