KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

June 2021

NEWS FROM THE CJEU

Concept of a fixed establishment – letting a property in a Member State

CJEU, ruling of 3 June 2021 – case C-931/19 – Titanium

The Court of Justice of the European Union (CJEU) has ruled that a rented property in the national territory does not itself constitute a fixed establishment in the national territory. This means that foreign traders that let a property located in the national territory must not, in this respect, be treated as resident within the national territory with the result that the reverse charge process comes into question for their B2B transactions.

The case
Titanium is a company with its registered office and management in Jersey. Its corporate purpose lies in property management, asset management, and the management of housing and accommodation. In the years under dispute, 2009 and 2010, it let a property in Vienna, subject to VAT, to two Austrian traders.

Whether Titanium, due to the lack of a fixed establishment in Austria, owes no VAT for its letting activity in connection with the property is disputed.

Ruling
The CJEU interprets the question referred as asking if a property let in a Member State constitutes a fixed establishment in line with Art. 43, 44 and 45 of the VAT Directive, if the owner of the property does not have its own staff for the performance of services in connection with the rental.

The concept of a “fixed establishment” requires, in accordance with established CJEU case law, a minimum degree of stability derived from the presence of both the human and technical resources necessary for the provision of certain services. Therefore, it requires a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to independently supply the services in question (CJEU, ruling of 28 June 2007 – case C-73/06 – Planzer Luxembourg, para. 54 with further citations). In particular, in the case of a structure that does not have its own staff, it is not possible to

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subsume it into the concept of a "fixed establishment" (cf., to this effect, CJEU, ruling of 17 July 1997 – case C-190/95 – ARO Lease, para. 19). This case law is confirmed by Art. 11 of the Implementing Regulation No. 282/2011.

In the case at hand, Titanium does not have any of its own staff in Austria. A property which does not have any human resources empowered to act independently does not fulfill the criteria set out in the case law for categorization as a fixed establishment within the meaning of the VAT Directive.

In light of the foregoing, the answer to the question referred is that a property let in a Member State does not constitute a fixed establishment in line with Art. 43, 44 and 45 of the VAT Directive, if the owner of the property does not have its own staff to perform services relating to the letting.

Please note:
This ruling contradicts the view of the German authorities in Section 13b.11 (2) VAT Application Decree (UStAE). The tax authorities assume that traders that own a property located in the national territory and let it subject to VAT must be treated as resident in the national territory in this regard. This blanket assumption is not viable.

Different German Lower Tax Courts have considered wind farms to be subsidiaries or fixed establishments within the meaning of the VAT law even if operated without staff. The referring Austrian court also referred to this case law in its submission. According to the principles of the CJEU Titanium ruling, wind farms are potentially not fixed establishments. Developments in this area will remain interesting to follow. Whether or not there is a fixed establishment can have an impact not only on the place of performance in terms of input and output services, but also on the question of the applicability of the correct taxation procedure (reverse charge / input tax refund versus regular taxation procedure). Due to previous VAT classifications, it must be viewed and reassessed against the background of this case law.

NEWS FROM THE BFH

On input VAT deduction and free gifts

BFH, ruling of 16 December 2020, XI R 26/20 (XI R 28/17)

This German Federal Tax Court (BFH) ruling concerns the input VAT deduction for the execution of works to develop a municipal road.

The case
Mitteldeutsche Hartstein Industrie AG is a managing holding company. A VAT group exists between it and its subsidiaries A GmbH and B GmbH. The Regional Council allowed A GmbH to operate a quarry on condition that they would develop one of the municipality's public roads, on which the quarry is located.

As the removal of limestone required this development, the municipality and A GmbH's predecessor in law concluded an agreement in which the municipality undertook to plan and extend the municipal road in question. Second, they undertook to make the road available to A GmbH's predecessor in law without restriction if the road remained open to the public. In return it was stipulated that A GmbH's predecessor in law would bear all of the costs in connection with the extension of this road. In 2006, A GmbH commissioned B GmbH to carry out the extension in accordance with the agreement entered into with the municipality. Following completion of the works, that section of the road was used by A GmbH's heavy goods vehicles as well as by other vehicles.

Whether the AG is entitled to deduct the input VAT amounts from the input services received from B GmbH to extend the road is disputed.

Ruling
The BFH affirmed the input VAT deduction following a request to the CJEU for a preliminary ruling. In the case at hand, the works to extend the municipal road in question were limited to what was necessary to ensure the operation of the limestone quarry by the AG. As the works to extend this road were limited to the extent necessary, the right to deduct input VAT for all costs incurred due to these works must be recognized. To the extent the BFH did not allow indirect links to suffice for the right to deduct input VAT in previous rulings, it will in this respect, no longer hold to that case law. Furthermore, the approval to operate the quarry, which was unilaterally granted by the district government, does not constitute a consideration for the works to extend the municipal road.

Please note:
According to the BFH, a benefit in kind for the municipality in accordance with § 3 (1b) sent. 1 no. 3 German VAT Law (UStG) or § 3 (9a) no. 2 UStG must be denied. The BFH understands the CJEU statements to mean that there is no threat of a risk of an untaxed end use under the

following conditions: The input service will be used above all for the needs of the taxpayer, it is necessary for the company and does not extend beyond that need, the costs of the input service are contained (imputed) in the price of the output transactions carried out, and the advantage for third parties – here, the general public – is in any case incidental. There is no question of VAT arising on a benefit in kind under these conditions as a result of a reduction, compliant with Union law, of § 3 (1b) sent. 1 no. 3 UStG. To the extent that this was previously viewed differently by the BFH, it will no longer hold to this case law under the conditions mentioned.

NEWS FROM THE BMF

Determination of the place of services in accordance with § 3a (3) no. 5 UStG

BMF, guidance of 9 June 2021 – III C 3 – S 7117-b/20/10002 :002

According to Art. 53 of the VAT Directive, the place of supply of a service to a taxpayer relating to the right of entry and the associated supply of services for events in the areas of culture, the arts, sports, science, teaching, entertainment, or similar events such as trade fairs and exhibitions, is the place at which these events actually take place.

The provision on location in Article 53 of the VAT Directive was implemented in § 3a (3) no. 5 UStG. According to Section 3a.6 (13) sent. 3 no. 3 UStAE, the application of the provision on location in the case of events in the areas of teaching and science require that the event is generally accessible to the public.

This prerequisite, according to the CJEU ruling of 13 March 2019 – case C-647/17 – Srf konsulterna – is not a requirement for the application of the provision on location. Therefore the UStAE will be amended accordingly.

In particular, the two examples used in the UStAE to differentiate between events with and without the public shall be dropped.

Elimination of example 1: The seminar provider S, domiciled in Salzburg (Austria) holds a seminar in Berlin on current VAT law in the European Union; the seminar is advertised across Europe. There are no restrictions on participation. Traders resident in Austria, Belgium, Germany and France attend the seminar. The place of supply is, according to § 3a (3) no. 5 UStG, the location of the event in Germany.

Elimination of example 2: The internationally active auditing company W, domiciled in Berlin, commissions the seminar provider S, domiciled in Salzburg (Austria) to hold an in-house seminar in Salzburg on current VAT law in the European Union. Only employees of W can participate in the seminar. The seminar is held in January 2011. 20 members of W's staff attend. As the seminar is not generally accessible to the public, the transaction does not fall under the admission entitlements in accordance § 3a (3) no. 5 UStG. The place of supply, according to § 3a (2) sent. 1 UStG, is the place where W is domiciled in Berlin.

Based on the new principles, in both cases the place of supply is the location at which the event takes place. The German Ministry of Finance (BMF) appears to therefore see no more need for the insertion of sample cases.

In addition, in Section 3a.7a UStAE the criterion of the necessity for the physical presence of the recipient of the supply at the event was inserted. Online participation has therefore been removed from the scope of application of § 3a (3) no. 5 UStG.

Please note:
In practice, it is problematic that the BMF would like to apply the change without a non-objection regulation for the past in all open cases. On the other hand, the interaction with the margin taxation applicable in the B2B area should be rated positively (see the draft of the revised UStAE; VAT newsletter May 2021), since the exception provision provided there now has a broader scope of application, namely also for events that are only open to a limited number of participants (e.g. members' meetings; customer events, etc.).

VAT-exempt purchase of admission tickets for cultural events

BMF, guidance of 9 June 2021 – III C 2 – S 7110/19/10001 :002

In its ruling of 25 April 2018, XI R 16/16, the BFH commented on the purchase of admission tickets for an opera. The BFH ruled that if a trader offering hotel services purchases admission tickets in their own name but for the account of the individual hotel guest requesting tickets granting admission to an opera, this constitutes a procurement service in line with § 3 (11) UStG. The procurement service is exempt from VAT if the opera house transactions are

subject to the VAT exemption of § 4 no. 20 (a) sent. 1 UStG.

In its guidance of 9 June 2021, the BMF amended Section 3.15 (3) UStAE in line with the BFH case law.

As has been the case up to now, personal attributes of those participating in the supply chain must, for every supply within a commission to supply services, be taken into account separately when it comes to the evaluation with regard to VAT law.

This can be of importance, for example, in relation to the application of provisions on an exemption from VAT or the determination of the place of supply if that is dependent on whether the supply is provided to a trader or a non-trader.

The following passage was inserted: If a trader procures for a third party services to which the VAT exemption of § 4 no. 20 (a) UStG applies, the procurement service provided to the customer is exempt from VAT in accordance with § 4 no. 20 (a) UStG, cf. BFH ruling of 25 April 2018, XI R 16/16.

As was previously the case, VAT according to § 13 UStG can arise for the particular supply at different points in time ; for example if the client calculates the VAT on the supply based on the agreed payment and the supplier calculates it on the basis of the payment received. Moreover, for example, whether non-traders, small traders (§ 19 UStG), farmers and foresters participating in the supply chain apply the average VAT rate in accordance with § 24 UStG to their operations must be taken into consideration.

The principles of the BMF guidance must be applied to all open cases.

IN BRIEF

Reminder: Implementation of the second stage of the digital VAT package on 1 July 2021

BMF, guidance of 1 April 2021 – III C 3 - S 7340/19/10003 :022; BMF, guidance of 20 April 2021 – III C 5 – S 7420/19/10002 :013

By means of the German Annual Tax Act, the second stage of the so-called digital VAT package was and will be implemented on 1 April 2021 and 1 July 2021, respectively.

In particular, it contains the following:

- Changes in the case of distance-selling
- Inclusion of operators' electronic interfaces in fictitious supply chains (§ 3 (3a) UStG)
- Expansion of the single point of sale (non-EU process)
- Expansion of the single point of sale (EU process)
- Introduction of the single point of sale for imports
- Introduction of a special provision for the payment of import VAT
- Abolition of the EUR 22 exemption limit

The BMF guidance of 1 April 2021 deals with these updates and is available to download from the BMF website.

To the extent that a fictitious supply in accordance with § 3 (3a) UStG is precluded, the operator of an online market remains liable in accordance with § 25e UStG. The previous regulation has been amended with the insertion of § 3 (3a) UStG. The BMF guidance of 20 April 2021 clarifies these changes with sample cases and is available to download from the BMF website.

Please note:
We already alerted you to these two BMF guidances in our VAT Newsletter April 2021. Due to the extensive changes, especially in the so-called distance selling (previously: mail order according to § 3c UStG), numerous companies are now subject to taxation in other EU countries due to their B2C sales. Depending on the circumstances, certain invoice regulations must be observed, new tax codes created and, if necessary, VAT registrations made. To the extent it has not already happened, there is an urgent need to analyze your business transaction in order to determine the extent to which changes arising from the digital VAT package exist, adjust processes – including documentary obligations and registration processes in a form suitable for each individual case – on time, and thus ensure a smooth customs and VAT processing of these transactions under the new provisions from 1 July 2021. In terms of customs law and import VAT, the abolition of the Euro 22 limit in particular leads to the need for action for many companies.

Reminder: Extension of the provision on non-objection for work supplies to 1 July 2021

BMF, guidance of 11 March 2021 – III C 2 - S 7112/19/10001 :001

In its guidance of 1 October 2020, the BMF defined the term work supplies anew. The background to this is that the BFH, in its ruling of 22 August 2013, V R 37/10, determined, in relation to the reverse charge procedure in the case of construction services, that work supplies exist as soon as, in addition to obtaining the authority to dispose of a third-party item, that item can be reworked or processed. Furthermore, the BFH determined that the reworking or processing of the supplier's own items does not suffice for the assumption of a work supply.

The UStAE will be amended in line with the BFH case law. The principles of the BMF guidance must be applied in all ongoing cases. With regard to all statutory VAT arising until before 1 January 2021 – including for the purposes of input VAT deductions and cases of § 13b UStG – no objection will be raised if the traders have treated supplies in accordance with the previous version of Section 3.8 (1) sent. 1 UStAE.

Please note:
In the BMF guidance of 11 March 2021, this provision on non-objection was extended to VAT arising until before 1 July 2021 so that the new definition must now be observed and implemented systemically and procedurally. This may also result in VAT registration obligations.

EVENTS

Webcast Live: Training Series „Practical cases of VAT"

Part 1 on 15 September 2021,
Part 2 on 22 September 2021,
Part 3 on 29 September 2021

Webcast Live: VAT meets Automotive – current trends and developments

Event on 15 September 2021

Webcast Live: Consignment warehouses

Event on 28 September 2021

Webcast Live: Customs, VAT and transfer prices

Event on 6 October 2021

Webcast Live: Quick Fixes 2020 – Status Quo and testimonials

Event on 28 October 2021

Webcast Live: Wage tax, VAT and social security challenges in bogus self-employment

Event on 29 October 2021

You can find shortly detailed information and the registration forms for these events here.

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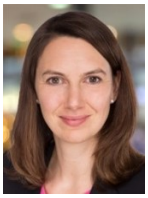

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