December 2014

LEGISLATION

Decision of the German Parliament on the Law on the adaption of the German Tax Code (AO) to the Customs Code of the Union and on the change of further tax provisions

German Federal Council's (Bundesrat) Journal 592/14 of 5 December 2014

On 4 December 2014, the German Federal Parliament (Bundestag) adopted the draft law on the adaption of the German Tax code (AO) to the Customs Code of the Union and on the change of further tax provisions. The law provides for – among others – the following VAT changes, taking into account the decision recommendation of the Financial Committee from 3 December 2014 (German Federal Parliament's Journal 18/3441 of 3 December 2014).

Changes according to the government draft of 26 September 2014 (see in detail VAT Newsletter October 2014)

- Introduction of a quick reaction mechanism to enlarge the reverse charge mechanism (§ 13 b (10) German VAT draft law (UStG-E)
- Monthly filing of preliminary VAT returns in case of shelf companies and acquired shell companies as with company establishments (§ 18 (2) sent. 5 UStG-E)
- Change of the rules regarding the location of telecommunication services, radio and television services and electronically supplied services to customers not liable to VAT as of 1 January 2015 (§ 3 a (6) sent. 1 no. 3 UStG-E).
- Expansion of VAT exemption for hospital and medical care to institutions that have concluded contracts pursuant to § 127 in conjunction with § 126 (3) German Social Code Book V (SGB V) for supplying non-physician dialysis services (§ 4 no. 14 (b) sent. 2 ff) UStG-E)
- New regulation for basic certificates issued for VAT-exempt cultural services by non-tax departments (revocation of § 4 no. 20 (a) sent. 4 UStG, change of § 171 (10) AO)

Further changes according to the statement of the German Federal Council dated 7 November 2014:

- Extension of the rules regarding the place of supply applicable to specific banking and insurance transactions with regard to the recipients of the supply located in a non-Member State in accordance with the CJEU ruling of 19 July 2012 – case C-44/11 – Deutsche Bank AG, see VAT Newsletter August/September 2012, such as portfolio management services involving securities (§ 3 a (4) sent. 2 no. 6 (a) UStG-E)
- Limitation of the extension of the tax liability for recipient of precious metal, base metal, selenium and cermet supplies – in accordance with the rule in § 13 b (2) no. 10 UStG, among others, for mobile devices. The sum of the fees to be charged for the supply within the framework of an economic transaction must exceed EUR 5,000.

Content

Any subsequent fee reductions will remain unaffected (§ 13 b (2) no. 11 UStG-E).

- Limitation of the reverse charge mechanism with regard to taxable natural gas supplies provided in Germany to cases where the recipient of the supplies is a retailer within the meaning of § 3 g UStG (§ 13 b (5) sent. 3 UStG-E).

Further changes according to the decision recommendation of the Financial Committee

In addition to the threshold of § 13b (2) no. 11 UStG-E above: Streamlining of Appendix 4 UStG, selenium, wire, ribbons, films, sheets and other flat-rolled products, treads and poles (rods) shall no longer be included in Appendix 4 UStG (Appendix 4 to § 13b (2) no. 11 UStG-E).

Please note:
On 4 December the German Federal Parliament passed a resolution on the draft law. The law still needs to be approved by the German Federal Council, which could occur in the next regular meeting on 19 December 2014. Subsequently, the publication in the Federal Law Gazette could occur until the end of the year. The entering into force is generally planned on the day of the publication in the Federal Law Gazette. This might affect possible changes of § 3a (4) sent. 2 no. 6 (a) UStG with regard to the place of supply for banking and insurance transactions and of § 13b (5) sent. 3 UStG with regard to the reverse charge rule in case of natural gas supplies. The changes on § 13b (2) no. 11 UStG and Appendix 4 UStG concerning tax liability for recipient of precious metal, base metal, selenium and cermet supplies shall enter into force on 1 January 2015. However, the remaining VAT changes would come into force on the first day of the quarter following the publication. If the publication occurs by the end of 2014, the remaining VAT changes would also promptly enter into force on 1 January 2015. Concerning the extension of the no-objection rule (which was introduced by the German Ministry of Finance (BMF) on 26 September 2014) to 3 13b (2) no. 11 UStG see the article in this newsletter.

However, the Federal Committee of the Federal Council has recommended to appeal the law to the mediations committee of the Federal Parliament and Federal Council. If the Federal Council follows the recommendation the completing of the legislative procedure by the end of 2014 is rather unlikely.

NEWS FROM THE CJEU

Retroactive effect of corrections to invoices

Request for a preliminary ruling (Germany), Lower Saxony Tax Court, ruling of 3 July 2014, 5 K 40/14, CJEU case C-518/14

The questions referred to the Court of Justice of the European Union (CJEU) by the Lower Saxony Tax Court were whether and under what circumstances corrections to invoices have retroactive effect.

The case

The reference for a preliminary ruling concerns invoices from commercial agents for the payment of commission by a wholesaler in the textile sector. The invoices were submitted by the wholesaler as the recipient of the supply under a self-billing arrangement. Following a tax inspection for the period 2008 to 2011, the tax authorities refused to allow an input VAT deduction on the basis of the self-billing invoices issued. The tax authorities argued that the self-billing invoices did not constitute proper invoices within the meaning of § 15 (1) in conjunction with § 14 (4) UStG. Neither the tax numbers nor the VAT identification numbers of the commercial agent concerned had been included on the statements or the attachments. The wholesaler subsequently corrected the self-billing invoices for the period 2009 to 2011 in the course of the tax inspection. The self-billing invoices for 2008 were only adjusted in 2014 while the appeal was pending. The tax authorities only allowed the deduction of input VAT once the corrected invoice had been issued in 2013/2014, arguing that corrections to invoices could not have retroactive effect (section 15.2 (5) of the German VAT Application Decree (UStAE)). Accordingly, the tax authorities imposed late payment interest in accordance with § 233a of the German Tax code (AO).

The ruling

The questions referred to the CJEU were as follows:

Requirements for retroactive corrections to invoices

1. Would the CJEU cases "Pannon Gép" (ruling of 15 July 2010 – C-368/09, see VAT Newsletter August/September 2010) and "Petroma Transports" (ruling of 8 May 2013 – C-271/12, see VAT Newsletter June 2013) serve to qualify the Court's finding in the "Terra Baubedarf-Handel" case (ruling dated 29 April 2004 – C-152/02) that an initial invoice is effective ex nunc ["from now on", i. e. has future effect] such as to enable the court to make a determination in this case, which concerns an amendment to an incomplete invoice, that the corrections had retroactive effect?

The Tax Court expressed doubt regarding the general prohibition against corrections to invoices with retroactive effect, holding that the VAT Directive did not preclude the correction of invoices. It held that the taxpayer was entitled to deduct input VAT, provided that the conditions required

under Articles 167 ff. and 226 of the VAT Directive were satisfied and the taxpayer had submitted the corrected invoice to the authorities concerned before those authorities had made a decision. The German Federal Tax Court (BFH) had previously concluded that input VAT could only be deducted at the time the correction was made. The BFH expressly left open the question of whether its previous case law would be overturned by the CJEU ruling in the "Pannon Gép" case (ruling of 19 June 2013, XI R 41/10, see VAT Newsletter November 2013).

Minimum requirements for an invoice that can be corrected with retroactive effect

2. What are the minimum requirements applying to an invoice that may be corrected with retroactive effect? Is it necessary to show the tax number or VAT identification number on the original invoice, or can these be added later, so that the right to deduct input VAT on the basis of the original invoice is retained?

The Tax Court held that for retroactive effect to be extended to the invoice in question, invoices must, as a minimum, provide details of the party issuing the invoice, the recipient of the supply, a description of the supply, the consideration, and the amount of VAT (see also Lower Saxony Tax Court, ruling of 23 October 2014, 5 K 140/14). In making its determination, the Tax Court relied on a BFH decision relating to an action brought for injunctive relief (BFH, decision of 20 July 2012, V B 82/11). However, the Tax Court concluded that a VAT identification number had no constituent effect in the sense that its subsequent inclusion only had effect for the future. In coming to this conclusion, the Tax Court relied on the CJEU decisions "Vogtländische Straßen-, Tief- und Rohrleitungsbau" (ruling of 27 September 2012 – C-587/10) and "Mecsek-Gabona Kft" (ruling of 6 September 2012 – C-273/11), see VAT Newsletter for October 2012 on both decisions. It argued that since these decisions were handed down, the CJEU has tended not to overstate the importance of VAT identification numbers.

Time limit applying to retrospective corrections

3. Is a correction to an invoice deemed to have been made at the proper time if it is only made in the course of appeal proceedings against the final decision (amendment notice) issued by the tax authorities?

By question 3, clarification is sought from the Tax Court as to the period within which a correction to an invoice must be made. Following the ruling of the CJEU in the "Petroma Transports" case, any correction to an invoice must be submitted to the authorities concerned before those authorities have made a final decision. The Court notes that under national law, a comprehensive review of the factual and legal situation is possible at any time until the appeal proceedings have been concluded (§ 367 (2) AO). The Tax Court is of the view that if it were already unlawful to correct an invoice at the amendment notice stage, this would lead to unfair outcomes or differences in treatment.

Please note:
The CJEU has previously considered the extent to which corrections to invoices have retroactive effect in "Pannon Gép" (ruling of 15 July 2010 – C-368/09) and "Petroma Transports" (ruling of 8 May 2013 – C-271/12). In making a request for a preliminary ruling, the Tax Court is seeking the broadest possible clarification of these unresolved issues. The retroactive correction of invoices has considerable commercial significance if the input VAT was improperly deducted at the outset. If a correction to the invoice cannot apply retroactively, late payment interest may be due (in Germany pursuant to § 233a AO).

NEWS FROM THE BFH

Reverse charge rule for construction work: Buildings within the meaning of § 13b UStG

BFH, ruling of 28 August 2014, V R 7/14

In its ruling, the BFH commented on the term building with regard to the reverse charge rule for constructions works.

The case
A plant construction company developed a smoke extraction system for industrial large combustion plants specifically for so-called drawing furnace. The company installed the smoke extraction systems it had developed into the production facilities of a customer. The installation and mounting services were outsourced to sub-contractors. The sub-contractors issued invoices separately stating the VAT. The company exercised its right to input VAT deduction. However, the tax authorities denied a right to input VAT deduction arguing that the company was liable to VAT for received construction work pursuant to § 13 b (1) no. 4 sent. 1 UStG old version (now 13 b (2) no. 4 sent. 1 UStG). The Tax Court upheld the action stating that the smoke extraction system was a plant facility as a result of which the reverse charge rule for construction work was not applicable.

Ruling
The BFH found that the appeal lodged by the tax authorities were without founding. The reverse charge rule for construction work contains supplies of goods (as work and material supplies – Werklieferungen) and other supplies for the production, repair, change or elimination of buildings except for planning and supervisory services. According to the BFH, buildings within this meaning are immovable items produced by coupling with soil. This does not include plant facilities (§ 68 (2) sent. 1 no. 2 German Valuation Act (BewG)). The BFH considers its interpretation to be covered by Art. 199 (1) (a) of the VAT Directive (MwStSystRL). As a result, the right to apply the tax liability of the recipient of the supplies is limited to supplies in connection with property. With regard to this, it has to be taken into account that the leasing or letting of property is VAT exempt, but

that this exemption does not include fixed attachments and machines and hence no plant facilities for the own use. Contrary to the tax authorities' view, an interpretation in accordance with the Construction Company Regulation (Baubetriebe-Verordnung) is not taken into consideration. The BFH does not liaise with the tax authorities insofar as the latter also obviously assume in Section 13b.2 (5) no. 2 VAT Application Decree (UStAE) that shop fittings, window displays and restaurant equipments are to be considered as being part of the building even if they are plant facilities.

Please note:
After the BFH reached, among others, the conclusion in its ruling of 22 August 2013, V R 37/10 (see VAT Newsletter December 2013) that developers cannot be liable to VAT for construction work, it interpreted again the legislative provisions in this case contrary to the tax authorities' view and hence excluded supplies in connection with plant facilities from the scope of application. Thus, if the recipient of the supplies invokes the non-applicability of § 13 b UStG, questions similar to those after the BFH ruling of 22 August 2013 (see VAT Newsletter August/September 2014) arise with regard to a VAT recovery a posteriori demanded from the supplier. Therefore, it remains to be seen how the tax authorities react to the BFH ruling.

Pursuant to Art. 13 b (d) of the Implementing Regulation EU No. 282/2011 for the purposes of the VAT Directive items, equipments or machines that are permanently installed in a building or structure and cannot be moved without destructing or changing the building or structure will be considered to be property as of 1 January 2017. This might also include plant facilities. This determination might be used already for the interpretation of the applicable law. Hence, the BFH could not know the CJEU's ruling of 16 October 2014 (case C-605/12) – Welmory; see VAT Newsletter November 2014) passed after its own ruling. The CJEU relied on the Implementing Regulation although this regulation did not apply in the present case at that point in time. The CJEU argues that the Union legislator intends to clarify specific terms and therefore to address the CJEU case law in this area. However, the BFH assumed in its ruling of 23 November 2011, XI R 6/08 with regard to the differentiation of supplies of goods and services for catering in the case year 2009 that Art. 6 (2) of the Implementing Regulation to the VAT Directive could not be used for the interpretation because it was not applicable before 1 July 2011.

Deduction of input VAT in the case of jointly held property

BFH, ruling of 28 August 2014, V R 49/13

In its ruling, the BFH stated its position on the right to deduct input VAT if property is held jointly in a *Bruchteilsgemeinschaft* (community by undivided shares) and deductions of input VAT are too low.

The case

Two farmers, A and B, bought a combine harvester together in which they both held a share (in a community by undivided shares) and which they both intended to use on their farms. The provision of the community was free of charge. Four years later, A sold his share in the combine harvester to B. While A had opted for flat-rate taxation under § 24 UStG, B had elected that his turnover should be taxed at the standard rate (§ 24 (4) sent. 1 UStG), rather than on a flat-rate basis. A's invoice for the sale of his share included a VAT charge of 10.7% in accordance with § 24 (1) sent. 3 UStG, which B claimed as input VAT. B later sold the combine harvester to a purchaser in Austria as a zero-rated intra-Community supply (VAT exemption with right to input VAT deduction). The tax authorities took the view that there ought to have been a supply of the shares in the property in favor of B before any zero-rated supply could be made. Accordingly, B had no right to deduct input VAT on the supply of his share in the property. Moreover, the tax authorities argued that prior to making the supply of the joint shares, the share in question should have been withdrawn from the business assets of A and B and restored to the community by undivided shares. For B, this would result in a taxable supply made other than for consideration.

The ruling

According, to the BFH, the free provision of an asset that is purchased jointly and held in common ownership to one of the co-owners does not mean that the community by undivided shares has a separate legal personality or that it engages in any business activity. As a result, the individual members of the community (who operate businesses) are deemed to be recipients of the supply to the extent of their share in the item purchased. The BFH explicitly rejected the conclusions of the tax authorities based on sections 15.2 (16) sentences 6 and 7 UStAE. The current stance of the tax authorities is that if an order has been placed jointly by two or more persons and the community as such has transferred the item, or parts thereof, to one of the members of the community other than for consideration, this will be sufficient to establish that the community is the recipient of the supply.

If, on this basis, the members of the community are deemed to be recipients, they may, according to the BFH, dispose of their shares in the asset without any interim purchase by the community. Where there are two members of the community, one of the members may therefore sell his share directly to the other member. This does not re-

quire any prior withdrawal of the co-owned share, giving rise to VAT liability. The BFH left open the question of whether it would follow settled case law, which would categorize the sale of the share in the combine harvester as an incidental transaction that would be taxed on a flat-rate basis, or whether it would be necessary to rule out such a presumption based on an interpretation in line with the VAT Directive. Namely, where the VAT charged on a taxable supply is too low, the amount shown on the statement will only be deductible as input VAT.

Please note:
The BFH previously held in a ruling dated 1 February 2001, V R 79/99, that where a business premises was let to two spouses forming a community, the landlord can only effectively opt for VAT liability in respect of his rental income insofar as the letting operations were carried out in respect of a community operating as a business. In its guidance dated 9 May 2008 (IV A 5 – S 7300/07/0017), the BMF did not extend this interpretation beyond the individual case at issue. According to the BMF, the spouses forming a community would be deemed the recipients of the supply, if the let premises was assigned, other than for consideration, to one of the spouses for business purposes. However, because supplies, as defined in § 4 sent. 12 UStG, can only be treated as taxable in accordance with § 9 (1) UStG if the supply is made to another trader for the purposes of his business, and the spouses in this case were not engaged in any commercial enterprise, the landlord was not permitted to exercise the option to tax. It remains to be seen whether the BMF will adopt the same approach as the BFH in its ruling of 28 August 2014, V R 49/13.

NEWS FROM THE BMF

Reduced VAT for audio book transactions as of 1 January 2015

BMF, guidance of 1 December 2014 – IV D 2 – S 7225/07/1002

The BMF comments on the introduction of a reduced VAT rate for audio book transactions as of 1 January 2015 by the law on the adaption of the national tax law to Croatia's accession to the EU and on the amendment of further tax provisions (see VAT Newsletter July 2014). In particular, the BMF guidance contains a transitional regulation for bundles with e-books with regard to transactions made before 1 January 2016.

Privileged transactions

The BMF clearly states that the reduced VAT rate for audio books does not only include supplies of goods, imports and intra-Community acquisitions (§ 12 (2) no. 1 UStG) but also leasing (§ 12 (2) no. 2 UStG). In order for the reduced VAT rate to be applied, a physical object in the form of a storage device needs to be transmitted or leased. Services provided electronically will not be privileged. According to the BMF, this includes, for example, downloading audio books from the internet.

The storage device may be in a digital (e.g. CD ROM, USB memory or memory cards) or analog form (e. g. audio cassette or records). Except for the sound recording of the reading of the book, nothing else may be stored on the device. The playback of a text is required by the function that corresponds to the conventional understanding of the book content. Hence, it is not necessary for a printed version to have been presented or to be presented.

It is allowed to use music and sounds in order to enable the illustration of the text. Even a reading with several voices does not exclude the classification as a privileged audio book insofar as this results from the book, e. g. in form of dialogs in direct speech. If a publisher was granted by the licensor exclusively the right to produce a reading without any rights to the radio play, the product is to be accepted as a reading for simplification reasons.

Non-privileged media

Radio plays are not privileged. They are usually based on a script similar to a cinematographic work. Furthermore, they mainly use dramaturgical effects, such as speech interaction. Radio plays generally do not reproduce the same content as printed books, but use the material as a basis for their own story.

Audio newspapers and audio magazines are not privileged. They are usually published periodically and reproduce information with regard to current issues, such as politics, economics, sports and culture or specific distinct specialist topic areas.

According to the wording of the legislation, those products are not privileged that are subject to restrictions as data media harmful to children or contain the duty to inform pursuant to § 15 (1-3) and (6) of the German Youth Protection Act (Jugendschutzgesetz).

Transitional arrangement for bundles with e-books for transactions before 1 January 2016

Insofar as the trader delivers a printed book against payment of a total sale price (VAT rate 7%) and grants electronic access to the audio book (VAT rate 19%) at the same time, the total sale price is to be split in accordance with Section 10.1 (11) UStAE. As a result, the BMF confirms the principles set forth for the relevant inter-branch associations in the BMF guidance of 2 June 2014 (see VAT Newsletter July 2014).

There will be no objections with regard to transactions before 1 January 2016 if the trader treats these transactions as a single supply that is generally subject to the reduced VAT rate. The BMF had already informed the inter-branch associations about this in its guidance of 7 November 2014. However, if printed newspapers/magazines and e-papers

are supplied at the same time, only a non-objection regulation applied until 1 July 2014 (see VAT Newsletter July 2014).

Please note:
For setting the VAT rate, the BMF points out to the general rules in Section A of the BMF guidance of 5 August 2004 regarding the scope of application of tax-privileged transactions, the differentiation of the privileged objects in accordance with the customs tariff (including tariff information) and the scope of the VAT reduction (e. g. ancillary supplies, sets of goods). Further, it refers to Section 12.1 (1) sent. 3 et seq. of the German VAT application Decree (UStAE) containing an update of the competences and notes on model forms with regard to non-binding tariff information in the case of supplies of goods and intra-Community acquisitions. Other general rules, such as particularly the BMF guidance of 21 March 2006 on the VAT rate for supplies of so-called combined articles the price of which is limited to up to EUR 20, may remain unaffected. This may be important, for example, if a printed book (7%) is sold together with a similar radio play on CD (19%) in one box.

Reverse charge procedure to supplies of precious metals, non-precious metals, selenium and cermets: Extension of the non-objection regulation

BMF guidance of 5 December 2014 – IV D 3 – S 7279/14/10002

The BMF has extended the transitional respective non-objection regulation in its guidance of 26 September 2014 (see VAT Newsletter October 2014) concerning the reverse charge procedure to supplies of precious metals, non-precious metals, selenium and cermets (§ 13 b (2) no. 11 UStG) by six months until 30 June 2015. Where supplies are made after 30 September 2014 and before 1 July 2015, the supplier and the recipient can, by mutual agreement, still assume that the supplier is liable for tax without any objections being raised if the appropriate amount of tax is paid on the transaction. This transitional arrangement also applies to down-payments and pre-payments before 1 July 2015. The implementation arrangements for final invoices, installments, etc. in the BMF guidance of 26 September 2014 apply accordingly, which indicates that the dates mentioned therein shall be deferred by nine months (the figure was hitherto three months) if the contractual partners make use of the transitional arrangement.

IN BRIEF

No reduced tax rate on tube-feeding

BFH, ruling of 29 September 2014 – VII R 54/11

This ruling concerns the tax rate applying to supplies of tube-feeding. The case concerned dietary foods in liquid form containing various nutrients, which are intended for individuals who are incapable of eating normally or whose ability to eat is impaired, and may be administered by means of stomach tubes. The BFH concluded that supplies of such nutritional preparations are subject to the regular VAT rate, and that these could be classified either as non-alcoholic beverages under heading 2202 of the Combined Nomenclature or medicaments under CN heading 3004. The BFH declined to categorize the supply as a food preparation under CN heading 2106, which would have qualified for a reduced tax rate under no. 33 of Appendix 2 to § 12 (2) sent. 1 UStG. In making its determination, the BFH relied in particular on the CJEU judgments of 26 March 1981 (case C-114/80 – Dr. Ritter) and 30 April 2014 (case C-267/13 – Nutricia NV).

The BFH thus endorsed the view of the tax authorities. Manufacturers were only allowed to calculate reduced tax rates until the end of 2001 (provided there was no conflicting tariff information) and wholesalers and retailers until the end of 2002 (see VAT briefing no. 118 for the tax authorities in Schleswig-Holstein dated 24 January 2004). After the *Landessozialgericht Rheinland-Pfalz* (district social court) had affirmed the reduced tax rate, the *Bundessozialgericht* (Federal Social Court) decided that social courts did not have competence to determine the tax rate (ruling of 17 July 2008, B 3 KR 18/07 R). The Tax Courts have subsequently handed down different rulings. The Münster Tax Court held that a reduced tax rate applied, while in a decision dated 20 June 2011, VII R 10/11, the BFH dismissed an appeal by the tax authorities on formal grounds. However, the Hesse Tax Court determined that no reduced tax applied in this case and its decision was upheld by the BFH.

Remission of interest on arrears pursuant to § 233a AO

Tax Court Mecklenburg-Western Pomerania, ruling of 26 February 2014, 3 K 59/09; BFH ref. no.: XI R 18/14

The ruling refers to the question under which circumstances interests in arrears (§ 233a AO) are to be remitted for reasons of equity pursuant to § 227 AO. The ruling relates to the remission of interest with regard to VAT due to incorrect application of a VAT group.

In the present case, the alleged "controlling company" did neither issue invoices stating the VAT for business management provided to the "controlled company" and nor did it pay the VAT. This was only done several years later

following an audit. At the time the audit was conducted, there was a VAT group between the two companies. The input VAT deduction was not accepted by the tax authorities before the invoicing date. Due to the later setting of VAT for the business management supplies, interest on arrears were accrued pursuant to § 233a AO. The tax authorities and the Tax Court denied a remission of the interest on arrears pursuant to § 227 AO based on objective unfairness.

According to the Tax Court, charging interests is not to be remitted due unfairness pursuant to § 277 AO, because the input VAT may not be deducted by the recipient of the supply before the taxation period in which an invoice is issued stating the VAT amount. It further states that this unfavorable legal consequence based on a conscious order of the legislator cannot be avoided due to an equity measure. The Tax Court also comments on the option of an equity remission with regard to interest in arrear pursuant to paragraph 70.2.5 Application Decree for the Tax Code (AEAO) in case a VAT group was mistakenly assumed. According to this administrative regulation, it is required that the party liable to subsequent payment did not or could not have any interest-rate advantage. The Tax Court confirms in the present case the interest-rate advantage due to the different periods and due dates for the VAT and claim for input VAT. As a result, the Tax Court supports the view of the tax authorities in the present case according to which the scope applies only to corrections of external transactions of the controlling company and the group company, but not to intra-group transactions. An appeal was filed against the ruling.

PREVIEW

In the following VAT Newsletter, we will in particular present the following tax instruction:

Payment by a third party in case of providing a device premium to agents for cell phone contracts

BMF guidance of 4 December 2014 – IV D 2 – S 7100/10/10005

The BMF adopted the BFH's view in its ruling of 16 October 2013, XI R 39/12 (see VAT Newsletter January/February 2014). If an agent of cell phone contracts supplies to customers "free" cell phones or other electronic devices when entering into a cell phone contract, the surcharge paid by the cell phone provider to the agent in addition to the commission (so-called device premium) is considered to be a payment by a third party within the meaning of § 10 (1) sent. 3 UStG for the supply of the cell phone by the agent to the customer. In this case there is no VAT-taxable transaction as a disposal free of charge within the meaning of § 3 (1b) sent. 1 no 3 UStG carried out for the customer by the agent of cell phone contracts. If the agent accepts self-billing by the cell phone provider in which the VAT for the device premium is shown separately, the agent may insofar be liable to tax pursuant to § 14c (1) UStG due to incorrect tax statement. According to the BMF the BFH ruling is applicable in all open cases. For transactions before 1 January 2015 the BMF has introduced a non-objection regulation which is applicable under certain conditions.

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