KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

July 2016

NEW LEGISLATION

Directive on the VAT treatment of vouchers

Directive 2016/1065 of 27 June 2016; OJ L 177 of 1 July 2016, p. 9

The Council of the European Union adopted a Directive on the VAT treatment of vouchers on 27 June 2016. The new provisions are without prejudice to the validity of the legislation and interpretation previously adopted by the Member States.

The provisions apply to vouchers issued from 1 January 2019. This means that Member States must transpose the Directive into national law by 31 December 2018. The key aspects of the new provisions are outlined below:

Definition of voucher

A voucher means an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services. The following must be indicated on the instrument itself or in related documentation (including the terms and conditions of use of such instrument):

- the goods or services to be supplied or
- the identities of their potential suppliers.

As stated in the Recitals to the Directive, vouchers can have physical or electronic form.

Please note:
The provisions regarding vouchers are not intended to apply to payment instruments. In particular, the new rules are not targeted at instruments entitling the holder to a discount upon purchase of goods or services but carrying no right to receive such goods or services.

These could include bonus schemes, e.g. cash back or similar arrangements. In addition, the provisions shall not trigger any change in the VAT treatment of transport tickets, admission tickets to cinemas and museums, postage stamps or similar.

Single-purpose and multi-purpose vouchers

The Directive draws a distinction between single-purpose and multi-purpose vouchers:

Content

A single-purpose voucher means a voucher where the place of supply of the underlying goods or services and the VAT payable are known at the time of issuing the voucher. A multi-purpose voucher means a voucher other than a single-purpose voucher.

Distribution of single-purpose vouchers

Where a retailer, acting in his own name, issues or transfers a single-purpose voucher, this is regarded as a supply of the goods or services represented by the voucher. In such circumstances, the retailer must account for VAT on the consideration received for the voucher.

However, the act of supplying the goods or services is not deemed to be a separate transaction. Provided the performing retailer (who accepts the voucher as consideration) and the voucher issuer are the same, only one transaction will be taxable. Where the performing retailer and the voucher issuer are not the same, the performing retailer will be treated as if it had supplied the goods or services to the issuer.

Accordingly, VAT should be accounted for on the consideration the retailer actually supplying the goods and services receives from the voucher issuer and, where applicable, the additional consideration received from the consumer redeeming the voucher.

If a voucher is issued or distributed by a retailer acting on behalf of another, the issue or transfer will be attributable to that other party. However, tax may be payable in accordance with general VAT rules, for example, in respect of intermediary services or a separate supply of services, such as distribution or promotion services.

Distribution of multi-purpose vouchers

Neither the issue nor the transfer of multi-purpose vouchers is subject to VAT. The taxable transaction is solely deemed to have been carried out by the retailer who actually supplies the goods or services and accepts the voucher as consideration or part consideration.

The taxable amount will be determined on the basis of general principles. In the absence of any information regarding the consideration, the monetary value indicated on the multi-purpose voucher itself or in the related documentation should be taken.

Please note:

The Directive does not cover situations where a final consumer in possession of a multi-purpose voucher fails to redeem this within the period of validity, so that the transaction is not taxed in accordance with the principles laid down.

By the end of 2022, the Commission will, on the basis of information obtained from the Member States, present to the European Parliament and to the Council an assessment report on the application of the provisions of the Directive, including, in particular, the VAT treatment of non-redeemed vouchers, accompanied if necessary by an appropriate proposal to amend the relevant rules.

The Directive demonstrates overall that the rules relating to VAT and vouchers are far from being standardized across the EU, and so, in practice, they can vary from one Member State to another. Businesses that have to apply these rules should start to prepare for the new ones, which will take effect on 1 January 2019. Although the rules have not yet been properly transposed into German law, it is important to assess the potential implications early on and consider possible courses of action.

NEWS FROM THE CJEU

Sale of a building below costs of construction

CJEU, ruling of 22 June 2016 – case C-267/15 – Gemeente Woerden

The Court of Justice of the European Union (CJEU) has commented on the case referred by the Netherlands where a building was sold at a price below its cost of construction.

The case

Gemeente Woerden made an order for the construction of two buildings. It deducted the VAT charged for the construction as input tax. Gemeente Woerden sold the new building to a foundation in the management of which it was involved. The sale price was equal to approx. 10 % of the cost price. The VAT was calculated based on the purchase price.

The purchase price owed by the foundation was converted into an interest-bearing loan. Also, the foundation left one part of the building to three institutions for primary education free of charge. The other part of the building was leased to various tenants partly VAT exempt and partly subject to VAT (sports facilities). It is in dispute whether Gemeente Woerden is

entitled to a full input tax deduction.

Ruling

The CJEU reached the conclusion that if an entrepreneur has a building constructed for it and sells it below the costs of construction including applicable VAT he is generally entitled to input tax deduction for the entire construction of the building.

The CJEU argued that the result achieved with an economic activity was irrelevant with regard to the entitlement to input tax deduction as long as the activity itself was subject to VAT. A proportional input tax deduction is only possible if the price paid was a token amount.

A full input tax deduction applied by the entrepreneur is also possible if the purchaser leaves a part of the respective building to a third party for use free of charge, as in the present case. A limitation of the entrepreneur's input tax deduction for the building parts used by the purchase for business activities does not exist.

The CJEU argued that the input tax deduction of the entrepreneur did not depend on a specific subsequent use pursuant to Art. 168 (a) of the VAT Directive. On the contrary, with regard to VAT, every transaction is to be evaluated independently from the VAT liable for previous or subsequent transactions.

Please note:
In its ruling of 6 April 2016, V R 6/14, the German Federal Tax Court (BFH) left it open, among others, whether the VAT on considerations is a limit for the input tax deduction for a holding company (see article in this Newsletter) if there are no investment or unsound measures. Based on the present CJEU ruling, such cap seems doubtful in terms of legal system even if an entrepreneur has not made any investments or taken any unsound measures.

NEWS FROM THE BFH

Requests for a preliminary ruling with regard to address details on invoices and deduction of input VAT in proceedings initiated on equitable grounds

BFH, rulings of 6 April 2016, V R 25/15 and XI R 20/14

The questions referred to the CJEU by two of the BFH VAT senates concerned the requirements for a proper invoice on the basis of which the right of deduction may be exercised, and, in particular, the inclusion of the supplier's full address on the invoice. A further question referred was whether the right to deduct could be allowed on equitable grounds if the invoicing requirements were not met.

The cases

In the Fifth Senate case, a vehicle dealer purchased a car from an online trader. The invoices of the online trader showed the address of premises rented by the trader. However, the premises were not suitable as business premises. Some cars were supplied from the street at that address, others from public places, such as station forecourts.

The Eleventh Senate case concerned the same invoice issuer and the same address as in the BFH ruling of 22 July 2015, V R 23/14 (see VAT Newsletter August/September 2015). In these parallel proceedings, the affiliated company also purchased cars in the capacity of a vehicle dealer. The address indicated on the invoices was the issuer's registered office address. However, this was merely a "letter box" address to which mail was sent, but was not the location at which the trader carried on business.

The rulings

The BFH sought clarification as to what specifically suppliers should state on an invoice for the purpose of disclosing their full address, as required for the deduction of input VAT:

- For an input tax deduction to be allowed, is it necessary for the supplier to provide the address at which it carries out business?
- If not, is it sufficient for the supplier to provide a mailing address (i.e. a letter box address) on invoices issued for goods and services supplied?
- Respectively: For businesses (e.g. online retailers) operating without brick-and-mortar premises, which address is required?

Clarification was also sought as to the circumstances in which input VAT deduction (for the trader as recipient of supply) should be allowed from a confidence standpoint, where the formal invoicing requirements have not been met:

- If a trader believed in good faith that the requirements for deducting input VAT were met, should this only be taken into account during separate proceedings initiated on equitable grounds, rather than at the tax assessment stage?

- Or is it possible to invoke EU law in support of the good faith argument at the assessment stage?
- Should the right to deduct always be allowed where there has been no attempt to evade tax, or the trader neither knew, nor could have known, that he was involved in fraud? Or is a trader, in such circumstances, required to have taken all reasonable steps to verify the accuracy of the invoice details for his legitimate expectations to be protected?

In this case, the Fifth Senate was not satisfied that the trader took all reasonable steps to do this. It held that special care should have been taken in circumstances where new vehicles were supplied from public places and locations other than business premises.

Please note:
Both references for a preliminary ruling are based on the CJEU decision of 22 October 2015 – case C-277/14 – PPUH Stehcemp. In the opinion of the BFH, the CJEU ruling could imply that it is not necessary for all formal invoicing requirements to have been met for the right of deduction to apply. At the very least, the CJEU seems to suggest that the trader's full address need not necessarily be the address at which he carries on business.

In accordance with established BFH case law, the requirement to include the full address on the invoice can only be met by providing the correct address at which the supplier carries on business (see BFH ruling of 22 July 2015, V R 23/14). The BFH was therefore in doubt as to whether past BFH decisions were consistent with CJEU case law.

The BFH ruling was published in the Federal Tax Gazette on 30 November 2015. In the ruling, the BFH also indicated, in an obiter dictum, that it did not concur with the German tax authorities that a P.O. box address constituted adequate information for invoicing purposes (section 14.5 (2) sent. 3 of the German VAT Application Decree (UStAE)). However, the UStAE has not been amended and the BMF has not provided any guidance on this issue to date (see VAT Newsletter January/February 2016).

Input tax deduction for holding companies

BFH, ruling of 6 April 2016, V R 6/14)

The BFH ruling relates to the input tax deduction for the acquisition of capital for the acquisition of shareholdings.

The case

Closed-end funds in the legal form of a KG (a German limited partnership) deals with forestry in a third country and is marketed by a GmbH (a German limited liability company). The KG has two subsidiaries in the third country. One of the subsidiaries is the owner of the property and the forest. The other subsidiary carries out the reforestation, maintenance and harvesting of the forest. It has a capital stock of USD 10,000 and does not have any other equity. The reported valuation of the shareholdings amounts approx. EUR 1,100,000 in total.

The KG provides to its subsidiary commercial service and consultancy services in return for a flat rate of EUR 10,000 per year.

Following the acceptance of further shareholders, the limited liability capital was increased from EUR 862,500 to EUR 7,800,000. The GmbH works for the KG on the basis of a distribution agreement for the referral of limited partnership shares and a project development agreement. The KG in turn leases to the GmbH business premises VAT exempt.

What is in dispute is the input tax deduction from the receipt of project development services and the attracting of capital through the GmbH and pro rata input taxes from other benefits.

Ruling

The BFH initially affirmed the business activity of the KG as a holding company based on its services provided to the subsidiaries in return for payment.

In consideration of the CJEU ruling of 16 July 2015 in the joint cases C-108/14 - Larentia + Minerva - and C-109/14 - Marenave (see VAT Newsletter July 2015), a holding company engaged in business activities is principally entitled to input tax deduction from receipt of services for the attracting of capital, because the costs need to be allocated to the business activity.

However, the required connection to the acquisition of shareholdings is missing if the attracted capital has no connection to the acquisition of shareholdings, as in the present case.

According to the BFH, the costs of attracting of capital in the present amount (capital contribution or founding limited partners: EUR 862,500; reported valuation of the shareholdings EUR 1,100,000; increase of the

limited partnership capital to EUR 7,800,000) are costs, which are not in connection with the acquisition of the shareholdings to subsidiaries with a share capital amounting to USD 10,000, because the attracted capital was not necessary in this amount. In addition, the BFH said that the shareholdings in subsidiaries had already existed before the limited partner's shares were issued.

The KG did not explain that or which of the remaining services received (including project development agreements) were to be allocated exclusively to its business activity. As it is assumed that the KG used the other services for both its business activities and its non-business activities, an input tax distribution pursuant to § 15 (4) of the German VAT Law (UStG) is to be applied.

The Lower Tax Court of Baden-Württemberg confirmed the pro rata input tax deduction of 25% based on an estimation, which was not challenged by the BFH. The BFH left it open whether the VAT on the consideration for the services is a limit for the input tax deduction if no investment or unsound measures exist. The BFH referred to the BFH ruling of 9 February 2012, V R 40/10.

Please note:
The BFH interpreted the CJEU ruling of 16 July 2015 in the joint cases C-108/14 - Larentia + Minerva - and C-109/14 – Marenave - for holding companies very narrowly. If the attracted capital has no connection to the shareholding acquisition, the BFH affirms a non-business activity even if the holding company carries out business activities for its shareholdings.

The CJEU ruling of 22 June 2016 – case C-267/15 – Gemeente Woerden (see article in this newsletter), however, speaks against the cap of the input tax deduction in the amount of the VAT of the consideration for services.

IN BRIEF

Rounding of the deductible proportion

CJEU, ruling of 16 June 2016 – case C-186/15 – Kreissparkasse Wiedenbrück

The ruling of the CJEU relates to a request for a preliminary ruling of the Lower Tax Court of Münster on the question as to whether it is allowed to round the deductible proportion to a full percentage if no total transaction formula pursuant to Art. 175 (1) of the VAT Directive is applied (see VAT Newsletter July 2015).

In the present case, a credit institution calculated that the mixed-use goods and services purchased by it for the fiscal year 2009 amounted to 13.55 percent and for the fiscal year 2010 to 13.18 percent. It rounded these rates up to 14 percent. In calculating the amount of adjustments for the above-stated fiscal years, which it had to apply due to its waiver with regard to VAT exemption of its transactions in the commercial customer business, the credit institution applied the deductible proportion to its favor by rounding it up to 14 percent.

The CJEU reached the conclusion that the Member States were free to round the deductible proportion to one percentage point if the deductible proportion does not relate to the total transaction (Art. 175 (1) of the VAT Directive), but is calculated by using an alternative sectoral or asset-related method (Art. 173 (2) of the VAT Directive). However, there is no obligation to do so (also already CJEU, ruling of 18 December 2018 - case C-488/07 – Royal Bank of Scotland).

In the event of a input tax adjustment at a later time, the Member States are only obliged to round up to one percentage point in the adjustment of the input tax if the original deductible proportion was rounded up to one percentage point permitted by the Member State.

Time of provision of services for prepaid phone cards

Lower Tax Court of Cologne, ruling of 16 February 2016, 1 K 927/13; ref. no. of the BFH: V R 12/16

In the present case, the Lower Tax Court of Cologne has commented on services in connection with prepaid agreements subject to VAT. The public limited company A concluded a prepaid agreement for the participation in mobile services B. The agreement took effect by the customer order and activation of the credit by A. For these purposes, the customer made deposits. The customers could use the credit both for services against payment provided by A (telephone services, text messages, MMS, mobile internet) and for third-party services provided in return for payment (e.g. downloading of ring tones). A provided to the customers a B mobile connection together with a phone number. The General Terms and Conditions included a sunset clause for the credit not used.

The parties and the tax authority agreed that the sale of the credit

does not represent services subject to VAT. However, the tax authority took the view that the expired credit was to be considered as payment for the availability or subsequently increased the payments for the services provided.

In contrast, the Lower Tax Court of Cologne reached the conclusion that a mobile provider provides services for payment already by making the credit on prepaid accounts available, this means

- with regard to the topping up of the prepaid account at the time of the top-up and
- with regard to the sale of credit cards for the later topping up at the time of the sale.

The later time for the use of the credit to top up the phone card etc. is not relevant. An appeal was filed against the ruling.

Liability of the recipient of construction work

BFH, ruling of 31 March 2016, XI B 13/16

The ruling of the BFH in the preliminary proceedings relates to construction work provided to developers in 2012. In accordance with the previous administrative opinion, 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 German Ministry of Finance (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 henceforth be liable to VAT considering § 27 (19) sent. 2 UStG (see BMF guidance of 31 July 2014; VAT Newsletter August/ September 2014).

The Lower Tax Court of Saxony had granted the application for interim legal protection. The appeal of the tax authority was unsuccessful. The BFH referred to a now settled case-law, according to which there are substantial doubts as to the legality of the changed VAT assessment pursuant to § 27 (19) UStG (see VAT Newsletter January/February 2016).

Contrary to the view of the tax authority, no special interest in suspension on part of the applicant is required. Although there is such a requirement (see e.g. BFH ruling of 7 July 2004, XI B 231/02) according to the previous jurisdiction of the BFH in the event of substantial doubts as to the legality of a formally and properly enacted law, the BFH left it open whether this jurisdiction is still to be adhered to. In the event of the reconciliation between tax law provisions and Union law, as in the present case, according to the settled case-law of the BFH no special interest in suspension is required.

Legal consequences of expiry of input tax adjustment period

CJEU, ruling of 16 June 2016 – case C-229/15 – Jan Mateusiak

The CJEU ruling was referred by a Polish court and relates to the interpretation of Art. 18 (c) of the VAT Directive (see VAT Newsletter October 2015). According to this, in the event of termination of the business activity, the Member States may treat the possession of items as transactions in return for consideration, particularly if a full or partial input tax deduction was possible for these items at the time they were purchased. In contrast to Germany, Poland has exercised its right to choose.

The CJEU reached the conclusion that this option of taxation also exists if the input tax adjustment period has already expired for fixed assets pursuant to Art. 187 of the VAT Directive (see § 15a UStG). The principles laid down by the CJEU should also be applicable for removals within the meaning of Art. 16 of the VAT Directive (see § 3 (1b) UStG) if the company is maintained as a going concern.

OTHER

Brexit – What is to be done?

On 23 June 2016, the British electorate voted for the withdrawal from the European Union. As a result, the relationship between the European Union and the United Kingdom will establish a new relation in the mid-term. This will affect especially companies that make business in or with Great Britain as well as foreign companies the European holdings of which are located in the United Kingdom. Further information on the effect of the Brexit and how companies should address these changes is available on the website of KPMG.

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