VAT Newsletter

Hot topics and issues in indirect taxation

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NEWS FROM THE BFH

Assignment of a share in ownership constitutes a supply of goods

BFH, ruling of 18 February 2016, V R 53/14

The ruling of the German Federal Tax Court (BFH) concerned the issue of whether the sale of a share in ownership of movable property could be treated as a zero rated intra-Community supply of goods (VAT exemption with entitlement of input VAT deduction).

The case

In 2008, an art dealer purchased a valuable book at an auction. He subsequently sold a 50% share in the book to a London gallery. The gallery collected the book from Munich and initially exhibited it in London. Following a second exhibition in 2010, the book was sold to an American collection, which required the art dealer to sell his 50% share to the gallery. The art dealer treated both sales of shares in the book as zero rated intra-Community supplies of goods.

The ruling applied only to the first sale which took place in 2008. The tax authorities took the view that the sale of the share did not constitute a supply of goods, but of services (in line with the BFH ruling of 27 April 1994, XI R 91-92/92 and section 3.5 (3) no. 2 of the German VAT Application Decree (UStAE)). The version of § 3a (1) of the German VAT Law (UStG) then in force provided that the service was supplied at the location in which the trader carries on business. Accordingly, the tax authorities considered the supply to be taxable in Germany and not zero rated.

Ruling

The BFH held that the sale of a share in an item of property constitutes a supply of goods. With the consent of the Eleventh Senate (16 December 2015, XI ER-S 3/15), the BFH overruled its earlier jurisdiction that was inconsistent with this view.

In so doing, it relied, in particular, on the Court of Justice of the European Union (CJEU) ruling of 15 December 2005 – case C-63/04 – Centralan Property Ltd. Under the VAT Directive, a supply of goods can include both buildings and parts of buildings, which implies that several supplies may

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concomitantly occur in relation to a single item of property. Accordingly, in the Centralan Property Ltd. ruling, the CJEU held that both the conferral of a right to occupy a property and the closely related transfer of the freehold reversion to another transferee constituted a supply of goods.

Please note:
The BFH held that in this case the sale of a fifty percent interest in the item of property was a zero rated intra-Community supply of goods, even though the accounting and documentary evidence presented was incomplete.

Under CJEU and BFH case law, satisfying evidential requirements is not a substantive condition for zero rating as an intra-Community supply of goods. Even if the formal evidential requirements have not been met, a supply will be zero rated if it clearly qualifies as an intra-Community supply of goods.

In this case, the fact that the book had been transported directly from Munich to London was not a matter of dispute. It was also a matter of record that the gallery traded in the UK and that the acquisition was taxable there, which meant that the substantive conditions for zero rating were met. The BFH did not allude to the fact that the gallery's VAT identification number had not been recorded (neither did the opinion of the Advocate General on 6 April 2016 – case C-24/15 – Plöckl; VAT Newsletter April 2016).

Despite this ruling, it should be noted that in determining contentious issues in the past, the BFH has taken a highly restrictive approach to the evidence required to establish zero rated status (see, for example, the exclusion of witness evidence in the BFH ruling of 19 March 2015, V R 14/14; VAT Newsletter August/September 2015).

Deduction of input VAT in proceedings initiated on equitable grounds

BFH, ruling of 18 February 2016, V R 62/14

The BFH held that where the legal requirements had not been met, the right to deduct could only be granted in proceedings to determine whether the payment of VAT was equitable.

The case

A trader generated taxable revenues from the storage, commissioning and distribution of goods of all kinds. The trader claimed input VAT deductions in respect of amounts invoiced by a company in Prague for supplies of nickel cathodes. The goods were transported by a haulier from a warehouse based in Germany directly to the buyer in Italy.

The goods were in fact supplied by an unknown third party, rather than the company issuing the invoice, and the invoice did not show the correct tax registration number for that company. The third block of numbers for the tax registration number indicated on the invoices consisted of four digits.

In the VAT assessment proceedings, the tax authorities rejected the claim for input VAT deductions in a final and non-appealable decision. The matter at issue was whether the trader was entitled to deduct input VAT in later proceedings due to equitable grounds.

The reasons cited by the tax authorities for their refusal of the right to deduct on equitable grounds were that the trader did not know the directors of the Prague-based company and did not have any other points of contact there, even though the trader had only recently commenced business relations with the company. The tax authorities noted that no contact persons were named on the company's faxed replies either. Moreover, the address shown on the invoices differed from that indicated in other correspondence. The tax registration numbers used by the company clearly deviated from the conventional numbering format applying in Germany.

The trader could have established this and verified the information with the tax authorities. According to the tax authorities, this case ultimately involved a special type of transaction, since a third party, i.e. the trader's Italian business associate, named the supplier and buyer, and no negotiations had been conducted regarding the business transacted or the prices. The tax authorities held that under these circumstances special care was required.

Ruling

The BFH held that where substantive and procedural requirements have not been met, input VAT deductions may be allowed, from a confidence standpoint, as a measure to ensure equitable treatment only. This means that any trader claiming the right to deduct must have acted in good faith and taken all reasonable steps to verify the accuracy of the information on the invoices and ensure that he was not party to fraud.

For the most part, the BFH had no objection to the assessment decision. However, it held that the tax authorities had erred in their assumption that the third block of numbers for tax registration numbers in Germany always consisted of five digits. The BFH pointed out that in North Rhine-Westphalia, at least, the third block of numbers normally consisted of four digits.

However, an authority could not be said to have erred in its assessment if its decision was based on a number of considerations only one of which, or a few of which, were erroneous. But for this rule to apply, it is necessary for the authority to state clearly that each individual consideration carries weight in and of itself. It could not be established that the decision in this case met these criteria and it was therefore set aside.

Please note:
The ruling illustrates the importance of careful selection and investigation of new business partners. Where the conditions set by the law for claiming VAT deductions are not met, any failure to exercise due diligence may preclude the right to deduct on equitable grounds. In addition, the courts have only limited powers to review discretionary decisions by the tax authorities allowing deductions on equitable grounds.

NEWS FROM THE BMF

New rules governing the business status of legal entities under public law

BMF guidance of 19 April 2016 – III C 2 – S 7106/07/10012-06

The BMF has issued guidance on the transitional arrangements set out in § 27 (22) UStG with respect to the new rules governing the business status of legal entities under public law – juristische Personen des öffentlichen Rechts, hereinafter "jPöR" – (§ 2b UStG). The new rules were established under the German Annual Tax Act 2015 (see VAT Newsletter October 2015).

Key features of the new rules

Regardless of the income tax terms, in future, jPöRs will not be deemed entrepreneurs insofar as they conduct their activities as a public authority and the competition is not significantly distorted.

There are no significant distortions of competition, in particular, if the comparable sales of the jPöR are below EUR 17,500 or equivalent supplies are VAT exempt under private law. Furthermore, there are no significant distortions of competition in certain cases of inter-municipal cooperations between jPöRs.

There is a catalog of supplies according to which, if exercised, jPöR is deemed to be an entrepreneur. The supplies performed by jPöR under private law are not covered by § 2b UStG and they are always subject to VAT according to the explanatory memorandum of the new law.

Transitional arrangements

The new rules apply to revenues generated after 1 January 2017. Transitional arrangements are in place for revenues generated prior to 1 January 2021. A jPöR may elect, on a one-off basis, to continue applying the old rules under § 2 (3) UStG by notifying the tax authorities prior to 31 December 2016. The jPöR is not permitted to make this election only in respect of certain activities or services. The notification to the authorities may be revoked only with effect from the beginning of the calendar year following the year in which it was submitted.

The BMF provides detailed guidance on making such an election. In addition, it specifically explains the material scope of the rule and addresses the issue of newly established entities, transfers by way of universal succession, mergers, the responsibilities of public sector legal entitles and the tax authorities, and matters of form.

It should be noted, in particular, that the time limit for notifying the election cannot be extended beyond 31 December 2016, so any jPöR established after 31 December 2016 cannot effectively elect to continue under the old arrangements.

Given that the election applies uniformly to all activities, it is not possible for individual organizational units or bodies within the jPöR, e.g. authorities, agencies, commercial institutions established under public law, or agricultural and forestry holdings, to make an election in respect of their specific areas of activity.

Please note:
The BMF is expected to issue further guidance on the new rules (§ 2b UStG) later this year. In 2016, jPöRs have a number of options in relation to the new rules.

Entities may opt for continued VAT treatment of their activities in line with the previous practice under § 2 (3) UStG until 31 December 2020 by notifying the authorities to this effect. Otherwise, they will be bound by the new rules applying from 1 January 2017. The new rules taking effect on 1 January 2017 will also apply to jPöRs that have previously relied on recent BFH rulings on the business status of such entities. Such entities may also notify the authorities that they wish to continue VAT treatment in line with the previous practice under § 2 (3) UStG until 31 December 2020.

VAT rate for supplies and intra-Community acquisitions of photo books

BMF, guidance of 20 April 2016 - III C 2 – S 7225/12/10001

Based on the present BMF guidance, the administrative opinion on the VAT rate for photo books has changed.

Previous opinion of the tax authorities

According to the BMF, the creation of a photo book is subject to the general VAT rate (currently 19%). The form of service supplied by creating/compiling a photo book, is paramount here, however, not the subsequent supply. If, on the other hand, only a photo book designed by the customer himself is printed and delivered, the reduced VAT rate (currently 7%) is applicable (see VAT summary information No. 2013/04 for the tax authorities of the state of Schleswig-Holstein of 14 June 2013).

According to the Saxon tax authorities, the reduced VAT rate also comes into consideration if the photo books produced are standardized without any individual and/or elaborate design. In such cases, the supply share is supposed to outweigh the service share (see State Office for Taxation and Finance Saxony of 4 March 2015).

New opinion of the tax authorities

According to the BMF, supplies and intra-Community acquisitions of photo books are also subject to the general VAT rate now. The Regulation on Implementation (EU) 2015/2254 of 5 December 2015 excludes a classification under heading 4901 of the customs tariff as book and therefore the reduced VAT rate pursuant to Section 12 (2) no. 1 in conjunction with no. 49 (a) of Annex 2 UStG. This also applies if the photo book has other dimensions or is not or not completely in color print. The BMF pointed out that photo books may not only serve for the documentation of private events, but may also be used to present companies (e.g. on the occasion of company anniversaries or to present reference objects). Photo books are not intended for general circulation, such as via publishing houses or bookstores. However, no international standard book number (ISBN) was allocated.

Please note:

The principles of the BMF guidance must be applied to all open cases. For intra-Community acquistions and supplies of photo books before 1 January 2017 reduced VAT payments made by the trader will not be objected, not even for the purpose of input tax deduction of the recipient of the supply. The non-objection rule applies subject to the legal requirement, according to which the photo books are not primarily used for advertising purposes or contain youth-endangering contents.

A non-objection rule was not agreed with regard to the import of photo books, which should also be subject to a general VAT rate. With regard to supplies to end users it is assumed that primarily gross price agreement are reached in practice. Companies affected should therefore check whether they need to adjust their prices in addition to the new tax keys as of 1 January 2017.

IN BRIEF

EU-Commission withdraws proposals for VAT reform

Commission, information, Official Journal of the EU of 30 April 2016 C155, p. 3

The Commission declared already in its Work Program 2016 of 27 October 2015 that it would withdraw some of its previous proposals on the amendment of the EU law. The reason for this is that the proposals became obsolete, are being blocked or are not as ambitious as they used to be. Thus, the Commission wants to clear the path for proposals of prime importance that in the Commission’s opinion have a good prospect of leading to an agreement. Furthermore, the Commission has also officially withdrawn its proposal on the implementation of a standard VAT return (COM(2013) 721, see VAT Newsletter November 2013). Similarly, the proposals on the new regulation of the VAT exemption of financial services and insurance services were dropped (COM(2007) 746 and COM (2007) 747).

Limited protection of legitimate expectations for construction companies

Lower Tax Court Münster, ruling of 15 March 2016, 15 K 1553/15 U; reference of the BFH: V R 16/16; ruling of 15 March 2016, 15 K 3669/15, reference of the BFH: VII R 11/16

The rulings of the Lower Tax Court in Münster relate to construction work provided to a developer in 2012. In accordance with Section 13b.3 UStAE, the construction work provided by the supplier was not subject to VAT. On the contrary, the developer as the recipient of the supply was liable to VAT.

The BFH decided in its ruling of 22 August 2013, V R 37/10 (see VAT Newsletter December 2013) that the reverse charge mechanism applicable to developers is generally not permitted. As a result, in the present case the developer did not make use of the non-objection regulation stated in the BMF guidance of 5 February 2014 (see VAT Newsletter March 2014) with regard to construction work provided before 15 February 2014 and claimed reimbursement of the VAT paid by it.

The tax authority determined that the supplier shall be liable to VAT henceforth. This was based on the regulation of § 27 (19) sent. 2 UStG newly created as of 1 October 2014 – following the BFH ruling – which excludes the protection of legitimate expectations for the present cases (see BMF guidance of 31 July 2014; VAT Newsletter August/September 2014).

On one hand, the rulings of the Lower Tax Courts relate to the setting of the VAT applicable for the construction work supplier, on the other hand, they relate to the tax collection. The legal action of the construction work supplier was unsuccessful with regard to the setting of the VAT (ref. no. 15 K 1553/15 U). However, the construction company's action was successful with regard to the tax collection of the tax authority (ref. no. 15 K 3669/15).

Although the tax authority was entitled to set a higher VAT applicable for the construction company pursuant to § 27 (19) UStG, because the protection of legitimate expectations of the construction company was excluded regarding the previous administrative opinion, the exclusion was only in line with the constitution if no financial burden arises for the construction work supplier. Therefore, the discretion of the tax authority pursuant to § 27 (19) sentence 3 UStG, to accept the assignment of the supplier's VAT claim against the developer, was reduced to zero.

The Lower Tax Court in Münster does not follow the view of the BFH on the respective application of § 17 UStG (ruling of 27 January 2016, V B 87/15, VAT Newsletter January/February 2016). According to the BFH, it is seriously doubtful whether the VAT claim, which arose against the person supplying the construction work based on the previous administrative opinion pursuant to § 17 (2) no. 1 UStG, actually became irrecoverable. Consequently, the trader would have to pay taxes for the supplied construction work upon receipt of the payable VAT amounts. The other way round, the VAT liability of the developer would not pass to the supplier of the construction work before the VAT amount was paid, or only in the event of an assignment to the tax authority pursuant to § 27 (19) sent. 3, 4 UStG. This applies in general and independently of whether the scope of protection according to § 176 AO is affected.

An appeal was filed against both rulings of the Lower Tax Court in Münster. The proceedings are currently pending at the Vth and VIIth Senate of the BFH.

Sale of phonecards

Lower Tax Court of Berlin-Brandenburg, ruling of 15 January 2015, 5 K 5381/13; ref. no. of the BFH: V R 4/16

The ruling relates to the question whether the trading with phonecards in the present case is to be deemed as an intermediary service or a telecommunications service. In the present case, the Lower Tax Court in Berlin-Brandenburg followed the assumption of the trader that only intermediary services for services of platform providers were supplied, so that only the intermediary fees earned are subject to VAT.

It argued that, although it must to be admitted to the tax authority that the trader has sold the phonecards in his shop and via his online platform, and thus has appeared to have a "proprietary trading" (*Eigenhandel*), this fact alone does not lead to a dismissal of the intermediary supply. For the Lower Tax Court of Berlin-Brandenburg, the consideration of relevance was rather the fact that the clients could not assume under any conceivable aspect that the trader himself would supply telecommunications services. So the trader offered a multitude of different phonecards, which allowed calls into numerous different areas throughout the world.

It further stated that this fact alone would give the customers the chance to understand that the telecommunications services supplied to them were offered by various professional telephone providers. In addition, this was physically apparent to the customers, because the names of the platform providers were stated on the cards. The applicability of the General Terms and Conditions was also another fact supporting the indication of intermediary services. The same would also apply to the sale via the online platform, where the indications after the extension numbers obviously signaled that the telecommunications services were not to be allocated to the trader.

Besides, it argued, the trader was not responsible for technical problems and would also not have been able to solve them. Moreover, the customers had to contact the relevant telephone provider directly for any technical problems. Also, the contracts concluded between the trader and the telephone providers did not either indicate that the trader himself supplied any telecommunications services. Finally, the CJEU ruling of 3 Mai 2012 - case C-520/10 - Lebara - (VAT Newsletter June 2012) did not either oppose to the assumption of an intermediary service. The BFH preserved for appeal the non-admission complaint by the tax authority.

Tax exemption limit of EUR 110 for corporate events remains

BMF, guidance of 19 April 2016 - III C 2 – S 7109/15/10001

The BMF had commented in its guidance of 14 October 2015 on the income and value added tax treatment of corporate events. This was due to the amendment of the income tax law effective as of 1 January 2015.

On 19 November 2015, the Association of Taxpayers (BdSt) commented on the present BMF guidance. The statement relates to the VAT exemption limit for corporate events amounting to EUR 110. For the purpose of simplification, the BdSt proposed that this amount should be tax-free amount, as is the case for income tax (see VAT Newsletter November 2015).

In its guidance of 19 April 2016 to the BdSt, the BMF rejected this proposal. The BMF argues that gifts made within the scope of corporate events could finally not be partly for business purposes and partly for non-business purposes.

PUBLICATIONS

New edition "Investment in Germany" published

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