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NEWS FROM THE CJEU

Input tax apportionment in the case of mixed-use buildings

CJEU, opinions of the Advocate General on 25 November 2015 – case C-332/14 – Wolfgang and Dr. Wilfried Rey Grundstücksgemeinschaft GbR

The Advocate General has given his opinion on the question referred by the German Federal Tax Court (BFH) on 5 June 2014, XI R 31/09 (see VAT Newsletter July 2014), which related to the apportionment of input tax payable on input transactions relating to a mixed-use building and to the correction of the input tax deduction.

The case

The dispute concerns the amount of the input tax deduction arising from construction costs and running costs for a residential and commercial building with which a company under civil law intended to earn both VAT exempt and taxable rental income. The company calculated the proportion of deductible input tax by reference to the ratio of the expected taxable output transactions to the expected VAT exempt output transactions (what is known as the "building-related transaction formula"). In this case, the use of a transaction formula to apportion input tax under § 15 (4) sent. 3 of the German VAT Law (UStG) – in force since 1 January 2004 – is permissible only if no other form of commercial apportionment is possible. It follows that the tax authorities essentially now recognize only the use of a surface area formula. At the same time, running costs are to be allocated to the various parts of the building put to different uses, so that the surface area formula is a workable option only for parts of the building that are mixed-use, such as stairwells. By contrast, it is to be used uniformly for all costs incurred in constructing a building. The question also arises as to whether the introduction of § 15 (4) sent. 3 UStG as of 1 January 2004 might result in correction of input tax on construction costs prior to that date if the use of a surface area formula rather than a transaction formula is now to be the norm when apportioning input tax.

Opinions

The Advocate General is of the view that the Member States may, under Art. 17 (5) (3) (c) of the Sixth EC Directive, provide for the use of a more precise surface area formula rather than a transaction formula in the case of a mixed-use building. However, the provision in § 15 (4) sent. 3 UStG might not be in line of EU law, as it is framed in too general terms and does not refer to a specific transaction or to absolutely specific cases or cover the peculiarities of specific activities. In stating this opinion, the Advocate General cited the CJEU rulings on 8 November 2012 (case C 511/10 – BLC Baumarkt; VAT Newsletter, January 2013) and on 10 July 2014 (case C-183/13 – Banco Mais). The Advocate General's view is that this case puts German legislator under an obligation to limit applicability beyond all doubt in the absence of an interpretation by the BFH that conforms with EU law. In this instance, the trader can apply the transaction formula under Art. 17 (5) (1) and Art. 19 (1) of the Sixth EC Directive, both of which are clear and unambiguous. Under such conditions, the questions submitted by BFH relating to the application of a

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calculation method that was an alternative to the transaction formula and to the input tax correction ought no longer to arise.

Please note:
The ruling from the Court of Justice of the European Union (CJEU) remains to be seen. Alternatively and additionally, the Advocate General has indicated that no distinction need be drawn between running costs and building costs when apportioning the input tax on a mixed-use building. The CJEU ruling of 4 October 1995 (case C-291/92 – Armbrecht, note 21), did not, he said, conflict with it. This ruling, in the Advocate General's view, applied only to a building used for both business and private purposes. With considerations of legal certainty – and potentially also of protection of legitimate expectations – in mind, the Advocate General stated that the correction of input tax on the basis of the implementtation, from 1 January 2004 onwards, of § 15 (4) sent. 3 UStG would not be permissible. The provision would be too imprecise for the supplier to be able to recognize a change from the use of a transaction formula to the now normative surface area formula.

NEWS FROM THE BFH

Distance selling regulation for drugs

BFH, ruling of 20 May 2015, XI R 2/13

The ruling relates to the regulation of distance selling (§ 3c UStG) with regard to supplies of goods between two Member States, to private customers in particular. Insofar as the distance selling regulation applies, the supply is deemed to have been carried out where the transportation or dispatch ends.

The case

The Dutch corporation X is an approved pharmacy in the Netherlands. In cooperation with pharmacies located in Germany, X sold drugs to private customers in Germany. Before the customers purchases the drugs, they were required to fill in an order form for X in the relevant German pharmacies. The customers were given the option to pick the drugs up in the Netherlands if they ticked the relevant box on the form. However, they usually authorized X to arrange a courier service on their behalf and on their account to transport the drugs to the German pharmacy for EUR 0.50. The courier service was the holding company of X, which had the same managing director. It was in dispute whether the supplies were taxable in the Netherlands or in Germany after exceeding the supply limit of EUR 100,000 according to the distance selling regulation.

Ruling

The wording of the distance selling regulation says that the supplier needs to transport the item or the dispatch of the item needs to be carried out by a third party commissioned by the supplier. On the other hand, if the customer arranges for the transport, § 3c UStG is not applicable. According to the BFH, an overall assessment of all circumstances of each individual case in accordance with objective criteria is required for the attribution of personnel needed for the transportation. Similar regulations for the intra-Community exercise legislation and the ruling of the CJEU (see ruling of 2 April 1998 – case C-296/95 – EMU Tabac) may be used. In consideration of Art. 10 (2) of the Directive 92/12/EEC, § 3c UStG contains all cases where the dispatch or transporttation is carried out by or at the risk of the seller. The position is different only if the transportation is not initiated by the seller but by the purchaser.

The BFH does not object the overall assessment of the Lower Tax Court according to which the distance selling regulation applies to the present case. Thus the private customers participated in the transportation only by ticking the box on the purchase order prepared and provided by X, while the alternative pick-up option was chosen only rarely. The choice of the carrier had been made by X alone already before the authorization was given. In addition, the courier service was the holding company of X, which had the same managing director. Furthermore, X had agreed a binding cost of the transportation and defined them for the private customers. X did not inform the private customers when and where the drugs are picked up by the courier. Further, the customers did not have any influence over the place of delivery. On the contrary, the goods were always delivered to the relevant partner pharmacy. Finally, the courier service could not have carried out one individual transportation order under the agreed conditions, because the gas costs were significantly higher and thus the business would not be profitable.

Please note:
According to the BFH, the definition of the transportation arrangements with regard to the distance selling regulation is not merely subject to civil law agreement. It is rather subject to an overall assessment of all circumstances of each individual case. The BFH further states that the contractual arrangements need to be examined also from the point of view of abuse of the procedure § 42 German Tax Code (AO). In the present case, the fact that the supplier declared its transactions in the Netherlands to be non-taxable in accordance with the distance selling regulation indicates an abuse of the procedure, as the supplier asked for an information in Germany at the same time, according to which the mail order regulation is not applicable, because the place of the supplies was in the Netherlands.

Relation between real estate transfer tax and value added tax

BFH, ruling of 10 September 2015, V R 41/14

In the present ruling, the BFH commented on the VAT treatment of intermediary services of an atypical intermediary with rights to exploit pursuant to § 1 (2) German Real Estate Transfer Tax Law (GrEStG).

The case

An intermediary obliged himself towards real estate owners to sell their real estate on their behalf at a minimum sales price. It was agreed that the intermediary will be entitled to any sales proceeds exceeding the minimum sales price as remuneration for his services. It is in dispute whether the intermediary services are liable to VAT or exempt from VAT as services of an atypical intermediary with rights to exploit pursuant to § 4 no. 9a UStG.

Ruling

The BFH concluded that the intermediary services of an atypical intermediary with a right to exploit pursuant to § 1 (2) GrEStG are not exempt from VAT pursuant to § 4 No. 9 (a) UStG.

§ 4 No. 9 (a) UStG relates to transactions regulated by the Real Estate Transfer Tax Act. Legal transactions enabling another person to use legally or economically a German real estate on one's own account without a claim to transfer are subject to real estate transfer tax pursuant to § 1 (2) GrEStG. According to the ruling of the BFH (e.g. ruling of 17 October 1990, II R 55/88) this regulation also applies to legal transactions of atypical intermediary contracts. For this purpose, an intermediary agent commissioned to provide intermediary services needs to receive a legal status, which grants to the intermediary agent an opportunity to participate in the substance of the real estate. This will enable the intermediary agent to use the real estate on his/her own account, because the real estate owner is obliged to conclude the sales agreements with the purchasers presented by the intermediary agent and the intermediary agent is entitled to the amount exceeding the defined minimum purchase price as intermediary commission. In this context, the intermediation and the right to use need to be separated. The atypical intermediary agent is not required to pay real estate transfer tax on the basis of the intermediary commission. In the present case, there is an intermediary service in terms of VAT. Such intermediary service is not VAT exempt pursuant to § 4 No. 9 (a) UStG. There are no concerns subject to Union law with regard to the VAT liability. According to the authorization basis under Union law, the Member States are only entitled to exempt the delivery of buildings and building parts from VAT (see Art. 135 (1) (j) (k) and Art. 371 in conjunction with Annex X part B no. 9 of the VAT Directive), but not intermediary services as other supplies (services).

Please note:
The BFH assumes that § 4 no. 9 (a) UStG has to be applied in a restricted manner in line with the EU law. Only supplies of goods may be considered as VAT exempt transactions, which are regulated by the real estate transfer tax act, but not supplies of services. This topic also relates to the reverse charge mechanism pursuant to § 13b (1) no. 3 UStG with regard to transactions, which are regulated by the real estate transfer tax act. The restricting interpretation in line with the EU law may not only have an effect on atypical intermediary contracts. In particular, the transfer of a co-ownership share or the provision of leasehold may be affected too. According to the present view of the tax authorities and the BFH, these transactions need to be qualified as supplies of services. In its ruling of 28 August 2014, V R 49/13, the BFH left open the question whether it still sticks to its previous rulings on the transfer of co-ownership shares as supplies of services. A new opportunity to provide comments will be given in the appeal proceeding V R 53/14 (see VAT Newsletter January/February 2015).

NEWS FROM THE BMF

Treatment of the acquisition of non-performing loans for the purpose of VAT

BMF, guidance of 2 December 2015, III C 2 – S 7100/08/10010

This BMF guidance represents a modification of the tax authorities' position on the VAT treatment of the acquisition of non-performing loans, following rulings from the CJEU and the BFH.

Transfer of a non-performing loan

Where a non-performing loan is transferred and the purchaser assumes the risk of default associated with it, the purchaser is not engaged in economic activity. It follows that the purchaser is not entitled to deduct input tax from the invoices relating to the acquisition of the loans or to their collection. Where a portfolio containing both performing and non-performing loans is transferred, the whole package is to be apportioned accordingly for the purpose of input tax deduction. The vendor is performing a VAT exempt supply under § 4 no. 8c UStG. Where a non-performing loan is transferred without the risk of default being assumed by the purchaser, the latter is performing an economic activity only if he also undertakes to collect the loan (see Section 2.4 (8) UStAE). The CJEU ruling of 27 October 2011 (case C-93/10 – GFKL (see VAT Newsletter November 2011) and the subsequent BFH rulings of 26 January 2012, V R 18/08 (see VAT Newsletter March 2012), and of 4 July 2013, V R 8/10 (see VAT Newsletter September/October 2013), have been published in the Federal Tax Gazette (Bundessteuerblatt).

Non-performing loans
The definition of a non-performing loan has been amended as follows (see Section 2.4 (7) UStAE): A loan (consisting of an entitlement to repayment and interest) is, as a whole, non-performing if, on becoming due, it has not been repaid at all or to a not merely insignificant extent, for more than 90 days. A loan is also non-performing if it has been terminated or the conditions for its termination have been met.

Please note:
The BMF guidance applies in all outstanding cases. Where the content of this BMF guidance conflicts with the principles set out in the BMF guidance of 3 June 2004 (IV B 7-S 7104-18/04), the latter shall no longer apply. By this is meant in particular the earlier view that a purchaser to whom non-performing loans were transferred and who also assumed the risk of default was to be assumed to be engaged in an economic activity. No objection will, however, be raised to transfers of loans prior to 1 July 2016 where the parties concerned have acted concordantly in line with the principles set out in the BMF guidance of 3 June 2004. Nor will any objection be raised in the event of later transfers until 1 January 2019, where these are proceeded with on the basis of a purchase agreement on the regular acquisition of non-performing loans concluded before 1 January 2016.

IN BRIEF

Subject of margin scheme

Requests for a preliminary ruling (Denmark), case C-471/15 – Sjelle Autogenbrug I/S

The request for a preliminary ruling made to the CJEU relates to the scope of application of the margin scheme with regard to supplies of second-hand goods pursuant to Art. 311 (1) no. 1 in conjunction with Art. 312 et seq. of the VAT Directive (see § 25a UStG). With regard to the margin scheme, the basis of assessment is principally the trade margin between the sales price and the purchase price of the item. The referring Danish Court asked the CJEU whether parts of end-of-life vehicles, which are taken from an end-of-life vehicle by a car recycling company in order to re-sell them as spare parts, are to be considered as second-hand goods under the conditions of the present case. The questions is also relevant for the interpretation of the German law. Accordingly, the tax authorities take the view that the margin scheme does not apply if only individual parts of a purchased used item afterwards as is the case with scrapping (Section 25a.1 (4) sent. 5 UStAE). Also, the Lower Tax Court in Berlin Brandenburg has taken this view in its ruling of 10 October 2015, 7 K 7183/13 (an appeal has filed; ref. no of the BFH: V R 37/15).

VAT rate for digital books

Requests for a preliminary ruling (Poland), case C-390/15 – Rzecznik Praw Obywatelskich (RPO)

In its ruling of 5 March 2015 – case C-479/13 – Commission/France and case C-502/13 – Commission/Luxembourg – the CJEU had already dealt with the permissibility of a reduced VAT rate for digital and electronic books in France and Luxembourg (see VAT Newsletter April 2015). According to the CJEU, electronically available books are not to be qualified as supplies of goods for VAT purposes, but instead represent electronic services. As a result, a reduced VAT rate for these electronic services is not permitted (see, in particular, Art. 98 (2) (2) of the VAT Directive. On the other hand, books on CD and other and other physical media with prevalently identical information content as printed books may be subject to a reduced VAT rate (see no. 6 Annex III VAT Directive). The question arising to the referring Polish court is whether no. 6 Annex III of the VAT Directive is inapplicable, because the European Parliament was not consulted during the legislative procedure. In addition, the Polish court wanted to know whether the present differentiation of the VAT Directive constitutes a violation of the principle of fiscal neutrality.

Administration of investment funds

BMF, guidance of 12 November 2015, III C 3 – S 7160-h/12/10001

Due to the Alternative Investment Fund Manager Implementation Law of 4 July 2013, the German Investment Law was repealed and the German Capital Investment Code (Kapitalanlagegesetzbuch) was created. As a result of the AIFM Tax Amendment Law of 18 December 2013, the wording of the VAT exemption of the "management of investment funds under the German Investment Law" pursuant to § 4 no. 8 (h) UStG was amended with effect from 24 December 2013. Accordingly, the VAT exemption now applies only to the "administration of investment funds within the meaning of the German Investment Tax Act". Section 4.8.13 UStAE was adjusted to the legislative amendment due to the present BMF guidance. The scope of the VAT exempt administration services was left largely unchanged. The principles of the BMF guidance apply to transactions carried out after 24 December 2013. With regard to transactions carried out until the publication of 30 November 2015 (day of publication of the BMF guidance in the Federal Fiscal Gazette), no objections shall be made if they are treated in accordance with Section 4.8.13 UStAE (old version).

Zero rating of transactions in accordance with § 26 (5) UStG – e.g. in accordance with Article 67 (3) NATO Ancillary Agreement

BMF, guidance of 4 November 2015,III C 2 – S 7304/15/10001

In its present guidance, the BMF comments on the competitive relation between the zero rating (VAT exemption with entitlement of input VAT deduction) in § 26 (5) UStG (e.g. in accordance with Article 67 (3) of the Ancillary Agreement to the NATO Status of Forces Agreement) and other VAT exemptions. The zero ratings stated in § 26 (5) UStG are special regulations, the application of which takes priority over the general VAT exemptions pursuant to § 4 UStG. As a result, the zero rating does not exclude the input tax deduction (see § 15 (3) no. 1 (a) and no. 2 (a) UStG). This even applies in the event that the transaction is covered by a VAT exemption, which excludes the input tax deduction (e.g. as letting of immovable property pursuant to § 4 no. 12 sent. 1 (a) UStG). With the change made to Section 15.14 (5) UStAE, the BMF clearly sticks to its previous view (see note 9 of the BMF guidance of 22 December 2004 – IV A 6-S 7492-13/04).

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

Lower Tax Court in Hamburg, ruling of 26 August 2015, 2 K 80/13

An intra-Community chain transaction is given, if several traders (e.g. A, B and C) enter into sales transactions involving the same item, which is sent by the initial trader (A) located in a Member State to the final trader (C) 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. With its two rulings of 25 February 2015, XI R 15/14 and XI R 30/13, the BFH has quashed the allocation principles of the tax authorities for the most part. According to the BFH, 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) (see VAT Newsletter May 2015). It is still open when a new legislative regulation will follow and what content it will have. In the meantime, the Lower Tax Court in Hamburg has taken the view that a supply in movement in a chain transaction may be allocated in individual cases regardless of whether the power to dispose is transferred in Germany or in the country of destination. This is the case if the delivery is only in the hands of the trader B, who is the only to know the end customer C. No appeal was permitted against the ruling accordingly.

Intra-Community supply of goods from a local warehouse

Lower Tax Court of Hesse, ruling of 25 August 2015, 1 K 2519/10; ref. no. of the BFH: V R 31/15

The Lower Tax Court of Hesse adhered to the view of the Lower Tax Court of Lower Saxony (ruling of 18 June 2015, 5 K 335/14; final), according to which supplies of goods from another EU Member State via a German warehouse need not to be subject to German VAT. However, this requires that a sales contract with a concrete customer had existed before the goods were imported or transported to the warehouse. The ruling contradicts the previous practice of the tax authorities, which principally assumes a registration obligation in Germany (see VAT Newsletter August/September 2015). These cases speak for an intra-Community supply if the purchaser may dispose of the delivered goods after the delivery to the warehouse – in particular, if no declaration of release of the supplier is necessary – and the removal from the warehouse is carried out regularly already a few days after the delivery of the goods. An appeal was filed against the ruling.

Additional VAT charge in the case of property developers

Cologne Regional Court, ruling of 30 October 2015, 7 O 103/15

The ruling by the High Court in Cologne concerns the charging of additional VAT payable by a property developer on supplies of construction work in the years from 2008 to 2012. The entrepreneur who did the work followed the administrative regulations of the BMF (see Section 182a of the VAT guidelines 2008 (UStR 2008)) in not making the construction work subject to VAT for the supplier. It was instead the property developer, as the recipient, who had to bear the tax debt. However, the BFH decided, in its ruling of 22 August 2013, V R 37/10 (see VAT Newsletter December 2013), that the reversion of the tax debt to the developer would not ordinarily be permissible. The property developer thereupon declined to avail himself of the no-objection rule in the BMF guidance of 5 February 2014 (see VAT Newsletter March 2014) for the building work done before 15 February 2014 and claimed back the VAT he had paid. The tax office notified the supplier of this and informed him that it was he who was now liable for the tax. In this case, as the Cologne High Court sees it, the supplier's right to demand additional payment of VAT by the developer arises in civil law by way of a further interpretation of the contract taking into account the circumstances of the dispute. The VAT payable by the supplier does not have to be determined in advance by the tax authorities. An entitlement stands, despite the misgivings about the standing under constitutional law of the provision in § 27 (19) UStG expressed by several other tax courts (see, for example, Lower Tax Court Berlin-Brandenburg, ruling of 3 June 2015, 5 V 5026/15; VAT

Newsletter June 2015; Lower Tax Court Münster, ruling of 21 September 2015, 5 V 2152/15 U; another view expressed by Lower Tax Court Düsseldorf, ruling of 31 August 2015, 1 V 1486/15; differentiating Lower Tax Court Cologne, ruling of 1 September 2015, 9 V 1376/15; left open by the Lower Tax Court of Hesse, ruling of 13 October 2015, 1 V 1483/15). In this dispute, the entitlement is not time-limited. Taking § 199 (1) of the Civil Law Code (BGB) into account, the three-year limitation period under § 195 BGB begins no earlier than the end of the year in which the property developer applies to the tax office for the repayment of the VAT.

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