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MwSt.VAT Newsletter

May 2015

NEWS FROM THE CJEU

Ancillary services to property letting

CJEU, ruling of 16 April 2015 – case C-42/14 – Wojskowa Agencja Mieszkaniowa w Warszwie

This Court of Justice of the European Union (CJEU) ruling relates to a reference for a preliminary ruling from Poland. The question at issue is the VAT treatment of charges for services purchased by a landlord from a third party and passed on to its tenant.

The case

A Polish landlord lets property subject to VAT at the standard rate (23 % since 1 January 2011). The landlord passes on the costs of services purchased from third parties (electricity, heating, water and refuse disposal) to its tenant as service charges. The matter under dispute is whether, for VAT purposes, the service charges constitute payment for only a single rental service or whether they should be treated as distinct services provided in addition to the let. If a single service, the taxable amount for the rent would increase (standard tax rate 23 %). If several distinct services were deemed to have been provided, this is particularly important for the supply of water, as the tax rate would then be only 8 % under Polish law.

The ruling

The CJEU established firstly that the services invoiced as service charges are provided by the landlord to the tenant and not by third parties (such as water utilities) directly to the tenant. In this respect, the court distinguished this case from its earlier ruling in the "Auto Lease Holland BV" case (CJEU ruling of 6 February 2003 – case C-185/01), in which a lessee bought in the name and on behalf of the lessor fuel at petrol stations, and had free choice regarding the quality and quantity of fuel and the time of the purchase. The CJEU decided that the fuel management agreement between the lessor and the lessee did not constitute a contract for the supply of fuel but rather a contract to finance its purchase. In the present case, however, the landlord purchases the services for the property it lets. It is true that the tenant uses these supplies directly, but does not purchase them by specialist third persons.

Regarding the question of whether service charges constitute an ancillary service to a let or a distinct service provided by the landlord to the tenant, the CJEU also referred to its rulings of 11 June 2009 – case C-572/07 – RLRE Tellmer Property (VAT Newsletter December 2009) and 27 September 2012 – case C-392/11 – Field Fisher Waterhouse (VAT Newsletter November 2012). The differentiation is as follows:

Services are deemed to be distinct from the let if, for example, the tenant is free to determine his own level of electricity, heating or water consumption using an individual meter and the landlord then invoices the amount consumed accordingly. Services may also be distinct if the tenant has the right to choose the supplier and if the landlord itemizes the ancillary services (e.g. cleaning of the common parts of a building under joint ownership or refuse disposal) separately in the invoices to the tenant.

The transactions would be treated as part of a single rental service if the accompanying services appear

Content

objectively, from an economic perspective, to form a whole with the rented building. This may be the case with the letting of turnkey offices which are ready for use with the provision of other supplies, for example, and with property that is let for short periods for professional or private reasons, in particular for holidays. On the other hand these are cases in which the landlord himself is not able to choose the suppliers and terms freely and independently of other landlords. This could apply, for instance, if the landlord let part of a multi-dwelling building and passed on his or her share of the electricity costs for jointly owned areas of the building.

Please note:
The current opinion of the tax authorities is that ancillary services are services which are secondary to, closely connected with, and, usually, a consequence of, the property letting. Supplies of electricity, heating and water usually fall under this definition, for example. This interpretation is not entirely consistent with the differentiation criteria established by the CJEU. According to the CJEU's principles, consumption-based invoicing using an individual meter should, as a general rule, be classed as a distinct supply. This could be the case with the letting of offices, for example, even if they are the individual property of the landlord. If the specific areas are only jointly owned by the landlord (such as stairwells and underground car parks) and the landlord cannot choose, say, the electricity supplier independently of the other owners, then treatment as a separate supply is likely to be ruled out. The differentiation is not only significant if the let is exempt from VAT. Even if the let is subject to VAT, the question arises as to which tax rate to apply. Only separate supplies of tap water are subject to the reduced rate of VAT (§ 12 (2) no. 1 of the German VAT Law (UStG) in conjunction with (34) Appendix 2 UStG). On the input side, a separate supply of electricity could, depending on the consumption, lead to a situation in which the landlord is liable for tax with regard to the purchased electricity as the supply recipient (§ 13b (2) no. 5 a) or b) UStG). The question is whether the tax authorities will change the wording of the German VAT Application Decree (UStAE). The previous CJEU rulings "RLRE Tellmer Property" and "Field Fisher Waterhouse" were incorporated only through an addition in parentheses in Section 4.12.1 (5) UStAE without addressing the content of the legal principles formulated by the CJEU. Even if the UStAE is not amended, landlords could consider directly invoking the principles established by the CJEU.

NEWS FROM THE BFH

Allocation of an intra-Community supply of goods in a chain transaction

BFH, ruling of 25 February 2015, XI R 15/14 and XI R 30/13

With both rulings on the allocation of zero rated (VAT exemption with entitlement of input VAT deduction) intra-Community supplies of goods in a chain transaction, the German Federal Tax Court (BFH) has quashed in large parts the interpretation principles of the tax authorities. As a result, many companies have to review the VAT treatment of its supply structures. Moreover, a new legal regulation is to be expected. To conclude, the following aspects are particularly important.

Intra-Community chain supply – initial situation

An intra-Community chain transaction is given, if several traders enter into sales transactions involving the same item, which is sent by the initial trader located in a Member State to the final purchaser located in another Member State. In this case, the transport or dispatch of the item is to be allocated to one of the supplies only. In this context, the supply in movement is the only one that may be considered as a zero rated intra-Community supply of goods. Earlier supplies in a chain transaction are generally liable to VAT in the Member State of departure, while the following supplies in a chain transaction are generally liable to VAT in the Member State of destination.

Cases

In the first case (XI R 15/14), a German GmbH (A) sold machines to an US company (B). On request, B only supplied the VAT ID number of the Finnish company (C) to which it re-sold the machines. B engaged a forwarding agent, who picked the item up at A's location. C paid to the company Z for the subsequent shipment to Finland. A issued to B an invoice showing no VAT.

In the second case (XI R 30/31), a vehicle dealer (A) in Germany sold new vehicles to company B, which has its headquarters in the United Kingdom. B re-sold the vehicles to company C and stating the UK VAT on its invoice. C engaged a forwarding agent to pick-up and transport the vehicles to the United Kingdom.

In both cases it is in dispute, whether the delivery between A and B could be a zero rated supply of goods in a chain transaction.

Rulings

The BFH's most important statements on the allocation of the movement of goods in chain transactions between A, B and C are as follows:

- The allocation requires an extensive assessment of all circumstances in each individual case. In particular, it has to be assessed whether the power of disposal has been

transferred from B to C already within the domestic territory. Only in such case does the movement of goods have to be allocated to the second supply (B to C).

- With regard to the allocation, exclusively objective circumstances are relevant. The point in time at which the power of disposal (transfer of the asset, value and revenue) to an item is obtained depends on the concrete contractual agreements and their actual execution considering the interests of the participants.
- For allocation purposes, the place of supply provision in § 3 (6) sent. 1 UStG cannot be used as a notional date of obtaining the power of disposition.
- Should any unrecoverable doubts remain that the power of disposal has been transferred from the initial purchaser (B) to the final purchaser (C) already in the domestic territory, the movement of goods is to be allocated to the first supply (from A to B).
- If all participants to a chain transaction are third parties and commonly assume that the movement of goods is to be allocated to a specific supply, then this is an indication that it corresponds to the actual circumstances.
- The allocation principles do not only apply if the initial purchaser (B) transports or dispatches the item, but as well if the last purchaser (C) does so. However, if C personally collects the item from A, then C will often obtain the power of disposal already in Germany and, as a result, the movement of goods will need to be allocated to the second supply (B to C). In individual cases, however, the overall circumstances could lead to other results.
- Contrary to the view of the 5th Senate stated in the ruling of 11 August 2011, V R 3/10 (VAT Newsletter November 2011), the initial purchaser (B) does not have the option to allocate the movement of goods to the first supply (A to B) or its own supply (B to C) by notifying or concealing the re-sale.
- Any intentions deviating from the objective circumstances may only be important within the scope of the assessment of the legitimate expectations. According to the BFH, A may obtain assurance from B that B will not transfer the power of disposal to a third party before the item leaves the domestic territory. If B acts in violation to this assurance, A may be entitled to legitimate expectations and B may be liable to VAT (§ 6a (4) UStG).

Please note:
The BFH sticks to its principles of its ruling dated 28 May 2013, XI R 11/09 (VAT Newsletter August 2013), on the allocation of the supply of goods in movement within the scope of a chain transaction and expands them explicitly to transports by the second purchaser (C) and probably also to transports arranged by the first participant. In its ruling of 21 January 2015, XI R 12/14, the BFH left – for procedural reasons – the question open how to allocate the movement of goods in a chain transaction involving an export supply. It is to be expected that there will be a new legal regulation on the allocation of supplies of goods in movement within the scope of a chain transaction already in this year (see the German Government's response dated 13 May 2015 (German Parliamant document No. 18/4902) to a request by the German Federal Council (Bundesrat) concerning a draft law to implement the declaration regarding the German Customs Code Amendment Act). Any affected companies should prepare themselves already at this point by analyzing their supply structures and any possible impact of the new ruling and also any possible options for action.

NEWS FROM THE BMF

Time at which VAT is incurred if it is charged incorrectly on an invoice

BMF, guidance of 2 April 2015 – IV D 2 – S 7270/12/10001

This German Ministry of Finance (BMF) guidance concerns the time at which VAT is incurred if it is charged incorrectly (§ 14c (1) UStG). This concerns charging VAT on a non-taxable or zero-rated supply or charging too high a rate of VAT on a taxable supply. Section 13.7 UStAE has been adapted in line with BFH case law.

The legal position

According to § 13 (1) no. 3 UStG, VAT is incurred in cases governed by § 14c (1) UStG at the time at which the supply of goods or services (in accordance with § 13 (1) no. 1 (a) or (b) UStG) arises, but at the latest upon issuance of the invoice. § 14c (1) UStG presupposes that the business charges a higher tax amount in an invoice for a supply than it is liable for under the German VAT Law. In this case, the business also owes the additional amount.

Interpretation in accordance with the VAT Directive

In accordance with the VAT Directive, if VAT is charged on a non-taxable or zero-rated supply, the tax owed under § 14c (1) UStG is incurred only when the invoice is issued (BFH ruling of 8 September 2011, V R 5/10). The tax authorities followed this interpretation in their guidance of 25 July 2012 – IV D 2 – S 7270/12/10001 (VAT Newsletter August/September 2012).

If the supplier charges a higher tax amount on an invoice for a taxable supply than that for which it is liable by law, the VAT owed under § 14c (1) UStG also is not incurred before the end of the accounting period in which the invoice is issued. The tax authorities are now following the BFH (ruling of 5 June 2014, XI R 44/12, VAT Newsletter August/September 2014) in this point, too, regardless of whether the

higher tax amount is based on a retrospective calculation (as in the case of the BFH ruling) or on an initial calculation.

Please note:
The rules laid down in the BMF guidance must be applied in all pending cases. According to the BMF, however, it is to be assumed that businesses regularly do not recognize additional amounts owed in accordance with § 14c (1) UStG as such. For the sake of simplicity, no objection will therefore be raised if the business reports the additional amount together with the tax due on the taxable supply, even if the invoice is not issued until a later accounting period. In this way, corrections of earlier preliminary tax returns can be avoided.

Example: In December 2013, a party service supplies meals for immediate consumption by special request for a large company event. The supply is worth a total of EUR 20,000 plus VAT and occurs in the December 2013 accounting period. The customer also receives napkins, disposable tableware and cutlery, which it disposes of itself. The supplies are subject to the reduced tax rate of 7 % (see example 13 in Section 3.6 (6) UStAE). However, the party service incorrectly issues an invoice with 19 % VAT on 7 January 2014 (EUR 3,800) and reports the 19 % VAT in its VAT return 2013. But only the VAT due by law of 7 % (EUR 1,400) is incurred at the end of the December 2013 accounting period. The additional amount of EUR 2,400 owed under § 14c (1) UStG is incurred at the time the invoice is issued, which is in January 2014. After an audit in 2016, the tax authorities of the customer reclaim the input VAT deduction as too high. Thus, the party service issues a corrected invoice to its customer. The party service does not make use of the non-objection regulation of the BMF and files corrected VAT returns which lead to a lower payment (EUR 2,400) for 2013 and to a higher payment (EUR 2,400) for 2014. Accordingly, interest on refunds (§ 233a of the German Tax Code) arise from 1 April 2015 whereas interest on arrears start later on 1 April 2016.

Reference must also be made to the draft legislation to implement the declaration regarding the German Customs Code Amendment Act (German Parliament document No. 18/4902). It is intended that the time at which VAT is incurred in cases governed by § 14c (1) UStG shall be uniformly set as the time the invoice is issued, thus bringing the German VAT Law into line with BFH case law.

IN BRIEF

The Advocate General's statement on the direct and immediate connection between input and output supply

Advocate General, opinion of 22 April 2015 – case C-126/14 – Sveda UAB

The Advocate General's opinion relates to a request for a preliminary ruling from Lithuania. The Lithuanian company Sveda constructed a leisure and discovery trail to the Baltic mythology. The construction work for the leisure trail was undertaken in accordance with the obligations arising from a contract concluded between the state and Sveda. According to this contract, Sveda is obliged to grant access to the leisure trail for the public free of charge. In return, up to 90 % of Sveda's cost of the trail construction are paid as "financial aid". Sveda intends to engage in commercial activity within the tourism industry, e.g. by selling food or souvenirs to visitors to the leisure trail. It is in dispute whether there is a right to input tax deduction from input supplies for the construction of the leisure trail.

The Advocate General affirms the right to input tax deduction and states two aspects in support of this.

On one hand, a right to input tax deduction is already possible where the construction of the leisure trail has to be considered as a taxable supply provided to the state for consideration. This option has not been considered by the referring court. In this context, there would have to be an immediate connection between the construction of the leisure trail and the "financial aid". Without knowing the specific content of the contract, it was not possible to conclusively assess the matter.

However, even if the construction of the leisure trail was no transaction liable to VAT, the question as to the right to input tax deduction was to be answered in the affirmative. Also, an allocation to the company assets was possible. Further, there was an objective commercial connection to the later transactions with the customers. The fact that the leisure trail was to be offered to the visitors primarily free of charge did not contradict the right to input tax deduction. This primary use was to be considered only if the transaction is exempt from VAT and in return for consideration or if the activity is non-economic. Contrary to the Commission's view, the mere fact that a supply is offered free of charge did not constitute a non-economic activity. In this context, the Advocate General referred to the example of a shopping center, which offers parking lots to their customers free of charge.

The ruling of the CJEU remains to be seen. According to the BFH (ruling of 4 March 1993, V R 73/87) and the tax authorities, the construction of a parking lot offered to customers free of charge does not constitute a non-economic activity. The right to input tax deduction depends on the output

transactions of the company (Section 15.12 (3) example 5 UStAE.

Principle of neutrality of VAT

CJEU, ruling of 23 April 2015 – case C-111/14, GST – Sarviz AG Germania

The ruling of the CJEU on a case referred by Bulgaria relates to the principle of tax neutrality with regard to the contracting parties' wrong assumption of the recipient's tax liability. In the present case, the supplier subsequently paid the VAT to the tax authority. According to the Bulgarian law, the supplier is not allowed anymore to issue invoices stating the VAT due to a sustainable tax assessment. Hence, he may not request the recipient to pay the VAT. The recipient also paid to the tax authority the VAT on the transaction, but ultimately did not have the right to deduct the VAT in the absence of the "tax document". Under these circumstances, the CJEU confirmed that the VAT is to be refunded to the supplier due to the principle of neutrality. Otherwise, the tax authority would have received the VAT twice. Once from the supplier and once from the recipient. The ruling refers to an exemption due to procedural requirements in Bulgaria. However, the ruling shows that the impact of the respective national procedural laws is always to be scrutinized in the light of the EU law.

Input tax deduction from advisory services for establishment of a single member limited company

Lower Tax Court of Dusseldorf, ruling of 30 January 2015, 1 K 1523/14 U; ref. no. of the BFH: V R 8/15

The ruling of the Lower Tax Court of Dusseldorf refers to a single person's input tax deduction from advisory services for the purpose of preparing and establish a so called Ein-Mann-GmbH (single member limited company). The Court reached the conclusion that a right to input tax deduction is given if the intention to generate with the limited company transactions liable to VAT was objectively recognizable. This also applies if the establishment of the GmbH failed. Also, if a single person did not want to carry out taxable transactions when he/she received the supply during the start-up phase, the right to input tax deduction was still not excluded. The Court's justification is based on the principle of neutrality of VAT. The single person was to be compared with a so-called Vorgründungsgesellschaft (company prior to registration) the object of which is exclusively to prepare the establishment of a capital company (cf. CJEU ruling of 29 April 2004 – case C-137/02 – Faxworld). If the right to input tax deduction cannot be granted to the capital company established later, because they did not receive the supplies themselves, it would contradict the principle of neutrality to also deny the company prior to registration the right to input tax deduction, because they do not receive the supplies for their own economic activities. According to the Financial Court, the particularity in the civil law that there is no organization similar to the company prior to registration with regard to the establishment of a single limited company does not constitute an objective reason to deny the future sole shareholder the right to input tax deduction from the first investment expenses. Further, a single person in the preparation phase of an own economic activity would be entitled to input tax deduction under comparable circumstances. An appeal was filed against the ruling.

Transactions of an Internet pharmacy

BFH, ruling of 24 February 2015, V B 147/14

The BFH ruling in the preliminary proceedings refers to an Internet pharmacy in the Netherlands. They dispatch drugs to customers in Germany. The customers are either patients covered by the statutory health insurance or patients covered by the private health insurance. As a pharmacy, they are obliged to inform and consult their customers with regard to the drug delivery. In this respect they needed the patients' assistance for the orders placed via the Internet. Therefore, in return for answering questions about the deceases and for sending the prescriptions, they granted to the patients an expense allowance.

The pharmacy treated their supplies to the patients covered by private health insurance as distance sales transactions liable to VAT in Germany pursuant to § 3c UStG. Moreover, the pharmacy issued invoices to the statutory health insurance companies with regard to the supplies for their members stating their supplies as zero rated intra-Community supplies of goods. It is in dispute whether the assessment basis for the taxable supplies to the patients covered by private health insurance is to be reduced not only by the expense allowance granted to them. According to the BFH, the connection between each expense allowance and the specific transaction needs to be checked. The expense allowances to the patients covered by the statutory health insurance are directly connected to the zero rated intra-Community supplies of goods to the statutory health insurance companies. In this respect, no VAT reduction may be granted, because there is no taxable transaction pursuant to § 17 UStG. The expense allowances paid to the patients covered by the statutory health insurance are only indirectly connected to the distance sales transactions with respect to the patients covered by private health insurance. As a result, a reduction pursuant to §17 UStG is excluded.

OTHER

Results of the special VAT-audit 2014

BMF, notification of 8 April 2015

The special VAT-audits are undertaken regardless of the rotation of the general audit and without differentiation between the sizes of the businesses. The special VAT-audits undertaken in 2014 resulted in a VAT surplus amounting to EUR 2.23 billion. The results from the engagement of special VAT-auditors in general audits or in tax investigations are not included in this taxable gain. In 2014, 89,202 special VAT-audits were undertaken. On a yearly average, 1,921 special VAT-auditors were engaged. On average, each auditor undertook 46 special audits. According to the BMF, this means that an average taxable gain of approx. EUR 1.16 million is reached per auditor engaged.

When comparing earlier notifications of the BMF it becomes clear that in the last five years the number of the special VAT-audits has declined, but the overall surplus has risen nonetheless. This also applies to the level of the individual auditors:

	2010	**2011**	**2012**	**2013**	**2014**
Total surplus (€)	1.9 billion	2.0 billion	2.3 billion	1.97 billion	2.23 billion
Total audits	96,138	93,144	91,198	90,407	89,202
Total auditors	1,958	1,937	1,904	1,908	1,921
Audits per auditor	49	48	48	47	46
Total surplus per auditor (€)	0.98 million	1.00 million	1.20 million	1.03 million	1.16 million

EVENTS

Electronic archiving – efficiency and audit security for companies

11 June 2015	–	Frankfurt / Main
12 June 2015	–	Cologne
16 June 2015	–	Munich
2 July 2015	–	Leipzig
7 July 2015	–	Hanover
14 July 2015	–	Mannheim
15 July 2015	–	Fribourg
22 July 2015	–	Regensburg
8 September 2015	–	Kiel
10 September 2015	–	Essen

For more information please click here.

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