KPMG

MwSt. VAT Newsletter

Hot topics and issues in indirect taxation

March 2016

NEWS FROM THE CJEU

Requirements for the content and correction of invoices

CJEU, opinions of the Advocate General of 18 February 2016 – case C-516/14 – Barlis 06

The opinions of the Advocate General relate to a question referred to the Court of Justice of the European Union (CJEU) from Portugal on the information that needs to be included in an invoice about the nature of a supply of services.

The case

The dispute involves a company active in the hotel industry. Between 2008 and 2010 it used the services of a law firm. The invoices referred to "provision of legal services" and the period in which the services were provided. The matter at issue was whether the invoices met the formal requirements and so entitled the recipient to deduct input tax.

After the input tax deduction was refused by the Portuguese tax authorities, the company submitted further documentation to the authorities containing a more detailed description of the services. However, the tax authorities continued to refuse the input tax deduction on the basis that the invoices still did not meet the legal requirements.

Opinions

The information required in an invoice such as the nature of the goods or services supplied are designed to enable the tax authorities to check whether the issuer of the invoice has charged the correct VAT on their supply. By the same token, the information in an invoice also enables the authorities to check that the correct input tax has been deducted. However, the information in the invoice is not intended to facilitate a check of the actual or intended use of the service for the purpose of producing taxable supplies.

On this basis the Advocate General deemed that "legal services" is in principle a sufficient description of the nature of the service performed to confirm that the correct tax has been charged. As an exception to this rule, the description would be insufficient if a reduced rate of VAT applies to particular legal services in the case at issue.

Content

In this case the information in the invoice needs to be more detailed to ensure that the correct rate of VAT has been applied.

The description "provision of legal services up to the current date" is insufficient information in an invoice on the amount and date of a supply. On the other hand a description along the lines of "provision of legal services from a particular date to today" would represent adequate information on the date of the supply, if the supply is taxable at the end of the period pursuant to Art. 64 (1) of the VAT Directive.

In order to exercise the right to input tax deduction it is in principle insufficient if the recipient of the invoice supplies other information in place of information missing from an invoice, if these documents do not themselves form part of the invoice.

Please note:
The principles set out by the Advocate General on the information required in invoices on the nature of goods and services supplied differ in some cases from those applied by the tax authorities (see section 14.5 (15) of the German VAT Application Decree (UStAE) and section 15.2a (4) to (6) UStAE).

Firstly the "standard commercial description" mandated by the tax authorities could mean that information above and beyond that required under EU law to check that the correct tax has been levied is being requested. Moreover, in the view of the German tax authorities accurate information on the nature of the supply is evidently intended to provide evidence that a supply was purchased for business purposes (see section 15.2a (4) UStAE), even though, according to the Advocate General, this is explicitly not one of the control functions of an invoice.

NEWS FROM THE BFH

Input tax deduction for a holding and VAT group

BFH, ruling of 19 January 2016, XI R 38/12

Following the CJEU ruling of 16 July 2015 – joint cases C-108/14 – Larentia+Minerva – and C-109/14 – Marenave (see VAT Newsletter July 2015) the German Federal Tax Court (BFH) has ruled on input VAT deduction for a holding company and the requirements for a VAT group.

The case
In this case Marenave AG, a holding company, supplied paid administrative and commercial services to its subsidiary partnerships with the legal form of a GmbH & Co. KG. At the same time it invested capital in a bank account which paid interest and extended interest-bearing loans to its subsidiaries.

To finance its business and the purchase of the shareholdings in the subsidiaries the holding company itself purchased services from other companies (for example for the drafting of an issuance prospectus and legal advisory services). It was in dispute whether the holding company was entitled to full input tax deduction for the VAT charged on services purchased by it.

Ruling
According to the BFH, Marenave AG as a holding company which supplies paid management services to its subsidiaries, is in principle entitled to full input tax deduction for input tax relating to the acquisition of the shareholdings.

The holding company's investments at banks and loans to the subsidiaries belong in this case to its main business activities and therefore do not qualify as "ancillary supplies" within the meaning of section 43 no. 3 of the German VAT Implementation Regulation (UStDV). Therefore, the portion of VAT relating to the capital investments and loans is not deductible as input tax if the holding company has not opted to be subject to VAT for these transactions in accordance with Art. 9 of the German VAT Law (UStG).

A further point at issue in the case was that Marenave AG and its subsidiaries might form a VAT group, which could have an impact on their entitlement to deduct input tax. The BFH concludes that Art. 2 (2) no. 2 sent. 1 UStG is incompatible with EU law insofar as it is stipulates that a GmbH & Co KG cannot be a controlled company in a VAT group purely on account of its legal form.

According to the BFH, this exclusion is not necessary or reasonable either to prevent abusive practices or behavior or to avoid tax evasion or avoidance. Art. 2 (2) no. 2 sent. 1 UStG can be interpreted in a directive-compliant manner such that the term "legal entity" also includes a GmbH & Co. KG.

In the absence of a finding on the facts by the Lower Tax Court Hamburg, the BFH did not rule on the question of whether the further requirement of Art. 2 (2) no. 2 sent. 1 UStG that a controlled company in a tax group must, on the basis of an objective assessment of the

overall circumstances, be financially, commercially and organizationally integrated within the controlling company, is compatible with EU law. The Fifth Senate of the BFH answered this in the affirmative in its ruling of 2 December 2015, V R 15/14 (see VAT Newsletter January/February 2016).

Please note:
The Eleventh Senate of the BFH (see preceding ruling) and the Fifth Senate of the BFH (see ruling of 2 December 2015, V R 25/13; VAT Newsletter January/February 2016) agree, at least with regard to a GmbH & Co. KG, that a partnership can be a controlled company within a VAT group.

In the opinion of the Fifth Senate, contra the Eleventh Senate, partnerships do not have to be structured in a profit-seeking manner in order to be eligible to be controlled companies in a VAT group. However, only the holding company and entities which are financially integrated within the holding company may be shareholders of the partnership. The Eleventh Senate of the BFH was able to leave the question of whether it agrees with this restriction or not open in this case. We will have to await further developments in case law and clarifications by the tax authorities on this issue.

Supply of a building as a business transfer

BFH, ruling of 25 November 2015, V R 66/14

In its present ruling, the BFH commented on the conditions under which a supply of a building may be considered a non-taxable transfer of a business as going concern pursuant to § 1 (1a) UStG.

The case
Two shareholders of a GbR (a German civil law partnership) purchased co-ownership in a plot of land, but did not include it into the joint total assets of the GbR. The GbR concluded a rental agreement with a third party for a workshop building still to be built and opted for VAT (§ 9 UStG). The rental was to start as of November 2005. For these purposes, the GbR constructed a building on the land of its shareholders. Starting in March 2006, the shareholders of the GbR tried to sell the land.

In September 2006, they concluded a notarial sales agreement in which the change of encumbrances was set for April 2007. The shareholders acted on their own behalf without any reference to the GbR. The purchaser continued the rental agreement. It is in dispute whether the GbR conducted a VAT-exempt supply of immovable property, leading to an input tax adjustment pursuant to § 15a UStG, or whether the transaction was a non-taxable transfer of a business as a going concern pursuant to § 1 (1a) UStG.

Ruling
The BFH first points out that in the present case the GbR has supplied to the land owners - and thus to the shareholders - the building constructed by the GbR, as of the termination of its rental activity. The construction of a building on third-party land is not necessarily associated with a further supply of the building to the owner of the land, in terms of VAT.

In the present case, a supply of the building by the GbR to the shareholders was already ruled out at the time of construction, because the GbR assumed the risk for the building constructed by the GbR due to the absence of special agreements with the land owners. As a result of the sale of land by the shareholders, the GbR lost its power to dispose of the building and thus the opportunity to use it for business purposes by renting. This also corresponds to the fact that the shareholders were not able to supply the developed land until they also obtained the power to dispose of the building.

This supply also led to a non-taxable transfer of parts of the business as a going concern pursuant to § 1 (1a) UStG. The sustainability of the rental that is required of a leasing business is given in the present case, because the building has been rented for over 17 months in total. The fact that the GbR delivered the building it had constructed to its shareholders, who in turn delivered the building as part of a uniformly developed plot of land in accordance with civil law, does not argue against the assumption of a transfer of part of the business as a going concern.

The respective purchaser does not need to personally, but only generally, continue the business activity required for the business transfer as a going concern in the event of a multiple transfer. In the present case, the purchaser of the developed land intended to continue the rental activity and, in fact, did so. As a result, the continuance of the business activity required for the transfer of business as a going concern is present in the chain.

Please note:
The transfer of a leased property leads to a non-taxable transfer of business as a going concern if

the purchaser takes on a lease company from the seller by entering into the existing lease agreements linked to the purchase of property. The review is undertaken on a property-related basis.

Therefore, a transfer of business can exceptionally be present if the seller is a developer who has purchased, renovated, largely leased and then sold a building. A transfer of business requires the seller to have a lease company at the time of the sale, owing to a sustainable lease activity (property-related), that is further pursued by the purchaser.

NEWS FROM THE BMF

Interpretation of the provisions on the minimum basis of assessment, conforming with Union law

BMF, guidance of 23 February 2016 – III C 2 – S 7208/11/10001

As a result of the present guidance of the German Ministry of Finance (BMF), the administrative opinion on the interpretation of the minimum basis of assessment in § 10 (5) UStG was (partly) adjusted to the BFH case-law.

Caps
With regard to the review of the minimum basis of assessment (§10 (5) UStG) for supplies of goods or services for consideration to certain related parties, and to staff or their relatives, the following caps need to be considered:

- Taxation should be conducted, at a minimum, in accordance with the agreed consideration (§ 10 (1) UStG).
- Taxation should be conducted, at most, in accordance with the values of a transaction as a benefit in kind (§ 10 (4) UStG).
- If the market price is between these two values, then the market price needs to be used as the basis of assessment. The tax authorities explicitly take the view that the taxation according to the market price (BFH, ruling of 7 October 2010, V R 4/10) is equal to the agreement on a market price.

Definition of market price
A market price is the total amount that should be paid to a trader by a recipient of a supply taking into account the level of trade in order to obtain the relevant supply of goods or services at that time, under the conditions of fair competition.

This also applies to services such as providing leased cars to employees. Therefore, special rates for specific client groups or special rates for employees and managers of other employers have no effect on the market price. The market price is not decreased by contributions made in individual cases.

Burden of proof
The existence and the amount of a market price that decreases the minimum basis of assessment needs to be proven by the trader.

Please note:
As before, in reliance on the BFH ruling of 24 January 2008, V R 39/06, the tax authorities take the view that applying the minimum basis of assessment may also be applicable to a recipient of the supply, who is fully entitled to an input tax deduction. However, this should not conform with the subsequent CJEU ruling of 26 April 2012 – case C-621/10 and C-129/11 – Balkan and Sea Properties (see VAT Newsletter June 2012).

This may be derived from the ruling of the BFH of 5 June 2014, XI R 44/12 (see VAT Newsletter August/September 2014) which could, however, leave this question open in the previous case. According to the tax authorities, an exception should only exist if the input tax deduction applied by the recipient of the supply is not subject to an input tax adjustment pursuant to § 15a UStG. This is the case if the type of goods or services received does not fall under any adjustment facts pursuant to § 15a UStG. Ultimately, the trader providing the supply bears the risk of interest on arrears (§ 233a German Tax Code (AO)), if the application of a market price that decreases the tax amount is incorrect.

Purchase commitments in leasing cases

BMF, guidance of 2 March 2016 - III C 2 – S 7100/07/10031 :005

Through the present BMF guidance, the administrative opinion on the VAT treatment of purchase commitments in leasing cases was changed. The previous regulation in Section 3.5 (7a) UStAE was based on the BMF guidance of 31 August 2015 (see VAT Newsletter August/September 2015). The present changes only affect the purchase commitment after execution of the supply by the supplier. For a better understanding, the updated regulations are presented once again in a general overview, as follows:

Purchase commitment
A purchase commitment will come into existence if the lessee concludes a purchase agreement for the leasing item with a third party and, only then, a leasing agreement with the leasing company. By entering into the purchase agreement, the leasing company agrees to pay the purchase price and obtains the right to transfer the ownership of the item under civil law.

Supply relations
With regard to the question as to who is to supply the leasing item in the event of a purchase commitment, and who will accept the supplied item, the contractual relations at the time of the performance of the supply is to be taken into account. The contractual parties may only be replaced, with a corresponding effect on the VAT, up to the date of delivery.

Purchase commitment before the provision of the supply
The delivery is made by the third party to the leasing company. This also applies in the event that the item is transferred to the lessee. The subsequent leasing relationship leads to a letting performance or another delivery, depending on the income tax-related allocation of the leasing item.

Purchase commitment after the provision of the supply
The delivery is made by the third party to the lessee. The delivery is not canceled based on the purchase commitment pursuant to § 17 (2) no. 3 UStG.

According to the BMF guidance of 31 August 2015 the supply to the lessee made by the leasing company is always a granting of a credit. Alternatively, a delivery of the customer to the leasing company followed by a supply of services by the leasing company to the customer, within the scope of a sale-and-lease-back-transaction, may be considered according to the BMF guidance of 2 March 2016.

On the other hand, there is no VAT-relevant supply between the third party and the leasing company. A framework agreement on sales financing concluded only internally between the supplier and the leasing company does not usually affect the supply relationship in terms of VAT.

Invoicing including VAT for intra-Community supplies of goods and exports

BMF, guidance of 16 February 2016 – III C 3 - S 7359/10/10003

The BMF guidance relates to the invoicing including VAT for intra-Community supplies of goods and exports as well as the consequences for the input tax deduction of the purchaser.

Incorrect VAT charge pursuant to § 14c (1) UStG
With regard to exports and intra-Community supplies of goods, a distinction needs to be made between the material requirements for the zero rating, such as goods crossing borders and purchaser status (§ 6 (1 to 3a) UStG or § 6a (1 and 2) UStG, and the formal requirements based on the documentary and accounting evidence (§ 6 (4) sent. 1 or § 6a (3) sent. 1 UStG).

If the documentary and accounting evidence may not be kept in general, completely, or in real time by the trader, it must be assumed that the requirements of the zero rating have not been fulfilled. Exceptions to this rule only apply if it is clear that the material requirements are fulfilled.

Stating the VAT separately in these cases constitutes an incorrect VAT statement pursuant to § 14c (1) UStG, as a result of which no input tax deduction can be applied to the input VAT refund procedure. The VAT treatment of the supply made by the supplier shall remain unaffected, according to the BMF. The guidance does not contain instructions as to whether the explanations of the BMF are also applicable mutatis mutandis to the input tax deduction in the common taxation procedure.

Please note:
According to the BMF, the denial of the input tax deduction based on the incorrect VAT statement in an invoice (§ 14c (1) UStG) will not affect the VAT treatment of the supply provided by the supplier. Should the German Federal Central Tax Office deny an application for input tax deduction because the zero-rating for an intra-Community supply is given under the substantive law, it is important for the supplier to know, after he has corrected the invoices and refunded the VAT, whether his tax authority takes the view of the German Federal Central Tax Office similarly to objective proof.

IN BRIEF

Invoice copies in the input VAT refund procedure

Lower Tax Court Cologne, ruling of 20 January 2016, 2 K 2807/12; ref. no. of the BFH: V B 28/16

The ruling of the Lower Tax Court Cologne relates to the admissibility of the electronic

transmission of invoice copies in the input VAT refund procedure for companies located within the rest of the Community territory. According to § 61 (2) sent. 3 UStDV, in the version applicable in the case year 2010, the electronic refund application must include copies of the invoices and import documents if the payment for the transaction or the import amounts was at least EUR 1,000, and at least EUR 250 in terms of invoices for the purchase of fuel.

Pursuant to § 61 (2) sent. 3 UStDV in the version applicable as of 30 December 2014, the invoices and individual receipts need to be attached to the refund application as scanned originals. The regulations are based on Art. 10 of Directive 2008/9/EC, according to which a Member State may request, before performing a refund, that the applicant submit electronically a copy of the invoice or of the import document together with the refund application.

In the present case, an Austrian company had enclosed scanned invoice copies to the application for the refund period 2010. The German Federal Central Tax Office denied the refund, because the original invoices had not been scanned and submitted within the limitation period (30 September 2011). The legal action challenging this decision was successful.

According to the Lower Tax Court Cologne, a scanned copy of an invoice also fulfills the requirements of a proper application in accordance with the EU law and § 61 (2) sent. 3 UStDV (old version). It stated that after the electronic input tax refund procedure, there was no need to submit the scanned originals. In contrast to the previous paper process, verifying the authenticity of and invalidating the invoice is not possible. An appeal is filed against the denial of leave to appeal with the BFH.

Documentary evidence for intra-Community supplies of goods

Lower Tax Court Munich, ruling of 21 April 2015, 2 K 1430/12; ref. no. of the BFH: V R 45/15

The ruling of the Lower Tax Court Munich Tax relates, among other things, to the provision of documentary evidence for zero rated intra-Community supplies of goods involving the collection of cars in 2007 and 2008. With reference to the BFH ruling of 8 November 2007, V R 26/05, the Tax Court took the view that where an item is collected by a representative the documentary evidence requirement set out in Art. 17a UStDV includes the provision of evidence that the person acting for the purchaser has been authorized to do so. If an authority to collect on behalf of a third party has been presented, but the certificates of delivery and collection authorities have been signed by the managing director of the purchasing company rather than by the person collecting, then, in the Tax Court's view, the documentary evidence requirement has not been met.

A supplier acting in good faith can exercise his right to zero rate the transaction even if the documentary evidence turns out to be incorrect at a later date as result of fraud on the part of the purchaser. However, a business can invoke its right to have acted in good faith only if it has taken all available steps it could reasonably be expected to take to ensure that the supply it is making does not facilitate tax evasion.

The BFH permitted an appeal, in particular on the question of whether the Lower Tax Court Munich was justified in rejecting the documentary evidence because the certificates of delivery were signed by the managing director of the purchasing company rather than by the person collecting.

UPCOMING EVENTS

VAT 2016 – Current Developments and Hot Topics
KPMG specialists will inform you on current developments in the field of VAT at the stated locations. Our focus will be on the innovations of the legal situation and selected rulings of the CJEU, the BFH and individual Lower Tax Courts. We will deal with pitfalls and show solutions. We will add to this overview the presentation of selected administrative guidances.

Please find further information on the events here.

5 April 2016 – Bremen

7 April 2016 – Karlsruhe

7 April 2016 – Leipzig

13 April 2016 – Hannover

13 April 2016 – Frankfurt am Main

19 April 2016 – Nuernberg

20 April 2016 – Braunschweig (Breakfast Meeting)

21 April 2016 – Goettingen (Breakfast Meeting)

27 April 2016 – Munich

28 April 2016 – Saarbruecken (Breakfast Meeting)

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International Network of KPMG

If you would like to know more about inter-national VAT issues please visit our home-page 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.

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