July 2015

NEWS FROM THE CJEU

Input tax deduction of a management holding company and VAT group

CJEU ruling of 16 July 2015 – cases C-108/14 – Larentia + Minerva – and C-109/14 – Marenave

The ruling of the Court of Justice of the European Union (CJEU) relates to two requests for a preliminary ruling from Germany. In the 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 CJEU. As a result, the CJEU follows the opinions of the Advocate General (see VAT Newsletter April 2015).

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. Larentia + Minerva performed administrative and commercial services subject to VAT. In addition to management services subject to VAT, Marenave provided VAT exempt loans. 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, because the input VAT amounts were to be split up due to holding and purchasing shares in subsidiaries (non-economic activity).

Ruling

The CJEU contests the view of the BFH according to which the two parent companies also conduct non-economic activities by purchasing and holding shares. As a continuation to the CJEU ruling of 27 September 2001 – case C-16/00 – Cibo Participations – costs incurred in purchasing the shareholdings have no direct and immediate link to certain output transactions. Moreover, the costs 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, provided the parent company only engages in taxable activities. Input tax only needs to be apportioned if the overall activities comprise both supplies where input tax may be deducted and supplies that deny the input tax deduction.

The CJEU clarifies that an apportionment is also necessary if the holding acts as finance holding (non-economic activity) and as management holding (economic activity), costs arise for the acquisition of several subsidiaries and the costs can't be attributed to a certain subsidiary. In this case, VAT paid on that expenditure may be deducted only in proportion to that which is inherent to the economic activity.

The CJEU does not follow the concern of the BFH that in the case of a VAT group shares may be held in a group company in a non-economic area as a result of which the VAT group would have no relevance for the input VAT deduction of the management holding.

Content

The CJEU points out, that an existing VAT group can be important for this dispute as in the case of a VAT group, the input VAT deduction is subject to the external transactions of the tax group, but not to the intra-company transactions.

The CJEU concludes that the personal area of application of the VAT group regulations subject to EU law in principle includes all persons, i.e. also partnerships. Further, the close connections between the members of a VAT group in general do not need a relationship of control and subordination. According to § 2 (2) no. 2 of the German VAT Law (UStG), a VAT group a legal person (controlled company) which is integrated in financial, economic or organisational terms into the undertaking of the controlling company. Based on traditional view, partnerships cannot be a member of a VAT group as controlled company. Moreover, an integration needs a relationship of control and subordination (see guidance of the German Ministry of Finance (BMF) dated 5 May 2014 – IV D 2 – S7105/11/1001 – IV D 2 – S 7105/13/10003). The CJEU takes the view that such restrictions are only justified if they constitute measures which are appropriate and necessary in order to achieve the objectives seeking to prevent abusive practices or tax evasion. However, it is ultimately a matter for the BFH as the referring court to determine.

If the German practice is not in line with the 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. If it is not possible to interpret the national law in conformity with the provisions of EU law without infringing the wording of the national legislation, a taxable person cannot rely directly on the VAT group provisions of EU law.

Please note:
The ruling of the CJEU is particularly interesting for financial investment companies where the supply against consideration to the subsidiary (based on the amount) plays a subordinate role. The statements of the CJEU should be interpreted to mean that also in such case a management holding company does not have per se a non-economic area ("sphere theory"). The BFH will now have the opportunity to further substantiate the principles of the input VAT deduction of a management holding in its subsequent rulings. It remains to be seen whether and to which extent the BFH adheres to the requirement of a relationship of control and subordination between controlling and controlled company and the exclusion of partnerships as controlled companies of a VAT group. Attention should be drawn especially to the case-law of the German Federal Constitutional Court according to which also partnerships may be legal entities within the meaning of Art. 19 (3) German Basic Law (see for example Federal Constitutional Court, ruling of 2 September 2002, 1 BvR 1103/02 on a civil law partnership). Thus, it might be possible to interpret § 2 (2) no. 2 UStG in conformity with the provisions of EU law without infringing the wording of the national legislation. The Lower Tax Court Munich has already affirmed in its ruling of 13 March 2013, 3K 235/10 (see VAT Newsletter August 2013) that capital-based limited partnerships like a GmbH & Co. KGs may be a member of a VAT group as controlled company. The Advocate General explicitly pointed this out.

Rounding up the input tax rate to the next percentage point

Request for a preliminary ruling (Germany), Lower Tax Court Münster, ruling of 17 March 2015, 15 K 2390/12 U; case C-186/15 – Kreissparkasse Wiedenbrück

The request for a preliminary ruling made by the Lower Tax Court Münster to the CJEU concerns the question of which cases entitle a business to round the input tax rate up when there are mixed supplies.

The case

A bank performed transactions which were VAT exempt under § 4 no. 8 UStG and did not qualify for input tax deduction. In its commercial business (lending, accounts, guarantees, etc.) it waived its VAT exemption (§ 9 UStG) and carried out taxable transactions, which therefore qualified for input tax deduction. The bank used margins on taxable and VAT exempt revenue to calculate an input tax rate for deductible amounts of input tax that could not be directly allocated. This gave an input tax rate of 13.55 % for 2009 and 13.18 % for 2010, which were both rounded up to 14 %. The bank also rounded up to 14% in its favor the input tax adjustments for the previous year under § 15a UStG made as a result of waiving VAT exemption. The issue in dispute is whether the bank is entitled to round up.

Ruling

The Lower Tax Court Münster assumes that banks allocate input tax based on margins (see German Ministry of Finance (BMF) guidance of 12 April 2005 – IV A 5 – S 7306a – 3/05), as in this instance, are not using a transaction formula based on the company as a whole. Based on the CJEU ruling of 18 December 2008 in case C-488/07 – Royal Bank of Scotland –, therefore, there is no right to round up the input tax rate to the next percentage point under Article 19 para. 1 of the Sixth EU Directive for periods prior to 1 January 2007. The Lower Tax Court asked the CJEU whether the principles in its ruling of 18 December 2008 still apply for periods after 1 January 2007, or whether there is, on grounds of equal treatment, a right to round up even when using the allocation methods based on area and subject set out in Article 173 (2) of the VAT Directive. Logically, the Lower Tax Court also has to face these questions when an input tax adjustment pursuant to Articles 184 ff. of the VAT Directive

is required (see § 15a UStG). The Lower Tax Court wanted the CJEU to clarify whether rounding up in the event of an input tax adjustment was only required if the adjustment was in favor of the business.

Please note:
The submission to the CJEU matters for German VAT law because the input tax allocation under § 15 (4) UStG does not provide for any explicit rounding rules. Under § 15 (4) sent. 3 UStG a total transaction rate, which is indisputably permitted under EU law, is only allowed if no other, more accurate economic allocation is possible. BFH case law indicates that it must be checked in each case whether a more accurate economic allocation can be achieved by using an object-related surface or transaction formula (see BFH ruling of 3 July 2014, V R 2/10, VAT Newsletter August/September 2014). It is also important to note in this case that the bank's input tax allocation was by margin (see German Ministry of Finance (BMF) guidance of 12 April 2005), and the Lower Tax Court also assumes there is no (overall) transaction formula.

NEWS FROM THE BFH

Rental of surgery rooms by a physician involved in the surgery

BFH, ruling of 18 March 2015, XI R 15/11

The ruling relates to the question under which circumstances the rental of surgery rooms by a physician is VAT exempt.

The case

A self-employed anesthesiologist rented surgery rooms to other surgeons for outpatient surgeries. These surgery rooms had the equipment needed for the surgeries. She herself was involved in the surgeries as an anesthesiologist. The rentals were based on oral agreements between the surgeons. In return, the anesthesiologist received compensation from the other surgeons whereby the relevant surgeon forwarded a part of the remuneration of the health insurance to the anesthesiologist. It is in dispute whether the rental of the surgery rooms was VAT exempt.

Ruling

The BFH concludes that in the present case there are no sufficient findings as to the contractual relationship between the surgeons and with the patients so as to be able to examine whether there is a VAT exempt medical treatment pursuant to § 4 no. 14 sent. 1 UStG. The Lower Tax Court did not examine whether the services are VAT exempt as a closely related activity pursuant to § 4 no. 16 (c) UStG old version (see now § 4 no. 14 (b) UStG) either. The BFH provided to the Lower Tax Court the following information for the further proceeding:

It needs to be clarified whether the treatment contract between the anesthesiologist and the patient contained all services of the operation center and the surgeon acted as the anesthesiologist's sub-contractor. In this case, a VAT exempt medical treatment pursuant to § 4 no. 14 sent. 1 UStG as a single supply may be considered. On the one hand, a single supply is given if a service is to be considered as a principal service and other services an ancillary service. However, a single supply is also given if two or more actions or individual services of the trader to the recipient of the supplies are interconnected so closely that they objectively form one single, inseparable transaction the separation of which would be unrealistic in the view of the average consumer. In the view of the BFH, several services may only be "merged" to a single supply under the principle of main and ancillary services if the services are provided to one and the same recipient; there are no ancillary services of third parties or to third parties. If the anesthesiologist was liable to the surgeon for the rental of the room, the VAT exempt medical treatment would be excluded pursuant to § 4 no. 14 sent. 1 UStG.

Furthermore, the Lower Tax Court needs to examine whether the anesthesiologist's office is to be qualified as "other facility for medical treatment" within the meaning of § 4 no. 16 (c) UStG old version. In this case, the closely related activities are also VAT exempt. According to the BFH, this also includes the rental of an appropriately equipped room for the purpose of carrying out outpatient surgeries.

Please note:
With two other rulings of 18 March 2015, the BFH decided on the VAT exemption of transactions carried out by private hospital operators. The BFH concludes in the proceeding XI R 8/13 that the VAT exemption for the activities closely related to the operation of the hospital pursuant to § 4 no. 16 (b) UStG in its version applicable until 31 December 2018 with regard to the 40 % limit was in line with the EU law. Hence, in a hospital that was not within scope of the Hospital Remuneration Law or the Federal Healthcare Tariff Law at least 40 % of the annual amount of billing days and days covered by the said Tariff Law had to be attributable to patients, whereas the billed amounts for hospital services did not exceed the general hospital services. In contrast, a private hospital operator may rely on the EU law with regard to the VAT exemption of his transactions as of 2009 insofar as § 4 no. 14 (b) sent. 2 (aa) UStG in conjunction with §§ 108, 109 of Volume V of the Social Insurance Code (SGB V) provides for a requirement reserve (e.g. through a limitation to hospitals accredited by the Hospital Finance Act or through conclusion of a supply contract), see proceeding XI R 38/13. Hence, the BFH liaises with the BFH ruling of 23 October 2014, V R 20/14.

NEWS FROM THE BMF

Zero-rating for exports

BMF guidance of 19 June 2015 – IV D 3 – S 7134/14/10001

Businesses must have the documentary and accounting evidence to prove that exports were zero-rated (VAT exemption with entitlement of input VAT deduction). As far as documentary evidence is concerned, it should be noted that participation in the electronic export procedure is mandatory throughout the EU and that the export notifications issued under this procedure are essentially probative. Secondly, centralized customs processing in the EU is possible under a single license. A business that exports from several locations in the EU can report exports centrally in the member state where its main accounting function is located. In the present guidance from the BMF the tax authorities comment on various situations and have amended the German VAT Application Decree (UStAE). The rules laid down in the BMF guidance must be applied in all pending cases.

Export declarations in Germany
ATLAS is the IT system available in Germany for participating in the electronic export procedure. If the export declaration is made under this procedure, export must be proven by means of the export notification sent to the notifier/exporter as a .pdf document by the office of export through EDIFACT.

In cases of a single license, ATLAS is used to declare exports of goods located in other member states which are reported as zero-rated exports outside the EU. German tax authorities can see from the information in field 15a (exporting/dispatching country) on the .pdf export notification that the goods were in another member state at the time of export.

Export declarations in other member states
Local IT systems are available for participation in electronic export procedures in other member states. It is up to the member states to decide whether a .pdf document will continue to be issued in addition to an EDIFACT message when goods are physically exported, as is the case in Germany.

In cases of a single license, the foreign IT system is used to declare exports of goods located in Germany which are reported as zero-rated exports outside the EU. If a pdf export notification is not issued, the EDIFACT message received from the foreign customs office about the physical export of goods as documentary proof must be recognized. This applies where the business has records/documentation in addition to the EDIFACT message showing that it received the EDIFACT message from the foreign customs office. In addition, the business must record the connection between the EDIFACT message and the corresponding export declaration to the foreign customs office. A print out of the EDIFACT message is no longer required. The BMF guidance indicates that the same essentially applies for export declarations without a single license. There is however the additional requirement that there may be no doubts that the goods have been properly exported from EU customs territory.

Please note:
In practice, cases are constantly occurring where there are doubts about proving export has taken place in particular cases that are not explicitly covered in UStAE. The BMF has therefore commented on various versions of the export notification in guidance dated 23 January 2015 – IV D 3 – S 7134/07/10003-02 (see KPMG Customs & Trade Newsletter April 2015). The BMF guidance of 19 June 2015 deals with more cases of doubt concerning export notifications. In particular, it should be noted that an EDIFACT print out is no longer required for export declarations in another member state. This has to be seen in the context of the fact that under customs law, when customs declarations are submitted electronically the full data set from application to the final export notification must be archived. However, it can be useful in addition to print out the EDIFACT message for documentation purposes.

IN BRIEF

CJEU denies input VAT deduction of the import VAT by a transportation company

CJEU ruling of 25 June 2015 – case C-187/14 – DSV Road

In the present ruling, the CJEU commented on the incurrence of the customs debt pursuant to Art. 203, 204 of the Customs Code and on the input VAT deduction of the import VAT by a transportation company. In the event of a customs debt, generally an import VAT is incurred in addition. According to the CJEU it is permissible to exclude the input VAT deduction of the carrier procuring the customs clearance that is not the "importer" or owner of the relevant goods. The CJEU argues that the value of the transported goods is not part of the costs that are included into the prices invoiced by a carrier, the activity of whom is limited to the transportation of such goods for consideration. Who is to be qualified as „importer" within this meaning was not expressly decided by the CJEU. Presumably, it will comment on this matter based on the referral of the Lower Tax Court Hamburg of 18 February 2014 to the CJEU (case at the CJEU: C-228/04 and C 226/04; VAT Newsletter August/September 2014). Up to now, the tax authorities and the BFH considered the company's power of disposal with regard to the imported goods and their integration into its organization as a necessary requirement for the right to input VAT deduction. "Importer" perhaps means in general the taxpayer with

regard to the import duties, i.e. also an indirect representative.

Official form for the certificate for resellers of natural gas and electricity

BMF, guidance of 17 June 2015 - IV D 3 - S 7279/13/10002

As a result of 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 (Customs Code Amendment Act) of 5 December 2014 (see VAT Newsletter December 2014), the reverse charge mechanism was adjusted to the administrative opinion with regard to taxable supplies of natural gas in Germany through the natural gas network. Accordingly, the recipient of the supplies is only liable to tax if he is a trader and he himself a supplier of natural gas, i.e. if he is a reseller within the meaning of § 3g (1) UStG, according to the interpretation in line with the Directive. This view of the tax authorities was also considered in the official form for the certificate for resellers USt 1 TH due to the BMF guidance of 19 September 2013 - IV D 3 - S 7279/13/10002. As a result of the changes in the law, editorial adjustments were made to the official form. In comparison to the previous official form, the maximum validity was extended. The validity of the certificate is limited to a period of maximum three years (instead of one year as hitherto) after the date of issue.

No VAT exemption for Deutsche Post AG competitors

Lower Tax Court Cologne, ruling of 11 March 2015, 2 K 2529/11, 2 K 1707/11, 2 K 1708/11 and 2 K 1711/11

The Lower Tax Court Cologne has dismissed the actions of four competitors of Deutsche Post AG for equal treatment with regard to the VAT exemption. In the Lower Tax Court's view, the companies do not provide universal postal services and therefore are not entitled to VAT exemption pursuant to § 4 no. 11b UStG. In the proceeding 2 K 2529/11, the Lower Tax Court held that the company could only ensure comprehensive postal services by using the infrastructure of Deutsche Post AG. Uneconomic cost structures in conjunction with the comprehensive supply of remote areas may thus be escaped. This is incompatible with the intention of the VAT exemption. In addition, letters and parcels are delivered only five days a week. In the other three proceedings, the companies had each committed to execute orders for the formal service of documents within the entire Federal Republic of Germany. In these proceedings, the Lower Tax Court based its dismissal of action on the fact that the formal service of documents does not serve as so-called services of general interest. This service is only available to authorities and courts. The benefit for the consumers is only reflected directly in an effectively functioning administration of justice. The Lower Tax Court permitted the appeal in all cases.

Delayed submission of invoices in the input VAT refund procedure

Lower Tax Court Cologne, ruling of 15 April 2015, 2 K 2705/12, final

The ruling relates to a company located in Italy which filed an application for the input VAT refund in Germany for the calendar year 2009 through the electronic portal established in Italy. The application was filed before expiration of the refund period extended for sixth months that year by the Directive 2006/112/EC on 31 March 2011. However, the scanned invoices with a net amount of each exceeding EUR 1,000 were sent to the German Federal Central Tax Office (BZSt) after 31 March 2011. For this reason, the application for input VAT refund was rejected. The action was unsuccessful. According to the law, the electronic refund application must include copies of the invoices and import documents if the payment for the transaction or the import amounts to at least EUR 1,000.00, with regard to invoices for the purchase of fuel the amount must be at least EUR 250.00. According to the Lower Tax Court, the wording of the legislation may only be interpreted in the sense that the invoices are to be filed together with the application. Thus, the non-extendable limitation period for the submission of the application also applies to the submission of invoices. To examine whether the invoices have been submitted on time, it is irrelevant whether the BZSt does not request the missing invoices from the applicant pursuant to Art. 20 (1) of the Directive 2008/9/EC within four months after receipt of application.

Incomplete application form in the input VAT refund procedure

Lower Tax Court Cologne, ruling of 23 March 2015, 2 K 1199/14, final

The court ruling relates to a company located in the U.S. that filed an application for input VAT refund with the BZSt for the calendar year 2011. The application was filed on 30 June 2012, before the end of the period. However, the required declaration in section 9 (a) of the form stating that the listed goods and other services were used for the purposes of the company, and the required declaration in section 9 (b) of the form stating any activities of the company relevant for the VAT were not made. For this reason, the application for input VAT refund was invalid and was therefore rejected. The action was unsuccessful. The Lower Tax Court pointed out that the input VAT refund period was a non-extendable limitation period. An application for input VAT refund on an officially prescribed form submitted by a company not established in the Community territory is invalid if the section 9 (a) and (b) of

the application form is not filled in. This information is crucial for the input VAT remuneration applied for and may not be provided after expiration of the refund period. Should the space in section 9 (a) not be sufficient to state the required concrete information, the applicant may use a supplement sheet attached to the application.

OTHER

Raise of the Intrastat notification threshold as of 1 January 2016

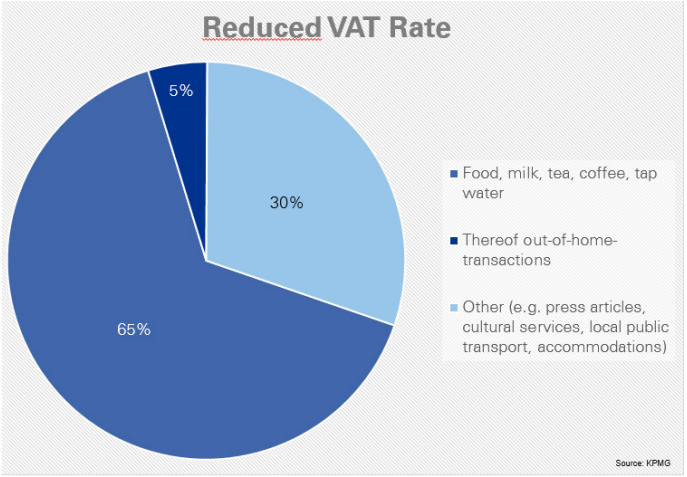
Federal Council Journal no. 304/15 of 3 July 2015

On 2 July 2015 the German Parliament decided on a law intended to relieve the burden of bureaucracy for medium-sized businesses particularly (Bureaucracy Reduction Act). The law was approved by German Federal Council on 10 July 2015. As of 1 January 2016, the law provides for a partial increase of the threshold limits for reports for the intra-Community trade statistics, among others. Thus, the notification threshold for intra-Community receipt of goods related to the value of the movement of goods of the previous calendar year has been increased from EUR 500,000.00 to EUR 800,000.00. The change relates to the Intrastat-reports as of 1 January 2016. The notification threshold for the supply of goods remains unchanged at EUR 500,000.00.

Additional VAT income in the event of a complete elimination of the reduced VAT

German Parliament's Journal 18/4993 of 22 May 2015

Upon request of a Member of Parliament, Dr. Michael Meister, Parliamentary Secretary of State at the Federal Ministry of Finance, commented on the additional tax income through a complete elimination of the reduced VAT rate for the Federal Government. These additional incomes would expect to amount to around EUR 30 billion in 2016. Possible changes of consumer behavior due to an increase of the tax rate were not taken into account. When the reduced tax rate was allocated to the different branches, the high proportion of the supply of food (approx. 70 % in total) became evident.



EVENTS

Electronic archiving – efficiency and audit security for companies

8 September 2015 – Kiel

10 September 2015 – Essen

For more information please click here.

Contacts

KPMG AG
Wirtschaftsprüfungsgesellschaft

Head of Indirect Tax Services
Dr. Karsten Schuck
Frankfurt am Main
T + 49 69 9587-2819
kschuck@kpmg.com

Berlin
Martin Schmitz
T + 49 30 2068-4461
martinschmitz@kpmg.com

Duesseldorf
Peter Rauß
T + 49 211 475-7363
prauss@kpmg.com

Frankfurt / Main
Prof. Dr. Gerhard Janott
T + 49 69 9587-3330
gjanott@kpmg.com

Wendy Rodewald
T + 49 69 9587-3011
wrodewald@kpmg.com

Ursula Slapio
T + 49 69 9587-2600
uslapio@kpmg.com

Hamburg
Gregor Dzieyk
T + 49 40 32015-5843
gdzieyk@kpmg.com

Kay Masorsky*
T + 49 40 32015-5117
kmasorsky@kpmg.com

Antje Müller
T + 49 40 32015-5792
amueller@kpmg.com

Cologne
Peter Schalk
T + 49 221 2073-1844
pschalk@kpmg.com

Munich
Dr. Erik Birkedal
T + 49 89 9282-1470
ebirkedal@kpmg.com

Günther Dürndorfer*
T + 49 89 9282-1113
gduerndorfer@kpmg.com

Kathrin Feil
T + 49 89 9282-1555
kfeil@kpmg.com

Claudia Hillek
T + 49 89 9282-1528
chillek@kpmg.com

Stuttgart
Dr. Stefan Böhler
T + 49 711 9060-41184
sboehler@kpmg.com

* Trade & Customs

International Network of KPMG

If you would like to know more about international VAT issues please visit our homepage KPMG International**. Further on this website the periodical KPMG publication "Global Indirect Tax Brief" (KPMG International) are published. We would be glad to assist you in collaboration with our KPMG network in your worldwide VAT activities.

You can also get up-to-date information via our homepage.

**Please note that KPMG International does not provide any client services.

Imprint

Issuer
KPMG AG Wirtschaftsprüfungsgesellschaft
THE SQUAIRE, Am Flughafen
60549 Frankfurt / Main

Editor
Ursula Slapio (Responsible***)
T + 49 69 9587-2600
uslapio@kpmg.com

Christoph Jünger
T + 49 69 9587-2036
cjuenger@kpmg.com

MwSt.VAT Newsletter – Free Subscription
To subscribe, please register at
www.kpmg.de/newsletter/subscribe.aspx

www.kpmg.de

*** Responsible according to German Law (§ 7 (2) Berliner PresseG)