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MwSt.VAT Newsletter

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NEWS FROM THE CJEU

Relevance of the VAT identification number for zero rated intra-Community supplies of goods

Request for a preliminary ruling (Germany), Lower Tax Court in Munich, ruling of 4 December 2014, 14 K 1511/14; case C-24/15 – Plöckl

In a request for a preliminary ruling, the Lower Tax Court in Munich referred to the Court of Justice of the European Union (CJEU) an issue of interpretation concerning the zero rating applicable to intra-Community movements within the own business (VAT exemption with entitlement to input VAT deduction). The question is to what extent the Member States are entitled to deny the zero rating if the entrepreneur has not fulfilled all reasonable measures with the regard to formal requirements to record the VAT identification number.

The case

The sole entrepreneur E purchased a new car for his company in 2006. He dispatched the car within the same year to a Spanish vehicle dealer to have it sold in Spain. In 2007, ten months later, the car was sold by E to the Spanish company D. However, he did neither report an intra-Community movement in 2006 and nor did he have an own Spanish VAT identification number which he could have recorded. Further, he did neither report an intra-Community purchase in Spain in 2006 nor a supply subject to VAT in 2007. On the contrary, he incorrectly assumed that the supply in 2007 was a zero rated intra-Community supply of goods and reported the transaction accordingly. The financial tax authorities as well the entrepreneur and the Lower Tax Court agreed that the present case is not involved in tax evasion.

The ruling

The Lower Tax Court in Munich asked the CJEU whether a zero rating for intra-Community movements was to be denied although the material requirements had been fulfilled and no specific indications pointing to a tax evasion are given. Taking into consideration the CJEU ruling of 27 September 2012 – case C-587/10 – VSTR (see VAT Newsletter October 2012), the Lower Tax Court tends to approve the zero rating in the present case although the sole entrepreneur has not undertaken all reasonable measures with regard to recording an (own) Spanish VAT identification number. According to the Lower Tax Court, reasonable measures to record the VAT identification number could only be requested if there are specific indications pointing to a tax evasion. If already the abstract danger of a tax evasion was sufficient, it would exceed what was needed to ensure a correct tax collection and to avoid tax evasion, the Lower Tax Court further states. Moreover, to ensure a correct tax collection, it is sufficient and necessary to exchange the required information with the Member State, in which the taxation has been omitted so far (see Art. 17 and 19 Regulation 1798/2003 and Art. 13 et. seq. Regulation 904/2010). The Lower Tax Court explicitly pointed out to the fact that the German tax authority could have undertaken steps to the appropriate taxation by informing the Spanish authorities about the transactions.

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Please note:
The present case affects the question of zero rating for intra-Community movements within a business. A possible zero rated intra-Community supply of goods to another entrepreneur was not given, because the later supply lacks a sufficient temporal and material relation with the transport to the other Member State (see CJEU ruling of 2 October 2014 – case C-446/13 – Fonderie 2A, VAT Newsletter November 2014). The Lower Tax Court negates such a relation, because the car was not supplied before roughly 10 months after its transport and that the purchaser was not known at the time the car was moved.

NEWS FROM THE BFH

Input tax deduction on tax returns where the domicile is unclear and the invoice shows VAT

BFH, ruling of 19 November 2014, V R 41/13

The German Federal Tax Court (BFH) had to decide whether a business was required to claim input tax amounts in a tax return or under the input tax refund procedure, where there was uncertainty as to whether the business was domiciled within or outside Germany. One special aspect of the case was that the business submitted invoices charging VAT, even though the reverse charge procedure potentially applied, and was therefore obliged to submit a tax return anyway.

The case

The case involved a limited partnership with its registered office in Germany, but whose partners were entities established under Danish law. The general partner had a Danish business address and was represented by a director with sole powers of representation who was resident in Germany. The partnership did not have an office or staff in Germany or Denmark. The partnership had transferred day-to-day commercial management and operations to a private limited company (GmbH) in Germany. The partnership supplied electricity to a municipal company in Germany in the first half of 2008. The electricity was generated by wind turbines. However, the partnership ultimately sold the wind turbines on 1 July 2008. The partnership maintained that it had suspended its electricity generation operations and would henceforth only settle the income and expenses for the new owner entities. However, it issued invoices with VAT charges to the municipal company throughout 2008. The matter at issue was whether the input VAT resulting from maintenance work on the wind turbines should be claimed under the input tax refund procedure or in the tax return.

The ruling

The BFH came to the conclusion that the input tax must be claimed in the tax return. If the partnership was domiciled in Germany, it would in any case be liable to tax in the first half of the year. If, however, the partnership was established abroad, the municipal company, as the recipient of the supply, would be liable for the tax (reverse charge procedure) pursuant to § 13b (2, 5 and 7) UStG. However, because it submitted invoices showing a separate VAT amount, the partnership remained liable to tax pursuant to § 14c (1) of the German VAT Law (UStG). The BFH left the question as to whether the partnership was domiciled in Germany unanswered. A business established abroad which is required to file a VAT return for the calendar year is both entitled and required to claim in that return all deductible input VAT for the calendar year. The court held that this also applied if the tax charge was too high pursuant to § 14c (1) UStG. In this case, there was no evidence whatsoever of abuse, i.e. that the partnership deliberately issued invoices that it was not entitled to issue, pursuant to § 14c (1) 1 UStG. The BFH expressly left unanswered whether this would also apply to unwarranted VAT charges by a non-business entity (§ 14c (2) UStG).

Please note:
The BFH was not required to address the issue of whether the operator of the wind turbines was domiciled in Germany. The operator argued that it was domiciled in Germany because it operated the wind turbines there. No other staff or an office were required for the day-to-day operations. Further he held that the domicile was also Germany in relation to the letting of a property (section 13b.1 (2) of the German VAT Application Decree (UStAE)). However, in this case the tax office argued there was no permanent establishment in Germany because the executive decisions were made through negotiations and the signing of contracts by the Danish persons behind the Danish partners.

NEWS FROM THE BMF

Price discounts by sales agents or agents

BMF, guidance of 27 February 2015 – IV D 2 – S 7200/07/10003

The German Ministry of Finance (BMF) has adjusted the administrative opinion on the VAT treatment of price discounts granted by sales agents/agents to the case-law in the highest courts (see CJEU ruling of 16 January 2014 – case C-300/12 – Ibero Tours and subsequent German BFH rulings of 17 February 2014, V R 18/11 and of 3 July 2014, V R 3/12; see VAT Newsletter August/September 2014).

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Price discounts within the supply chain

According to the principles of the CJEU ruling of 24 October 1996 (case C-317/94, Elida Gibbs), a reduction in consideration of the first entrepreneur within the supply chain is given if this entrepreneur grants a refund for his supply to one of the subsequent purchasers within the supply chain. The benefiting buyer does not need to be in a direct supply relationship with the first entrepreneur. If the end customer is an entrepreneur entitled to partial or full input tax deduction, the input tax deduction resulting from the supply is reduced by the tax amount included in the refund or in the price discount (see § 17 (1) sent. 4 of the German VAT Law (UStG)).

Price discounts outside the supply chain (change of administrative opinion)

Contrary to the previous administrative opinion, the above-mentioned principles may not be applied accordingly if – instead of the entrepreneur participating in the supply chain – an agent grants the partial refund of the price for the intermediary transaction to the recipient of the intermediary supply. Equally, price discounts granted by a central settlement office to the factoring customers for the receipt of goods from a specific supplier do not reduce the assessment basis for the supplies, which the central settlement office provides to the suppliers. Accordingly, these price discounts do not lead to the factoring customer's correction of the input tax deduction resulting from the supply of goods.

Should in exceptional cases the price discount not be granted by the agent for the intermediary transaction but rather on the basis of the existing supply relationship with the customer, the discount is subject to special assessment. As a result, the price discounts granted by the central settlement office to its so-called factoring customers might be considerations for the factoring customer's supply to the central settlement office or a reduction of the consideration for the central settlement office's supply to the factoring customer.

Please note:

The principles of the BMF guidance must be applied to all open cases. The BMF guidance and the BFH rulings of 27 February 2014, V R 18/11 and of 3 July 2014, V R 3/12 are expected to be published in issue no. 5/2015 of the Federal Fiscal Gazette end of March 2015. For price discounts granted up to and including the day of publication of the BFH rulings in the Federal Fiscal Gazette a non-objection regulation is provided for in the BMF guidance. Up to that date, no objection will be made if the agents or the sales agents have assumed a reduction in consideration. According to the BMF, the tax rate relevant to the intermediate supply is relevant for the VAT reduction of the agent's supply. In its ruling of 3 July 2014, V R 3/12, the BFH left this question open.

IN BRIEF

Liability of the recipient of construction work and building cleaning services

BMF, guidance of 4 February 2015 – IV D 3 – S 7279/11/10002-04

The BMF guidance provides for a clarification of the non-objection regulation of the tax authorities with regard to the tax liability of the recipient of construction work and building cleaning services in the version of the BMF guidance of 8 May 2014 (see VAT Newsletter June 2014). The non-objection regulation refers to construction work executed before 15 February 2014 or the execution of which was started before 15 February 2014. In cases where the contracting parties applied by mutual agreement the tax liability of the recipient of the construction work while taking into consideration the administrative guidelines in section 13b.3 and 13b.8 UStAE applicable until 14 February 2014, no objection was made if they also decided afterwards by mutual agreement to stick to the former decision, even if by applying the BFH ruling of 22 August 2013, V R 37/10, the supplier would be liable to tax. According to the BMF guidance of 4 February 2015, this non-objection regulation also applies if a construction work that was started before 15 February 2014 was concluded after 30 September 2014 and the recipient is not liable to tax for this transaction pursuant to § 13b (2) no. 4 sent. 1 and (5) sent. 2 UStG in its version applicable since 1 October 2014.

Gratuitousness with regard to supplies provided free of charge on presentation of a coupon previously put into circulation

BFH, ruling of 19 November 2014, V R 55/13

If an entrepreneur puts a coupon into circulation that entitles the owner to receive supplies from the entrepreneur free of charge, there is usually no exchange of supplies in return for payment according to the BFH. This also affects the calculation of the basis of assessment with regard to transactions from the gaming machine operation. If coupons issued free of charge were incorrectly treated as consideration, the consideration must be reduced in this respect. At the same time, it has to be considered that with regard to transactions from the operation of gaming machines the game stakes do not represent the full consideration, but must be adjusted by the profit distributions. With regard to transactions from the operation of gaming machines where a specific percentage of the game stakes is paid to the players as profit due to mandatory legal provisions, a particularity must be considered concerning the calculation of the basis of assessment in accordance with the case-law of the CJEU (see last CJEU ruling of 24 October 2013 – case C-440/12 – Metropol). Following this, the consideration actually received for the provision of the gaming machines is only that part of the

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game stakes that he can effectively dispose of. Therefore, the game stakes in Germany are to be reduced by the profit distribution according to the German Gaming Ordinance.

Difference between a taxable sale of property and a non-taxable sale of a business as a going concern

Berlin-Brandenburg Lower Tax Court, ruling of 12 November 2014, 7 K 7283/12; BFH ref. no.: V R 66/14

The transfer 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. These principles also apply *mutatis mutandis* to sub-let properties (see section 1.5 (2) UStAE). However, due to the BFH (BFH, ruling of 24 February 2005, V R 45/02) the purchaser is not deemed to have acquired a letting business as a going concern if the business carried on by the seller principally consists in erecting a building and finding tenants for the rental units with a view to facilitating a sale on completion on the grounds that the premises are already let. By contrast, the Saarland Lower Tax Court affirmed that the letting business was a going concern and held that having an intention to sell from the outset was immaterial if the property, which was later sold, was let for two to three years (ruling of 5 March 2014, 1 K 1265/11; ref. no. at BFH: XI R 16/14). However, according to the Berlin-Brandenburg Lower Tax Court, the sale of a let property does not constitute a sale of a business as a going concern if the premises was let for only 17 months and there was an intention to sell from the outset which is at least equivalent to the lease. The Lower Tax Court therefore authorized an audit to clarify the circumstances under which an entity that sells rented property soon after the building is completed is effectively selling a business as a going concern.

NEWS FROM THE LEGISLATION

Amendment of the reverse charge procedure for supplies of metal

Draft legislation to implement the declaration regarding the German Customs Code Amendment Act, as at 19 February 2015

The reverse charge procedure applying to certain supplies of metal, which took effect on 1 October 2014, has been restricted by further amendments to § 13b (2) no. 11 UStG and Appendix 4 UStG as of 1 January 2015 (see VAT Newsletter January/February 2015). According to the explanatory memorandum, the wording of no. 3 of the Appendix concerning iron and steel has to be amended because these items were not precisely designated. The amendment does not aim to have substantive impact for those concerned.

Please note:
Even though the proposed amendment merely concerns the form of words, a closer look at the differences in wording between the past and future versions raises doubts. For example, according to the first draft, granular iron and steel as well as iron and steel powder will once again fall within the scope of § 13b UStG. The scope may well be expanded in practice, including for large continuously cast products that are only pre-rolled or pre-forged, which are designated in the draft law as "ingots and other primary forms made of iron or steel; semi-finished products made of iron or steel". Industry associations have also criticized the fact that the EUR 5,000 limit in § 13b (2) no. 11 of the draft UStG is mandatory rather than optional. Further criticisms included, for example, the fact that ferro-alloys were not included in Appendix 4.

OTHER

New guidelines from the VAT Committee

Guidelines from the 101st meeting on 20 October 2014, overview on pps. 180, 181 and 186

The index of guidelines issued by the VAT Committee, which is published on the Commission's website, has been updated. We would like to highlight two issues from the new guidelines from the 101st meeting on 20 October 2014:

VAT refund for taxable persons registered for the Mini-One-Stop-Shop (MOSS)
The guidelines relate to an EU-based business that supplies in 2015 telecommunications, radio, broadcasting or electronic services subject to VAT to non-taxable persons in another Member State (see VAT Newsletter July 2014). Instead of registering in the Member State of consumption, it registeres for the MOSS in the country in which it is domiciled. If the business carries out other transactions in the Member State of consumption, it must claim all input VAT amounts there in a VAT return (Art. 369j (2) of the VAT Directive). Otherwise, the input VAT must be claimed under the input tax refund procedure (Art. 369j (1) of the VAT Directive). The VAT Committee unanimously agreed that the business must check the box on its electronic refund application, indicating that it did not supply any services in the Member State of consumption. The VAT Committee also unanimously agreed that the business may indicate in an empty field (if any) in the same refund application that it is registered for the MOSS. No such field is currently available for the German Federal Central Tax Office application.

Inclusion of non-taxable persons in a VAT group
The guidelines address the issue of whether and to what extent non-taxable persons must be included in a VAT group (or German Organschaft), having regard to the CJEU rulings

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of 9 April 2013 – case C-85/11 – Commission/Ireland and of 25 April 2013 – case C-480/10 – Commission/Sweden (see VAT Newsletter May 2014). The VAT Committee (in response to a question submitted by Germany) almost unanimously agreed that while Art. 11 of the VAT Directive did not preclude non-taxable persons from being included in a VAT group, Member States are not required to allow non-taxable persons to be members of a VAT group. The scope of the rules governing VAT groups may be limited by excluding such persons from membership, provided the principle of neutrality is observed. In its guidance of 5 May 2014 (see VAT Newsletter May 2014), the BMF previously maintained its position that under German law non-business entities cannot be part of a VAT group.

Please note:
Neither the guidelines of the VAT committee nor the publications of the Commission are binding (see BMF guidance of 3 January 2014 and 17 December 2014, VAT Newsletter January/February 2015). However, they reflect the current stance adopted by the tax authorities in the individual member states, either unanimously or predominantly, depending on the matter at issue. Furthermore, the guidelines may also form the basis for future amendments, in particular to the VAT Directive, the EU Implementing Regulation No. 282/2011, and the rules governing the input tax refund procedure.

Entry certificate remains obstacle within the EU export

The Association of Bavarian Chambers of Industry and Commerce (BIHK), Bavarian business survey, status: January 2015

In November 2014, over 800 Bavarian businesses took part in the Association of Bavarian Chambers of Industry and Commerce's (BIHK) survey on the entry certificate as evidence of the zero rating for intra-community supplies of goods. The results were summarized in a prospect. Following the results, the entry certificate leads to higher personnel expenditures, higher costs and higher business risk and also places a burden on customer relationships. The requirement of the customer's signature particularly leads to problems. However, the introduction of alternative evidences, such as the carrier's receipt or the CMR consignment note, is perceived as facilitation. However, this also includes additional costs, which all in all lead to competitive drawbacks in export-focused Germany. The BIHK therefore strives for uniform documentary evidence within EU.

EVENTS

VAT 2015 – Current Hot Topics

At the stated locations, KPMG specialists will inform you about the current developments in the field of VAT. Our focus will be on the innovations of the legal situation and selected rulings of the CJEU and BFH as well as their interpretations by the German Finance Courts. We will deal with pitfalls and show solutions. We will add to this overview the presentation of selected administrative guidance.

20 April 2015 – Hamburg

21 April 2015 – Kiel (Breakfast Meeting)

22 April 2015 – Bremen

For more information please click here.

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