April 2015

NEWS FROM THE CJEU

The Advocate General on VAT groups and input VAT deduction by a management holding company

Advocate General, opinion of 26 March 2015 – joined cases C-108/14 – Larentia + Minerva – and C-109/14 – Marenave

The Advocate General's opinion relates to requests for a preliminary ruling from Germany. In rulings of 11 December 2013 (XI R 17/11 and XI R 38/12), the German Federal Tax Court (BFH) had referred questions concerning VAT groups and input VAT deduction by a management holding company to the Court of Justice of the European Union (CJEU), see VAT Newsletter April 2014.

The case

The two parent companies Larentia + Minerva and Marenave were each majority limited partners in a number of 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' day-to-day business. Both holding companies deducted the input VAT paid in raising capital that was used to fund the acquisition of the shareholdings in the subsidiaries. However, the tax authorities allowed only a partial input VAT deduction. They held some of the costs attributable to the non-economic area of the holding companies' activities, namely holding and purchasing shares in subsidiaries, for which there were no input tax deduction allowed.

Opinion

The Advocate General challenges the premise of the BFH that the two parent companies in the dispute are engaged in both economic and non-economic activities. Contrary to the BFH's view, in the opinion of the Advocate General the costs incurred in purchasing the shareholdings are attributable to each parent company's economic activity as a whole. As a result the VAT charged on these costs is deductible in full in accordance with Art. 17 (2) of the 6th EC Directive, provided the parent company only engages in taxable activities. Input tax only needs to be apportioned if the activities comprise both supplies where input tax may be deducted and supplies that deny the input tax deduction.

The Advocate General believes that under EU law VAT group regulations in principle apply to all persons, i. e. including partnerships. However, under § 2 (2) sent. 2 of the German VAT Law (UStG), partnerships may head a VAT group as controlling company but cannot be a member of a VAT group as controlled company. Such a restriction is at best permissible, if it is necessary and appropriate to prevent tax evasion and avoidance. At least this distinction breaches the principle of fiscal neutrality. However, it is ultimately a matter for the BFH as the referring court to determine.

According to the Advocate General, under EU law the integration of the members of a VAT group in financial, economic and organizational terms does not need to involve a relationship of control and subordination. Provisions in national law according to which the integration required for a VAT group

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is only deemed to exist where there is a relationship of control and subordination must be necessary and proportionate to prevent abuse and to combat tax evasion and avoidance. They also must be compatible with the principle of fiscal neutrality. Determining whether this condition is met is again a matter for the BFH as the referring court. However, the Advocate General doubts whether a relationship of control and subordination is strictly necessary.

In the Advocate General's view a taxable person cannot rely directly on the VAT group provisions of EU law. The BFH as the referring court is obliged to interpret its national legislation in conformity with the provisions of EU law as far as possible.

Please note:
It remains to be seen whether the CJEU follows the Advocate General. If this is the case, the debate about the input VAT deduction in holding structures and the German VAT group regulations could be revived. Because in contrast to the BFH's view a management holding company does not have per se a non-economic area ("sphere theory") as the Advocate General explains. Only if the holding company operates partially as finance holding – and thus not supplying services against consideration to its subsidiaries – a non-economic area will be established according to this approach. The BFH could consider this in its subsequent ruling. The BFH also would have the opportunity to abstain from the requirement of a relationship of control and subordination within a VAT group without legal changes – as this was established from its jurisdiction – and to redefine the integration attributes. Also it will probably no longer be possible to maintain the exclusion of partnerships as controlled companies of a VAT group. Direct relevance could be given at least for partnerships with a capital-based structure, like GmbH & Co. KGs as limited partnerships. For such partnerships the Advocate General believes it might be possible to interpret the national legislation in conformity with the provisions of EU law – by reference to the ruling of the Lower Tax Court in Munich of 13 March 2013, 3K 235/10 (see VAT Newsletter August 2013). The further juridical and legal development – in particular for other partnerships like civil law partnerships (GbRs) and general partnerships (OHGs) – remains to be seen.

Impermissible reduction of VAT rate for electronic books in France and Luxembourg

CJEU, ruling of 5 March 2015 – case C-479/13 – Commission/France and case C-502/13 – Commission/Luxembourg

The rulings of the CJEU relate to the permissibility of a reduced VAT rate for the supply of digital and electronic books in France and Luxembourg.

Subject-matter
The products in question are electronic books which can be called up on a computer, smartphone, e-book reader or another reading device in exchange for payment by downloading or streaming it from a website. Since 1 January 2012, the VAT rate has been 5.5 % in France and 3 % in Luxembourg.

Ruling
According to the CJEU, the electronic available book contents in dispute are not to be qualified as supplies of goods for VAT purposes, but instead represent electronic services. As a result, a reduced VAT rate for these electronic services in France and Luxembourg is not permissible (see in particular Art. 98 (2) (2) of the VAT Directive).

On the other hand, the CJEU states that the reduction of the VAT rate under EU law can include books on CD and other physical media with prevalently identical information content as printed books (see no. 6 Annex III of the VAT Directive).

Please note:
In Germany, particularly books in printed form and newspaper/periodicals are subject to a reduced VAT rate. Supplies of goods, intra-Community purchases of goods and imports and items on loan are included. As of 1 January 2015, the reduced VAT rate was extended to audio books (cf. § 12 (2) no. 1 and 2 UStG in conjunction with no. 50 of Annex 2; see BMF guidance of 1 December 2014 – IV D 2 – S 7225/07/1002, VAT Newsletter December 2014). The reduction for audio books requires a digital and analogous storage device. Another requirement is that only the sound recording of the reading of the book is stored on this device. Hence, radio plays, audio newspapers and audio magazines as well as electronic services are not privileged. This distinction is within the framework of Union law (see Art. 98 (2) (2) of the VAT Directive and no. 6 Annex III of the VAT Directive). However, it must be recognized that the scope of the national VAT reduction includes not all products which are permissible according to EU law (for example dictionaries on CD); as regards the legitimacy CJEU ruling of 11 September 2014 – case C219/13 – K, VAT Newsletter October 2014. It is questionable to what extent the reduced VAT rate in particular on electronical services will be extended at the EU level. The considerations on changing the EU law are not yet finished (see press release of the Council of the European Union – Education, Youth, Culture and Sports of 25 November 2014).

Commission brings action against Germany for insufficient VAT reduction granted to cost-sharing associations

European Commission, press release of 26 February 2015, IP /15/4493

Certain activities of companies like medical care, cultural services or finance and insurance services are VAT exempt in the EU but in general these companies don't entitle for input VAT deduction. In order to avoid a definitive burden of input VAT several measures come into consideration. For example in several member states a VAT group with the third party can be built, so that all supplies within the VAT group are in general outside the scope of VAT. The same effect might be reached in case of services between members of a cost pool as far as no settlement balance ("Spitzenausgleich") is paid (CJEU, ruling of 29 April 2004 – case C-77/01 – EDM). Furthermore, Art. 132 (1) f of the VAT Directive exempts services provided by independent groups of persons to their members from VAT. To be eligible for the VAT exemption, the members themselves need to perform an activity, which is exempt from VAT or for which they are not taxable persons. The services must be directly beneficial for their members' execution of the favored activity. In doing so, the VAT exemption is applicable insofar as the associations may only claim from their members a refund amounting exactly to the relevant share of the common cost. Finally, any eligibility to the VAT exemption must not lead to a distortion of competition.

The European Commission has announced that it will bring legal action against Germany for insufficient implementation of Art. 132 (1) f of the VAT Directive into national law. According to the German law, only associations from the health industry are exempt from VAT (see § 4 no. 14 d) UStG on physicians' associations).

In the Commission's view, the VAT exemption applying to cost-sharing associations is not limited to specific industries. Thus, the VAT exemption shall also apply for the finance and insurance sector.

Please note:
The Commission had asked Germany to change the German VAT law insofar already in 2011 (see VAT Newsletter May 2011). Since it was not changed, the case will now be brought before the CJEU. The result of the legal actions remains to be seen. The CJEU will particularly need to determine whether an expansion of the VAT exemption for cost-sharing associations to all economic industries, such as the financial industry, is generally permissible. The title on Art. 132 VAT Directive only refers to VAT exemptions for specific transactions in the public interest.

NEWS FROM THE BFH

Intra-community supply of goods subject to excise duty

BFH, ruling of 21 January 2015, XI R 5/13

The ruling relates to a dispute over whether supplies of wine to the United Kingdom are zero rated (VAT exemption with entitlement of input VAT deduction).

The case

The case concerns a business engaged in retailing and wholesaling of fine wines. One of its clients was a fund that invested in high-value wines. The fund was a limited company established under the law of the Cayman Islands and registered in the Commercial Register there. The fund held an excise warehouse with a warehousekeeper in the UK. In 2003 the wine merchant treated down payments on deliveries of wine to the fund as down payments on zero rated intra-Community supplies of goods. The invoices referred to the zero rated status of intra-Community supplies of goods and listed the VAT identification number of the warehousekeeper. The wine merchant did not obtain confirmation of the VAT identification number listed on the invoices from the German Federal Central Tax Office in accordance with § 18e (1) UStG. The wines were delivered to the excise warehouse in 2004. It is under dispute whether the supplies are zero rated from VAT. In particular, by not recording the VAT identification number of the fund as the buyer of the goods, the wine merchant failed to provide proper accounting and receipt evidence. Moreover, the Lower Tax Court argued against zero rating on the basis that under UK law the transfer to an excise warehouse does not entail an intra-Community acquisition of goods in the United Kingdom.

The ruling

According to the BFH, the Lower Tax Court was wrong to assume that the intra-Community acquisition of the wines was not subject to VAT treatment as an acquisition of goods by the fund. The place of the intra-Community acquisition was the United Kingdom, because that was where the wines were located when shipping was completed. Under Community law excise warehouses – like customs warehouses – are part of the territory of the relevant member state. Whether or not the United Kingdom has implemented the provisions of Community law into its national law is not the main point here.

The BFH points out that under the case law of the CJEU, the VAT identification number of the acquirer is not a substantive condition for a zero rated intra-Community supply of goods, but merely a formal one (see, for example, the CJEU ruling of 6 September 2012 – case C-273/11 – Mecsek-Gabona, VAT Newsletter October 2012). Nonetheless, in the opinion of the BFH the zero rated status of the supply could be undermined by the fact that the wine merchant did not record the fund's VAT identification number.

According to the BFH, the wine merchant provided information that adequately demonstrated that the purchaser was a taxable person who was acting in this capacity in this transaction. However, the intra-Community supply of goods could only be zero rated, if the wine merchant was unable to supply the VAT identification number of the fund resident in the third country after having made every reasonable effort to ascertain it. The BFH instructed the Lower Tax Court to establish the precise sequence of events. For example, it has to established, whether the fund informed the wine merchant at the beginning of their business relationship some years before that it did not have its own VAT identification number and therefore gave the claimant the VAT identification number of a third party (in this case the warehousekeeper). If so, the court will have to consider whether, having been informed by the fund that the VAT identification number is not its own but the warehousekeeper's, a taxable entity should obtain additional confirmation by verifying the VAT registration number with the German Federal Central Tax Office in accordance with § 18e (1) UStG. When considering what checks the taxable person could be reasonably expected to make, the Lower Tax Court is instructed to take into account that there is no suggestion of any fraud on the part of the persons involved in the case, there was no threat to the tax revenue of the United Kingdom as the wines were stored in a UK excise ware-house and that the claimant correctly recorded the valid VAT identification number of the warehousekeeper.

Please note:
The zero rating of an intra-Community supply of goods requires that the acquisition is in the scope of VAT in another EU member state. It is not necessary that the acquisition is taxable, zero rating is also possible. The BFH clarifies in its ruling that the EU law alone is decisive for the question whether the acquisition is in the scope of VAT in another EU member state, and not the respective local VAT law. Thus, the supplier was not obliged to check the local VAT law whether the transport in an excise warehouse was in the scope of acquisition VAT in the country of destination. This is advantageous for the supplier as he must not be aware of the different local VAT regimes in the EU member states. But if the customers are entitled according to EU law to rely on local purchase thresholds, the local VAT law is important. For example this concerns customers who only perform VAT exempt transactions without entitlement of input VAT deduction. In particular such thresholds are not applicable for goods subject to excise duty as wine in the case of dispute.

NEWS FROM THE BMF

Tax liability of the recipient of metal supplies

BMF, guidance of 13 March 2015 – IV D 3 – S 7279/13/10003

In its guidance, the German Ministry of Finance (BMF) has commented on the changes of the tax liability of the recipient of metal supplies as of 1 January 2015 (see VAT Newsletter January/February 2015). Due to the Customs Code Amendment Act, the amount limit of EUR 5,000 was introduced in § 13b (2) no. 11 UStG in accordance with the already existing regulation applying to supplies of mobile devices (§ 13b (2) no. 10 UStG). On the other hand, selenium and gold as well as wires, rods, tapes, foils, plates and other flat products and profiles from base metals are no longer included in Appendix 4 UStG.

Section 13b.7a VAT of the German VAT Application Decree (UStAE) listing the metals of the items stated in Annex 4 UStG was revised due to the change in the law.

Application rules

The BMF guidance also states application rules for the following cases:

- Final invoices for supplies provided after 31 December 2014 with regard to installment payments before 1 January 2015;
- Correction of an invoice issued for advance payments before 1 January 2015 if the payment is not made before 1 January 2015;
- Invoices after 31 December 2014 for supplies provided before 1 January 2015
- Correction after 31 December 2014 of an invoice for advance payments issued and paid before 1 January 2015.

Transitional arrangements

Ultimately, the BMF guidance includes the transitional arrangements stated in the BMF guidance of 5 December 2014 (see VAT Newsletter December 2014) and in the BMF guidance of 22 January 2015 (see VAT Newsletter January/February 2015). Accordingly, the contracting parties may mutually assume the tax liability of the supplier with regard to supplies and advance payments after 30 September 2014 and before 1 July 2015 if the supplier pays the correct VAT amount for the transaction. In addition, the contracting parties may mutually assume the tax liability of the recipient with regard to supplies and advance payments after 31 December 2014 and before 1 July 2015 although the supplier would be liable to tax according to the new version of § 13b (2) no. 11 UStG and Appendix 4 UStG. The above-stated application rules of installment payments made before 1 January 2015 etc. apply respectively. As a

result, the dates stated therein are apparently postponed by six months if the contracting parties make use of the transitional arrangements.

Please note:
As stated in the VAT Newsletter March 2015, Appendix 4 UStG is to be changed once more with regard to iron and steel due to the inaccurate description of the goods. In the meantime the in so far unchanged bill is published (German Federal Council's Journal 121/15 of 27 March 2015). According to the wording of the bill, granules and powder made of iron and steel are to be included again into the scope of application of § 13b UStG and the "massive, continuously cast, only pre-rolled or pre-forged goods" are to be redefined as "ingots and other primary forms from iron or steel, semi-finished products from iron of steel". The change made to Section 13b.7a (1) no. 3 UStAE in the BMF guidance of 13 March 2015 makes it clear that, in the tax authorities' view, the planned changes in the law will not lead to any changes in the content.

IN BRIEF

The Advocate General's statement on the zero rated transactions in the sea transport

Advocate General, opinion of 5 March 2015 – case C-526/13 – Fast Bunkering Klaipėda

Pursuant to Art. 148 (a) of the VAT Directive, the Member States are obliged to grant a zero rating for supplies of goods for specific vessels on high seas (see § 8 (1) no. 3 UStG). The request for a preliminary ruling from Lithuania refers to the supply of fuel, which is not directly charged to the account of the operators of the vessels. On the contrary, the trader issues an invoice to an intermediary, where the final fuel consumption has already been predefined and the fuel is directly supplied to the relevant vessels. It is questionable whether the zero rating also applies in this case. Art. 148 (a) of the VAT Directive is the direct successor provision to Art. 15 (4) of the 6th EC Directive. According to the CJEU ruling of 26 June 1990 – case C-185/89 – Velker International Oil Company – this provision only applies to supplies of goods to the operators of the vessels, but not to supplies on a previous level of trade. The justification given was that otherwise control and monitoring mechanisms would have to be introduced in order to ascertain the final destination of the supplied goods zero rated. The Advocate General takes the view that the transaction of the trader to the intermediary and the subsequent transaction to the operator are zero rated if the operator directly and unconditionally acquires from the trader the beneficial ownership to the fuel. However, if the intermediary acquires the beneficial ownership, only its transaction to the operator shall be zero rated from VAT.

Adjustments of the input tax deductions for advance payments

BFH, ruling of 29 January 2015, V R 51/13

The BFH has commented on the input tax deduction of a trader with regard to a block heat and power station purchased and paid in advance for the purpose of leasing. The transfer of the power station from the purchaser to the leaseholder was to be made by the assignment of the claim to surrender the property. The leaseholder is a subsidiary of the supplier.

However, the supply and subsequent lease did not take place. Insolvency proceedings were commenced with regard to the assets of the supplier and leaseholder and respectively discontinued for lack of assets. The BFH referred the case back to the Lower Tax Court. The latter needs to determine whether the input tax deduction is to be declined from the outset or to be corrected afterwards, taking into account the CJEU ruling of 13 March 2014 – case C-107/13 – Firin (see VAT Newsletter April 2014). The input tax deduction is to be dismissed from the outset if – from the entrepreneur's objectified point of view – the supply was "uncertain" or if he knew or should have known that there will be no delivery. If the Lower Tax Court denies this, it further needs to determine whether the CJEU ruling Firin may mean – contrary to the previous treatment in Germany – that the party making the advance payment may adjust the input tax deduction before the return of the advance payment.

Deduction of import VAT paid as input tax – requirement of the power of disposal

Lower Tax Court of Schleswig-Holstein, ruling of 9 October 2014, 4 K 67/13; BFH ref. no.: V R 68/14

The Lower Tax Court of Schleswig-Holstein has admitted the question in an appeal before the BFH whether the operator of a customs warehouse may be granted the input tax deduction in cases of removal from customs supervision. In its ruling of 13 February 2014, V R 8/13 the BFH explicitly left the question open whether in these cases there is an input supply of the warehousekeeper's company (see VAT Newsletter July 2014). The Lower Tax Court Hamburg had affirmed this question in the first instance. Thereby, it deviated from Section 15.8 (4) UStAE and from the previous BFH ruling, according to which the power of disposal of the entrepreneur for the imported goods and its incorporation into its company are necessary requirements to be granted the right to input tax deduction. On the other hand, the Lower Tax Court of Schleswig-Holstein takes the view that the criterion of the power of disposal is given both by the EU law criterion of the use of the imported goods for the purposes of the taxed transactions and the criterion of the import for the company stated in § 15 (1) sent. 1 no. 2 UStG. An input tax deduction of the warehousekeeper

would require him to allocate the goods to his company to be able to sell them on his own account.

Sale of a business as a going concern where a property is partly let

Lower Tax Court of Hesse, ruling of 12 November 2014, 6 K 2574/11; BFH ref. no.: XI R 1/15

The sale of leased property generally constitutes a non-taxable sale of a business as a going concern (§ 1 (1a) UStG), where a letting business is acquired by entering into the lease. In the matter at issue, a fully let property was sold to a purchaser who partly used the property for his own business purposes and partly continued the letting activity. The question is whether this qualifies as a non-taxable sale of a business as a going concern.

The Lower Tax Court believes that it does not, because around half of the lettable area is now being used for the business's own purposes. The court refers to the BFH ruling of 30 April 2009, V R 4/07 (see VAT Newsletter October 2009), according to which the transfer of a leased property can constitute the sale of a business even if the property is only partly let. However, the seller must have intended the unused area for letting and the purchaser must also be planning to let. In order to continue an independent commercial letting activity, the purchaser must take on a rental contract covering a not insignificant proportion of the total usable area of the property. The BFH considered this condition to have been met with a letting ratio of 37 %. In the view of the Lower Tax Court, however, use of previously let space for other purposes with no intention to resume letting, as in this case, no longer meets the minimum conditions for the sale of a letting company as a business. The court believes that the fact that the rental contract for the portion of the property used by the purchaser for his own business purposes had ended at the date of the transfer is not relevant. In the Lower Tax Court's view the question of whether the business activities are sufficiently similar before and after the transfer should, where the sale of a company directly involves changes to that company, be answered on the basis of the overall circumstances rather than the situation at a particular date. An appeal has been lodged against the ruling.

VAT exemption for an ATM service provider towards banks

Lower Tax Court in Rhineland-Palatinate, ruling of 23 October 2014, 6 K 1465/12; BFH ref. no.: V R 6/15

In its ruling, the Lower Tax Court in Rhineland-Palatinate comes to the conclusion that the service transactions of an ATM (automated teller machines) service provider could be exempt from VAT for services provided to banks. Taking into consideration the CJEU ruling of 5 June 1997 – case C-2/95 – SDC – there can be VAT-exempt transactions in the payment transactions pursuant to § 4 no. 8 (d) UStG. According to the Lower Tax Court, the specific and substantial service elements of the VAT exempt payment transactions within the meaning of § 4 no. 8 (d) UStG still need to be clarified by the highest courts. An appeal has been lodged against the ruling.

Concept of electronically supplied services

Lower Tax Court Cologne, ruling of 14 May 2014, 9 K 3338/09, BFH ref. no.: XI R 29/14

The ruling refers to an American corporation, which operates contact forums from the U.S. that are globally offered to consumers, among others, in Germany. The membership in return for payment provides authorization rights to access personal information about other members and enables members to contact each other in the sense of a dating agency. For these purposes, the members are given access to data bases on an internet platform with an automated search and filter function. The Lower Tax Court Cologne takes the view that this operation of websites via which the members within the community may contact each other is a so-called other electronically supplied service within the meaning of § 3a (4) no. 14 UStG old version (since 1 January 2015 § 3a (5) no. 3 UStG). It further stated that the services supplied to German consumers were accordingly subject to VAT in Germany. The control and monitoring of the member profiles and the operation of complaint handling numbers does not exclude an electronically supplied service despite the services being provided by humans. In contrast, the foreign corporation takes the view that it provides a sui generis supply of service. Pursuant to § 3a (1) UStG, its place is in the U.S. from where it operates its business. An appeal has been lodged against the ruling.

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