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MwSt.VAT Newsletter

November 2015

NEWS FROM THE CJEU

Input tax deduction for public recreational path

CJEU, ruling of 22 October 2015 – case C-126/14 – Sveda UAB

The ruling relates to the requirement for there to be a direct and immediate link between incoming and outgoing supplies in order to deduct input tax.

The case

The Lithuanian company Sveda UAB concluded a finance agreement with the National Paying Agency of the Lithuanian Ministry of Agriculture. Under this agreement Sveda UAB undertook to build the "Baltic Mythology Recreational and Discovery Path" and to offer the public access to the path free of charge. The agency committed itself to assuming a share of up to 90 % of the costs of the project, with the remaining expenses to be covered by Sveda UAB. The matter in dispute is whether Sveda UAB is entitled to deduct input tax for the acquisition or manufacture of certain capital goods required to build the recreational path. In the view of the referring court the capital goods are intended directly for use by the public free of charge. However, they could also be viewed as a means of attracting visitors to a location where Sveda UAB plans to carry out its economic activeties.

Ruling

According to the Court of Justice of the European Union (CJEU) a business is entitled to deduct input tax for the construction of a recreational path that can be used free of charge by the public, if there is a direct and immediate link with the business's economic activities, taken as a whole, and these activities consist solely of supplies which are themselves eligible for deduction of input tax. The direct and immediate link is to be established on the basis of objective criteria. In the case at issue the recreational path can be seen as a means of attracting visitors with a view to selling goods and services such as souvenirs, food and drink, as well as access to attractions and swimming facilities. The construction of the leisure path therefore has a business purpose. Giving the public access to the recreational path is not covered by any VAT exemption.

The CJEU did not express an explicit view in its ruling on the VAT consequences of the subsidy paid by the National Paying Agency. According to the Advocate General (see the opinion of 22 April 2015) the subsidy could be viewed as payment for the construction of the recreational path. Provided this supply is taxable, the business would be entitled to deduct input tax for the construction of the recreational path. The CJEU evidently believes that the subsidy in this case does not stand in the way of input tax deduction, since the construction of the recreational path is for a business purpose.

Please note:
Section 15.19 (2) sent. 2 and 3 of the German VAT Application Decree (UStAE) relates to a spa town that engages in economic activities by maintaining footpaths in return for the payment of the visitors' tax. In the opinion of the tax authorities the spa is unable to include footpaths and walkways that have been

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destinated for public use as part of its economic activeties. The spa is therefore not entitled to deduct input tax relating to the construction of these footpaths. However, based on the CJEU ruling of 22 October 2015 – case C-126/14 – Sveda UAB – an outright ban on input tax deduction in this or similar cases is likely to be unlawful.

Exchange of Bitcoins into legal tender

CJEU, ruling of 22 October 2015 – case C-264/14 – Hedqvist

The CJEU has commented on the case referred by Sweden which relates to the VAT treatment of the exchange of the virtual currency Bitcoin into legal tender.

The case
Mr. Hedqvist intends to buy and sell units of the Online currency Bitcoin in exchange for legal tender such as Swedish crowns. The Bitcoins will be offered to the customers at a price, which applies on a specific exchange portal, however, plus an additional percentage. Before any transactions were carried out, Mr. Hedqvist applied to the Fiscal Law Commission for a provisional notice in order to learn whether this kind of purchase and sale is subject to VAT. The Fiscal Law Commission assumed that the service is VAT exempt. However, the tax authorities took legal steps against this before the referring court.

Ruling
The CJEU concluded that the exchange of Bitcoins against legal tender and vice versa is a service in return for payment if a remuneration is to be paid for it. In the present case the remuneration is the amount between the price at which the trader buys the currencies and the price at which he sells them to his customers. Transactions carried out with these means of payment are VAT exempt pursuant to Art. 135 (1) (e) of the VAT Directive.

Please note:
Contrary to the CJEU, the German Ministry of Finance (BMF) takes the view that the trade with Bitcoins is subject to VAT. Hence, such transactions may not be exempt (as legal tender transactions) from VAT pursuant to § 4 No. 8b of the German VAT Law (UStG). Accordingly, Dr. Michael Meister – Parliamentary State Secretary at the German Ministry of Finance – was asked by the German Parliament (Bundestag) to make a statement on this issue, which he did on 12 May 2014. This view was confirmed by the Federal Government in the present CJEU proceedings. The BMF is expected to revise its previous statement and possibly publish a non-objection regulation for the past periods.

NEWS FROM THE BMF

Income and value added tax treatment of corporate events

BMF, guidance of 14 October 2015, IV C 5 – S 2332/15/10001

In its present guidance, the BMF commented on the income and value added tax treatment of corporate events due to changes of the Income Tax Act (§19 (1) sent. 1 no. 1a Income Tax Act (EStG)) as of 1 January 2015.

Previous VAT treatment
Free gifts made by employers within the scope of a corporate event are not subject to VAT in the overriding company interest insofar as these gifts remain within the usual limits (see Section 1.8 (4) no. 6 UStAE). The usual practice with regard to the gifts does not need to be reviewed if the amount is up to EUR 110 including VAT per employee and corporate event (not more than two events per year). The income tax assessment applies accordingly (see R 19.5 Income Tax Regulations (LStR)).

Changes for corporate events as of 1 January 2015
In the BMF guidance of 14 October 2015, the tax authority sticks to the aforementioned statements with regard to corporate events taking place as of 1 January 2015. It canceled merely the comment in brackets "(see R 19.5 Income Tax Regulations (LStR))", because now the statements in the BMF guidance of 14 October 2015 apply with regard to the income tax assessment. Whether there is a corporate event and how the costs for each individual employee shall be calculated depends on the changed income tax principles. While the previous income tax exemption limit was substituted by a tax-free amount, the amount of EUR 110 is still deemed a tax exemption limit with regard to VAT. For simplification reasons, it shall not be objected if the principles are applied only to corporate events, which take place as of the date on which the guidance was published in the Federal Fiscal Gazette.

Please note:
Occasional tokens of appreciation up to EUR 60 customary in the business are also deemed to be free gifts from the employer and are not subject to VAT. These gifts include, for example, flowers or luxury foods, which are made on the occasion of special personal events (see Section 1.8 (3) UStAE). Due to the German Income Tax Amendment Regulation 2015 (LStÄR 2015) of 22 October 2015, the tax exemption limit for free gifts was increased from EUR 40 to EUR 60. According to the BMF guidance of 14 October 2015, this amount will also be adopted with regard to VAT applicable to non-cash benefits as of 1 January 2015. Due to the increase of the

tax exemption limit for free gifts, a higher input tax deduction is possible. Nevertheless, it will not be objected if companies apply the higher tax exemption limit only after publication of the BMF guidance. On 19 November 2015 the taxpayers association (BdSt) commented in a press release on the BMF guidance. The comments concern the tax exemption limit (EUR 110) for VAT purposes in case of corporate events. As simplification in practice the BdSt suggests that this amount should be a tax-free amount in line with the Income Tax treatment. It remains to be seen whether the tax authorities take up this suggestion.

Breakdown of an all-in fee for hotel accommodation and sauna use

BMF, guidance of 21 October 2015, III C 2 – S 7243/07/10002-03

This BMF guidance concerns the breakdown of an all-in fee for short-term hotel accommodation (VAT rate 7 %) and sauna usage (VAT rate 19 % for supplies since 1 July 2015).

Requirement to provide a breakdown of an all-in fee
For services such as short-term hotel accommodation a VAT rate of 7 % applies under § 12 (2) no. 11 UStG. It applies, for example, to the room, the fixtures and fittings and the supply of electricity (see section 12.16 (4) and (5) UStAE). In relation to other services subject to the standard VAT rate of 19 %, suppliers are required to provide a cost breakdown even if a single service has been provided. This includes, for example, food and drink, the mini bar and telephone calls (see section 12.16 (8) UStAE for further details). Since 1 July 2015, a cost breakdown is also required where use of a sauna is provided (see the BMF guidance of 28 October 2014, taking account of the ruling of the German Federal Tax Court (BFH) of 12 May 2005, V R 54/02).

Taxable amount for sauna-related services
The invoicing of sauna-related services supplied since 1 July 2015 has to consider:

- If a separate amount is agreed for use of a sauna, this constitutes the taxable amount (converse situation to section 12.16 (11) sent. 1 UStAE).
- If an all-in price is agreed, the proportion of the price attributable to sauna usage must be estimated. The basis for the estimate can, for example, be the imputed costs plus an appropriate profit margin (see section 12.16 (11) UStAE).
- The tax authorities will accept the standard rate services included in an all-in offer being combined into a single item (e.g. under the heading "business package" or "service flat rate") to the value of 20 % of the all-in price (for the certain supplies subject to the standard rate of VAT see the list in section 12.16 (12) UStAE, which now also includes the use of a sauna after the BMF guidance of 21 October 2015).

Please note:
In further guidance of 7 July 2015 (III C 2 – S 7243/07/10002-03) the BMF clarified the use of swimming pools at the reduced rate of VAT in accordance with § 12 (2) no. 9 UStG. In light of the BFH ruling of 28 August, 2014, V R 24/13, these swimming pools must, according to the tax authorities, be destinated and suitable for swimming in order to qualify for the reduced rate of VAT. The distinction between qualifying and non-qualifying pools also applies to hotel swimming pools. If the reduced rate of VAT does not apply in a particular case, the service cannot be included in a business package at 20 % of the all-in price in accordance with section 12.16 (12) UStAE.

IN BRIEF

Documentary evidence for an intra-Community supply of goods

BFH, ruling of 9 September 2015, V B 166/14

According to the ruling of the CJEU (see ruling of 9 October 2014 – case C-492/13 – Traum) the obligations with regard to evidence for an intra-Community supply of goods must be determined in the light of the regulations explicitly laid down in that regard by national law and in accordance with the general practice established for similar transactions. In laying down the obligations with regard to evidence, the Member States must take into account the principles of legal certainty and proportionality. The principle of legal certainty, from which the principle of protection of legitimate expectations derives, requires legal provisions to be clear and certain and that their application is predictable for each individual.

In its ruling of 9 September 2015, V B 166/14, the BFH has commented on the impact of the CJEU ruling on the national law. According to the BFH, documents used as evidence of a transport or shipment within the scope of intra-Community supplies of goods must itself, or in conjunction with other documents, indicate the name and address of the issuer (BFH ruling of 12 May 2009, V R 65/6). In its ruling of 9 September 2015 on insurances in pick-up cases, the BFH sticks to this view (§ 17a (2) no. 4 of the VAT Implementing Regulation (UStDV) old version). The recognizability of the issuer of the document is, according to the BFH, an inherent criterion of the documentary evidence. Therefore, with regard to the requirement of recognizability of the document issuer, no explicit legal regulation is needed.

VAT treatment of legally mandated discounts

Lower Tax Court of Rhineland-Palatinate, ruling of 24 September 2015, 6 K 1251/14

The ruling relates to a producer of pharmaceutical products. The company distributes drugs to pharmacies and their intermediaries. Pursuant to § 130a of the German Social Insurance Code V (SGB V), the pharmacies have to grant statutory health insurance companies a discount on the drug sales price. The producer is obliged to reimburse this discount to the pharmacies and their intermediaries. The BFH (ruling of 28 May 2009, V R 2/08) and the tax authorities (BMF ruling of 14 November 2012, IV D 2 – S7200/08/10005) assume that this leads to a reduction in consideration of the producer. Since 1 January 2011, pursuant to § 130a SGB V, the producers are obliged to reimburse to private health insurance companies and medical care these discounts granted on prescription drugs, the cost of which are fully or partially reimbursed by these private health insurances. The private health insurances claim the discounts against the producers through a central drug discount settlement company known as "Zentrale Stelle zur Abrechnung von Arzneimittelrabatten" (abbreviated: ZESAR). Both the BMF and the Lower Tax Court of Berlin Brandenburg (ruling of 13 May 2015, 7 K 7323/13, ref. no of the BFH: XI R 14/15), denied the reduction in consideration, stating that discounts may only lead to a reduction of the assessment basis within the supply chain. In contrast, the Lower Tax Court of Rhineland-Palatinate affirmed the reduction in consideration in the present case. According to the Lower Tax Court, what speaks for a reduction in consideration is the fact that the producer may neither retain the full amount of the consideration received nor dispose of it freely, but is obliged to pay for the discount when the insured claim the costs from their private health insurance companies or their medical care. It further states that the repayment is in direct connection with the supply provided before and, therefore, constitutes a price reduction. The Lower Tax Court permitted the appeal before the BFH.

Billing of scaffolding work

Lower Tax Court in Hamburg, ruling of 21 August 2015, 2 V 154/15

The ruling in the preliminary proceedings (suspension of operation) relates to a GmbH (a German limited liability company), which erects scaffolding of any kind around ships, buildings and industry plants. The GmbH deducted the input tax from invoices of several scaffolding companies. What all invoices have in common is that the amounts for the supplies provided were indicated in the invoices as a lump sum amounting to EUR 1,000 or EUR 5,000 for each full accounting month. The Lower Tax Court has already denied the input tax deduction due to formality reasons. An entrepreneur is only permitted to deduct the VAT due by law as input tax pursuant to § 15 (1) sent. 1 no. 1 UStG if the formal requirements pursuant to § 14 (4) UStG are fulfilled. In particular, the invoices must contain information on the scope and type of the supplies and enable easy-to-identify and clear indication of the supply. With regard to the billed scaffolding work, detailed information about the place of the planned construction and exact description of each individual work activities may be required. Due to lack of the exact description of the place and detailed description of the work, providing information about the measurement, built-in elements and precise work activities, it is incomprehensible which works were provided on which construction site under which conditions, so there is a risk of double charging with other scaffolding work. Furthermore, it was in dispute in the present case, whether the companies engaged as subcontractors by the GmbH really participated in the business transactions.

Zero-rated supplies for shipping

Ministry of Finance of Schleswig-Holstein, VAT notice of 12 October 2015, VI 358-S 7155-055

In the opinion of the highest tax authorities of the German federal government and the federal states supplies made for the purpose of maintaining research ships are not zero-rated (VAT exemption with entitlement of input VAT deduction) in accordance with § 4 no. 2 in conjunction with § 8 (1) no. 1 UStG (see Art. 148 (c) of the VAT Directive). The authorities base this opinion on the fact that government-owned research ships are not designed to be acquired by the shipping industry. This opinion is presumably related to the non-binding guidelines published by the EU VAT Committee at its meeting on 20 April 2015. In the almost unanimous view of the VAT Committee, the member states need to implement safeguards to ensure that only ships which are effectively and predominantly carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities on the high seas benefit from the EU zero rating.

OTHER

News from the VAT Committee and the Commission

VAT Committee, 105th meeting of 26 October 2015; Commission, explanations of 26 October 2015

In the 105th meeting of the VAT Committee on 26 October 2015, in particular, the following working papers were discussed:

- Discussion between the Commission and the VAT Committee on the VAT treatment of "sharing economy" of

companies with regard to resources limited by time (working paper 878)

- Discussion between the Commission and the VAT Committee on the impact of the CJEU ruling of 17 September 2014 – case C-7/13 – Skandia America Corporation USA (working paper 879)
- Discussion between the Commission and the VAT Committee on the scope of application and consequences of VAT-exempt cost-sharing agreements pursuant to Art. 132 (1) (f) of the VAT Directive (working paper 883).

Please note:
It remains to be seen to what extent the VAT Committee will publish guidelines on these topics (see VAT Newsletter March 2015). These guidelines, as well as the publications of the Commission, are not binding (see BMF guidance of 3 January 2014 and of 17 December 2014, VAT Newsletter January/February 2015). The Commission last published their explanations of 26 October 2015 with regard to the place of property-related services as of 2017, taking into account the Regulation on Implementation (EU) no. 1042/2013 (see VAT Newsletter July 2013). The Regulation on Implementation contains a large adoption of the guidelines of the VAT Committee set forth in the 93rd meeting of 1 July 2011, which were incorporated into the BMF guidance of 18 December 2012 (see VAT Newsletter February 2013).

EVENTS

We would also like to point out to the following events with regard to these topics that are organized by publishing house Dr. Otto Schmidt in cooperation with KPMG.

Cologne VAT Congress 2015

3 and 4 December 2015 in Cologne

Topics

- Tax Compliance
- Input tax deduction for contributions in kind and private use of business property as well as shareholding
- Current developments in the Austrian and Swiss VAT
- News from the administration, case-law and practice
- Cross-border chain transactions
- VAT group
- VAT treatment of sales competition

Further information and the registration form for the event are available here.

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