KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

June 2016

NEWS FROM THE CJEU

Input tax deduction for a mixed-use building

CJEU, ruling of 9 June 2016 – case C-332/14 – Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft

The Court of Justice of the European Union (CJEU) has commented on the case referred by the German Federal Tax Court (BFH) of 5 June 2014, XI R 31/09 on the input tax distribution from input transactions for a mixed-use building and the adjustment of the input tax deduction. In this case, the CJEU did not follow the opinions of the Advocate General of 25 November 2015 (see VAT Newsletter December 2015).

The case

The present case relates to the amount of the input tax deduction from construction costs and current costs of a building, with which a GbR (a German civil-law partnership) intended to achieve both VAT exempt and taxable rental income.

The GbR determined the proportion of the deductible input tax amounts according to the ratio of the expected taxable output transactions to the expected VAT exempt output transactions (referred to as property-related transaction formula). Pursuant to § 15 (4) sentence 3 of the German VAT Law (UStG), as of 1 January 2014 a transaction formula is only permitted if no other economic allocation is possible.

Accordingly, the tax authorities generally accept only a formula based on the use of space. As a result, current costs need to be allocated to the parts of the buildings used in different ways so that the formula based on the use of space may only be taken into consideration for those parts of buildings that are subject to a mixed-use (e.g. staircase). However, the formula based on the use of space is applicable to all construction costs of a building.

Ruling

With regard to a mixed-use building, the input transactions need to be allocated to the various intended output transactions due to the varying amounts of the input tax deduction.

Content

The referring court needs to determine whether such allocation turns out to be too complex, and therefore too difficult to implement. This applies to both, the purchase or construction and the use, servicing and maintenance of a mixed-use building. The CJEU assumed that a direct allocation with regard to the latter cases would be easy to implement in practice.

If no direct allocation is possible, the input tax will generally be distributed according to Union law on the basis of a total transaction formula. The Member States may also apply another method taking into account the options given under Union law.

It must be ensured that the deductible amount may be determined more precisely by using the chosen method than by using the total transaction formula. However, the method does not need to be the most precise one. As a result, the referring court needs to examine whether a formula based on the use of space may lead to a more precise result than the determination using the transaction formula.

The CJEU affirmed the question whether the introduction of § 15 (4) sentence 3 UStG as of 1 January 2004 may lead to an input tax adjustment with regard to construction costs from the previous years if now the formula based on the use of space instead of the turnover formula was applied for the input tax distribution. This does not conflict with the principal of legal certainty and the principle of protection of legitimate expectation.

Please note:
The CJEU ruling leaves a margin of discretion to the BFH with regard to the assessment of the input tax distribution of a mixed-use property. This applies to priority direct allocation of input transactions and to the necessary formula.

On the other hand, the Advocate General already took the view that the regulation in § 15 (4) sentence 3 UStG conflicted with the Union law, because it was too general did neither refer to a specific transaction of specific cases nor take into account the particularities of specific activities. The CJEU failed to address this point. It remains to be seen how the BFH will implement the comments of the CJEU in its subsequent case law.

VAT exempt transactions concerning payments and transfers

CJEU, ruling of 26 May 2016 – case C-607/14 – Bookit

The CJEU ruling applies to the VAT treatment of card handling fees.

The case

Odeon owns and operates a chain of cinemas in the UK. Bookit is a subsidiary of Odeon. Bookit sells admission tickets over the telephone and online as an agent of Odeon. Under these sales the customer pays the admission price, plus a card handling fee when paying by debit or credit card.

Ruling

First the referring court has to consider whether the service provided by Bookit in processing the card payment is a separate service independent of the (taxable) sale of the admission ticket by Odeon. If this is the case, then only VAT exemption as a payment transaction may be considered.

In this case the CJEU rules there is no VAT exemption. A transfer is a transaction that consists of executing an instruction to shift a sum of money from one bank account to another. This transaction involves legal and financial changes between the parties.

Bookit does not take part in any specific or material way in the transfer. It restricts itself to implementing technical and administrative steps which allow it to gather information and pass this on to the seller's bank. In the same manner it only receives information that allows it to make a sale and receive the corresponding money.

By its nature, the supply of such a service cannot be regarded as a VAT exempt financial transaction. Otherwise, any business that took the necessary steps to receive payment by debit or credit card would be carrying out a VAT exempt financial transaction. This would be contrary to the requirement to interpret VAT exemption narrowly.

Also, granting VAT exemption would breach the objectives pursued in exempting financial transactions. VAT exemption is meant to reduce the difficulties associated with determining the assessment basis and the amount of deductible VAT, so as to avoid increasing the costs of consumer loans. However, that does not apply in this case.

Please note:
In its ruling of 26 May 2016 in case C-130/15 – NEC – the CJEU also rejected VAT exemption for supplying card handling services for other

events such as trade fairs, exhibitions, sporting events and concerts. Both rulings from the CJEU demonstrate the narrow scope of application for VAT exempt transactions concerning payments and transfers as financial services.

Breaches of customs obligations and import VAT

CJEU, ruling of 2 June 2016 – joint cases C-226/14 – Eurogate Distribution – and C-228/14 – DHL Hub Leipzig

The CJEU has responded to a submission from the Lower Tax Court Hamburg dated 18 February 2014 (see VAT Newsletter August/September 2014) on assessing import VAT on logistics service providers. These had re-exported non-EU goods for their customers. However, duty had been assessed due to a breach of Article 204 of the Customs Code.

The case

In case C-226/14 – Eurogate Distribution (Eurogate) took non-EU goods into its private customs warehouse for its customers, which were subsequently sent outside the EU again. When these goods were withdrawn from the customs warehouse, customs declarations were issued for re-export. As the withdrawals were entered late in the inventory, the Main Customs Office for Hamburg City issued an assessment for duty and import VAT after they had been exported. After appealing unsuccessfully, Eurogate commenced legal proceedings.

Following the submission from the Lower Tax Court Hamburg the CJEU ruled on 6 September 2012 in case C-28/11 – Eurogate Distribution that late entry in the inventory results in duty being owed for these goods under Article 204 of the Customs Code even when they have been re-exported. The Main Customs Office takes the view that according to practice to date, import VAT became due at the time duty became due, because VAT law refers to customs law. However in Eurogate's opinion the conditions for charging import VAT were not met because the goods did not enter into business circulation in the EU.

In the case C-228/14, a T1 transit procedure was commenced for non-EU goods. The goods should therefore have been transported to China via the relevant customs office within the prescribed deadline. However, DHL Hub Leipzig as the carrier of the goods failed to declare the goods to the customs office before they were shipped to China. Hence it was not possible to complete the transit procedure because the documents required were not submitted.

The Main Customs Office Braunschweig therefore issued an assessment for import VAT, amongst other things, under Article 204 of the Customs Code. No appeal was lodged. Some five months later DHL Hub Leipzig applied for a refund of the import VAT paid under Article 236 of the Customs Code. The main customs office declined to do so. DHL Hub Leipzig submits in its claim that VAT may not be levied on goods in transit that do not enter business circulation in Germany.

Ruling

The CJEU points out that the goods in question were from a third country and subject to the customs warehouse procedure and/or the external transit procedure when they entered the EU and continued to be so until they were re-exported. Hence, although they were physically in EU territory, they cannot be assumed to have been imported within the meaning of the VAT Directive. As no import took place, import VAT cannot be levied.

The CJEU also considered the admissibility of refunding import VAT to DHL Hub Leipzig under Article 236 of the Customs Code. Article 236 (1) of the Customs Code states that import duties may be refunded where it can be demonstrated that the amount was not owed in law at the time it was paid. However, the CJEU refused a refund on the grounds that the term "import duties" in this sense did not include import VAT. The court referred to its ruling of 29 July 2010 – case C-248/09 – Pakora Pluss.

Please note:

According to § 21 (2) UStG, the rules on duty apply analogously to import VAT. However, this ruling from the CJEU shows that while the rules on import VAT are closely linked to the customs duty rules, there may be different legal consequences for import duties (customs) and import VAT depending on the circumstances.

Hence, where there has been a breach of customs obligations with non-EU goods despite going through full customs procedure in the EU and subsequent export, customs duty may be levied but not import VAT. This contradicts previous practice (see German Federal Tax Court's (BFH) ruling of 22 February 2012, VII B 17/11). While it is true that the Customs Code has been replaced by the Union Customs Code with effect from 1 May

2016 (see, amongst others, Customs & Trade News June 2016), there remains a tension with the provisions on import VAT enshrined in customs law.

NEWS FROM THE BFH

VAT exempt postal services requires delivery on all business days

BFH, ruling of 2 March 2016, V R 20/15

In the present case, the BFH had to comment on the requirements of VAT exempt postal universal services (§ 4 no. 11b UStG).

The case

The postal service company offers mail delivery services throughout Germany and parcel delivery throughout the EU. The company itself delivers the mail only within a part of Germany; the mail delivery to the other parts of Germany is carried out by cooperating partners. The company delivers mail on five days per week: Tuesday through Saturday, excluding Mondays. The company sought a certificate pursuant to § 4 no. 11b sentence 2 UStG from the Federal Central Tax Office (BZSt). However, the BZSt denied this request. It argued that the company was not fully able to effectively fulfill its declaration of obligation and thus to offer postal universal services throughout Germany.

Ruling

The BFH denies the entitlement to a certification pursuant § 4 no. 11b sentence 2 UStG. According to this regulation, postal services are only VAT-exempt subject to limitations if the universal services pursuant to Article 3 (4) of the Directive 97/67/EC are provided. This requires the trader to have committed to the BZSt to provide the entire or parts of the universal services throughout Germany. In addition, a certification from the BZSt is required.

According to Art. 3 (4) Directive 97/67/EC, universal services include picking-up, sorting, transporting and delivering mail up to 2 kg and parcels up to 10 kg, and also services relating to registered items and insured items. The universal service must be provided on at least five business days per week pursuant to Art. 3 (3) Directive 97/67/EC. The BFH reached the conclusion that a Member State only needs to comply with the minimum period, but may also exceed it. According to the provisions of the Postal Law, the delivery must be made at least once per business day. Business days are defined as calendar days, which are not Sundays or bank holidays. As a result, the delivery needs to be made usually on six days per week. In the present case, this requirement is not fulfilled.

Please note:

The BFH did not comment on all points in dispute in this appeal proceedings, but restricted itself on the time component of the provision of postal universal services. Apparently, the treatment was in dispute if a company does not have any structures increasing the costs due to deliveries to peripheral areas, but instead relies on cooperation partners. With regard to the question whether delivery orders may also be postal universal services, there are two pending appeal proceedings at the BFH (V R 30/15 and V R 8/16).

IN BRIEF

Supply of blood plasma

CJEU, opinions of the Advocate General of 2 June 2016 – case C-412/15 – TMD

Human blood deliveries are exempt from VAT pursuant to Art. 132 (1) (d) of the VAT Directive and § 4 no. 17 (a) UStG while input tax deductions are excluded. This even applies in the event of intra-Community supplies of goods (see CJEU ruling of 7 December 2006 – case C-240/05 – Eurodental).

In its ruling of 24 March 2015, 1K 1166/13, the Hess Lower Tax Court asked questions on the interpretation of the Union law (see VAT Newsletter August/September 2015). The Advocate General takes the view that the term "blood" includes the supply of blood plasma obtained from human blood. This also applies to blood plasma used for the production of drugs. The ruling of the CJEU remains to be seen.

In this context, another referral to the CJEU by the Lower Tax Court of Münster of 18 April 2016, 5 K 572/13 U (case C-238/16) is also relevant here. The questions have the same wording as the CJEU referral of the Hess Lower Tax Court. The Lower Tax Court in Münster has the additional question whether the input tax deduction is denied in the case of VAT-exempt blood plasma supplies even if the supplies are classified as zero rated export supplies to third countries at the same time. The BFH has left this question open in its ruling of 22 August 2013, V R 30/12, however, the tax authorities affirmed this question (see section 15.13 (5) of the German VAT Application Decree (UStAE)).

Supply of goods with option to purchase

Reference for a preliminary ruling (United Kingdom), case C-164/16 – Mercedes Benz Financial Services UK Ltd

This reference to the CJEU for a preliminary ruling relates to the definition under EU law of the supply of goods as opposed to services. Under Article 14 (1) of the VAT Directive, supply of goods is deemed to be the transfer of the right to dispose of tangible property as owner.

At the same time, under Article 14 (2) of the VAT Directive, handing over goods on the basis of a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment, is also considered supply of goods. The referring court asks the CJEU in particular whether the wording "in the normal course of events" means that a tax authority only has to determine that an option to purchase exists which may be exercised up to payment of the final instalment.

If the tax authority has to go further and determine the economic purpose of the agreement, the referring court asks to what extent the probability of the option to buy being exercised and the amount of the price to be paid on exercise are of any significance.

VAT rate for the transport of persons by taxi and rental cars

BMF, guidance of 2 June 2016 – III C 2 – S 7244/07/10002

The provisions of the UStAE were adjusted to the BFH rulings of 2 July 2014, XI R 22/10 and XI R 39/10 (see VAT Newsletter November 2014) and 23 September 2015, V R 4/15.

Contrary to the previous administrative opinion, the tax-reduced transport of persons does not require the license holder to carry out the service with his own taxi. Therefore, the VAT reduction may also apply if the supplying entrepreneur does not have an own license according to the Law on the Transport of Persons (Personenbeförderungsgesetz) and the transport of the persons is carried out by a contractor, who has an appropriate license to do so.

If a car hire company carries out ambulance transports with vehicles that are not specially equipped for these purpose and if these services subject to VAT are supplied on the basis of special agreements with health care insurances, which also apply to taxi operators, the VAT reduction may apply by way of exception if the other requirements are fulfilled. For simplification reasons, the similarity of this special agreement applicable to car hire companies and taxi operators may regularly be assumed with regard to the ambulance transports.

The changes of the UStAE must be applied in all pending cases. With regard to services supplied before 1 October 2016, it will not be objected if the entrepreneur applies the general VAT rate to these transactions.

OTHER

Opinion on the VAT action plan

Federal Council, Journal no. 191/16 of 13 May 2016; VAT Expert Group, Opinion of 20 May 2016, Ref. Ares (2016) 2356986; ECOFIN, Information of 25 May 2016;

ECOFIN agreed on conclusions on the VAT action plan of the European Commission, which outlined the main points of their work in this action plan for the upcoming years. The goal is to make the VAT system less sensible to fraud and to simplify the VAT application for companies (see VAT Newsletter April 2016).

The German Federal Council also supports the goals set out in the action plan to simplify and make the VAT system more fraud proof. The German Federal Council refers to its competence according to the Law on cooperation between the Federation and the federal states in European Union affairs and explicitly reserves the right to provide their opinion upon presentation of the concrete legislative proposal.

The VAT expert group appreciated that the country of destination principle was to be implemented in order to create equal conditions of competition with national transactions, however, at the same time VAT fraud was to be prevented. The VAT expert group called on the Member States, the Commission and the companies to fight against VAT fraud together. For these purposes, the options given at the moment must be exploited. The individual Member States shall not expand the reverse charge system, because it could conflict with the final VAT regulation.

Results of the special VAT-audit 2015

BMF, notification of 20 May 2016

The special VAT-audits are undertaken regardless of the rotation of the general audit and without differentiation between the sizes of the businesses. The special VAT-audits undertaken in 2015 resulted in a VAT surplus amounting to EUR 1.68 billion (2014: EUR 2.23 billion). The results from the engagement of special VAT-auditors in general audits or in tax investigations are not included in this taxable gain. In 2015, 88,321 special VAT audits were carried out (2014: 89,202). On a yearly average, 1,918 special VAT-auditors were engaged (2014: 1,921). On average, each auditor undertook 46 special audits, as in 2014. According to the BMF, this means that an average taxable gain of roughly EUR 0.876 million is reached per auditor engaged (2014: Approx. EUR 1.16 million).

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