KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

February 2023

NEW LEGISLATION

Value added tax in the digital age

In its action plan for 2020, the EU Commission announced plans for a fair and simple taxation supporting the recovery strategy of the legislative package “VAT regulations for the digital age”, which has also been incorporated into the Commission’s work program for 2022.

The legislative package comprises

- a proposal to amend the VAT Directive – COM(2022) 701 final –, as well as
- a proposal for a Council Regulation amending Regulation (EU) No. 904/2010 regarding the necessary agreements for the digital age on administrative cooperation in the area of VAT – COM(2022) 703 final – and
- a proposal for a Council Implementing Regulation amending the Council Implementing Regulation (EU) No. 282/2011 relating to the information requirements for certain VAT regulations – COM(2022) 704 final –.

This package primarily has three goals:

1. By introducing digital reporting obligations, the VAT reporting requirements will be modernized so that information that taxpayers need to transmit to the tax authorities for every individual transaction will be standardized. At the same time, the use of electronic invoicing will be compulsory for cross-border transactions.
2. The challenges of the digital platform economy shall be tackled by updating the VAT regulations currently in force for the platform economy, thus dealing with the issue of equal treatment, the regulations in effect regarding place of supply for these transactions will be refined, and the role of platforms supporting short-term lettings of accommodation or passenger transports will be strengthened in the area of charging VAT.
3. Through the introduction of one single VAT registration, multiple VAT registrations in the EU shall be dropped and the functioning of tools for the registration and payment of VAT on distance sales of items shall be improved.

Content

This means that the existing single point of contact (OSS) system and the single point of contact for imports (IOSS) as well as the reverse charge system will need to be improved and expanded in order to limit the cases in which a taxpayer must register in another Member State to an absolute minimum.

The German versions of the three Commission proposals are now also available on the EU Commission's website.

NEWS FROM THE CJEU

Reduction of the basis of assessment due to irrecoverable debt

CJEU, ruling of 9 February 2023 – case C-482/21 – Euler Hermes

The CJEU has ruled on the reduction of the basis of assessment due to irrecoverable debt.

The case

The Hungarian resident company, Euler Hermes, is an insurance company that undertakes, as part of its insurance contracts, to pay compensation to its policyholders, if their customers do not pay a given debt. The amount of the compensation is generally 90 per cent of the value of the unpaid debt including VAT. Under the insurance contract, in parallel with that compensation, the relevant portion of the value of the debt and all related rights originally attributed to the policyholder are attributed to Euler Hermes. In practice, the burden of VAT previously paid to the Treasury by the policyholders, but passed on by them to their customers and not paid by the latter, is borne by Euler Hermes as regards the portion of the VAT attributed.

As for the debts concerned, the referring Court notes that the debts, at the time of their transfer to Euler Hermes, were not yet considered irrecoverable and that they became definitively irrecoverable only after that transfer. In addition, the VAT law was contrary to EU law until 1 January 2020, since that law did not permit the subsequent reduction of the taxable amount of VAT in respect of such debts.

Whether Euler Hermes, under the insurance contract, is entitled – as the legal successor of its policyholders with regard to the irrecoverable debts in question – to a refund of VAT is disputed. Similarly, under Union law it would be entitled to such a refund on the basis of the principle of tax neutrality.

Ruling

In this case, Euler Hermes paid, to the customers that were the taxpayers, compensation in the amount of 90 per cent of the debts in question including VAT.

In that context, it appears that the part of the debts for which Euler Hermes granted compensation was indeed received by the taxable customers as consideration for the taxable transactions in question, with the result that it cannot be regarded as being the subject of a "non-payment" within the meaning of Article 90 (1) of the VAT Directive.

Therefore that part of the debt, even if it was received by way of compensation, cannot give rise to any right to a reduction of the basis of assessment for VAT for the taxable customers.

Furthermore, it cannot be held that, in light of EU VAT law and irrespective of the national rules that may govern assignment of debt under civil law, an insurer such as Euler Hermes may be identified as being the taxable person entitled, with regard to the portion of the debts that were the subject of compensation and assignment, to a reduction of the taxable amount for VAT purposes under Article 90(1) of the VAT Directive.

If such an insurer were recognized as having that status, this would violate the principle of tax neutrality, since the VAT paid to the tax authorities would not be exactly proportional to the price actually received by the taxable customers who carried out the taxable transactions in question.

Please note:

The practical handling of this issue in Germany may contravene the principles of the CJEU ruling. Thus, in the case of the assignment of a debt less than the nominal value, the compensation is determined on the basis of the actual expenses of the recipient of the supply (see BFH, ruling of 6 May 2010 – V R 15/09 and section 17.1. (6) VAT Application Decree (UStAE) with the following example):

As a result of a supply of goods, a trader has a debt in the amount of EUR 11,900 vis-à-vis its customer entitled to deduct input VAT. The trader assigns this debt to a collections agency for a fixed price of EUR 5,750. The collections agency is able to retrieve EUR 8,925.

The supplier's VAT is initially determined on the basis of the agreed payment for the supply of EUR 10,000 (VAT at a rate of 19 per cent = EUR 1,900). The final amount of VAT for the supplier, however, is only EUR 1,425, as the customer only paid out EUR 8,925 (§ 10 (1) sent. 2 German VAT Law (UStG)), while the remaining EUR 2,975 is irrecoverable.
In practice, this often leads to

difficulties, as the supplier is dependent on the information provided by the collection agency in order to be able to claim an adjustment of the VAT on the basis of the payment received from the customer by the collection agency. In this respect, an adjustment of the VAT based on the payment agreed with the collection agency for the assignment of the receivable would be more practicable, but would lead to consequential questions concerning the systematics of taxation at the individual levels..

Payment via assignment of half of prize money

CJEU, ruling of 9 February 2023 – case C-713/21 – A

The CJEU has ruled on the payment via assignment of half of the entitlement to prize money won on horses in competitions.

The case

From 2007 to 2012 A operated a training stable for show horses in Germany. He concluded contracts with horse owners living in Germany, on the basis of which those owners made their horses available to him. These horses were housed and cared for in this stable. They were trained there and participated in competitions in Germany and abroad.

According to these contracts, the owners bore the costs for the accommodation, participation in competitions, blacksmiths, and vets for the horses, while A covered the costs for his own participation in competitions as a jockey, i.e. travel and hotel expenses.

Against the background of any prize money won at these equestrian events accruing solely to the horse owner, the contracts in question stipulated that A shall receive 50 per cent of all cash and non-cash prizes. To this end, the owner already assigned these future entitlements to A upon conclusion of the assignment contract. A was allowed to offset any debts owed by him to the owner against any debts owed by him to the owners concerned.

The tax authorities hold the view that the revenue from competitions using horses not owned by the rider is subject to the standard rate of VAT. An appeal and legal suit were not successful. The German Federal Tax Court (BFH) submitted the case to the CJEU for a preliminary ruling.

Ruling

The CJEU interprets Art. 2 (1) (c) of the VAT Directive such that the single supply of the owner of a training stable for competition horses, consisting of accommodation, training and competition participation constitutes a supply of services for a fee within the meaning of this provision, if the owner of the horses pays for this supply by assigning half of the prize money won by their horses in the case they participate successfully in competitions.

The CJEU differentiates its ruling from the ruling of 10 November 2016 – case C-432/15 – Baštová. According to that ruling, Art. 2 (1) (c)of the VAT Directive must be interpreted to mean that the transfer of a horse by its owner, if that owner is liable to pay VAT, to the organizer of a horserace for the purposes of the horse participating in that race does not constitute a supply of services for a fee if no entry fees or other direct payment is paid to them and if, the horse placing successfully in the race, only the owner receives the prize money – even if the amount is determined in advance. The transfer of a horse, however, does constitute a supply of services for a fee if the organizer pays a fee that does not depend on the horse placing in the race.

NEWS FROM THE BFH

CJEU submission on the taxation of vouchers

BFH, resolution of 3 November 2022, XI R 21/21

In this case the parties dispute if the transfer of prepaid credit cards or codes for the purchase of the digital content of X-Network (X), so-called Y-cards, are subject to VAT.

For the year under dispute, 2019, the BFH, in its resolution of 3 November 2022 (XI R 21/21) submitted the following questions to the CJEU for a preliminary ruling on the interpretation of Art. 30a no. 2 and Art. 30b (2) of the VAT Directive:

1. Does a single-purpose voucher within the meaning of Art. 30a no. 2 of the VAT Directive exist, if

- the place of supply of services to which the voucher refers is established to the extent that this supply of services is intended to be provided to the end-user within the territory of a Member State, but
- the fictitious transfer contained in Art. 30b (1) (1) sent. 1 of the VAT Directive, according to which the transfer of the voucher between taxpayers for the provision of the supply of service to which the voucher relates, also leads to the existence of a supply of service within the territory of another Member State?

2. If question 1 is denied (and therefore, in the case at hand, a multi-purpose voucher exists):

Does Art. 30b (2) (1) of the VAT Directive, according to which the actual supply of services for which the provider of the services accepts a multi-purpose voucher in payment or part payment, subject to VAT in line with Art. 2 of the VAT Directive, whereas every previous transfer of this multi-purpose voucher is not subject to VAT, stand in the way of there being another reason for VAT liability (CJEU ruling Lebara of 3 May 2012 – case C-520/10) ?

For 2017, the year under dispute – before the Voucher Directive entered into force on 1 January 2019 – the BFH, in its resolution of 29 November 2022, XI R 11/21, ruled that prepaid credit cards relating to specified supplies to be provided in Germany could be treated as a product and, at any rate before the entering into force of § 3 (13) et seq UStG, leading to VAT arising via prepayment tax.

Reference for a preliminary ruling in relation to rights of direct action

BFH, resolution of 3 November 2022, XI R 6/21

The BFH has submitted the following questions to the CJEU for a preliminary ruling on the interpretation of the VAT Directive:

Resolution

1. Does the recipient of a supply, resident in Germany, have a so-called right of direct action against the tax authorities in accordance with the CJEU ruling of 15 March 2007 – case C-35/05 - Reemtsma Cigarettenfabriken, if

a) the recipient of the supply is issued an invoice with domestic VAT by a supplier also resident in Germany, which the recipient of the supply pays, provided that the supplier duly pays the VAT shown in the invoice,
b) but the supply invoiced is a supply provided in a different Member State,
c) the recipient of the supply is therefore denied an input VAT deduction in Germany, due to the lack of any legally owed VAT in Germany,
d) the supplier subsequently corrects the invoice so that the domestic VAT is omitted and the amount of the invoice is therefore reduced by the amount of the VAT,
e) the recipient of the supply, as a result of insolvency proceedings being initiated relating to the supplier's assets cannot assert a claim for payment against the supplier, and
f) the possibility exists for the supplier, not registered in a different Member State before then, to register for VAT in that Member State so that consequently they could issue the recipient of the supply an invoice showing the VAT of that Member State, which would entitle the recipient of the supply to correct the input VAT deduction in a special procedure in accordance with the Directive 2008/9/EC?

2. Does the answer to this question depend on the domestic tax authorities having refunded the VAT payment as a result of the mere correcting of the invoice, although the supplier, due to the initiation of insolvency proceedings regarding their assets, has not paid anything back to the recipient of the supply?

The case

The case under dispute deals with six sale-and-leaseback transactions for motorboats. In this regard, a GmbH initially purchased a new motorboat from the Italian-resident E-sr. The invoices were issued without VAT and with reference to an intra-Community supply of goods ("prestazione intracomunitaria"). The purchase price was paid in full by the GmbH as per the invoices.

In each case, a few days later the GmbH and a KG concluded a "sales and transfer agreement". In this, the GmbH sold the boat in question to the KG for the identical net purchase price plus German VAT. The KG paid the purchase price to the GmbH. The transfer of the boat was, in each case, replaced by an agreement to conclude a leasing contract for use.

The GmbH then issued invoices to the KG for the sale of the individual boats, showing German VAT, recorded the domestic VAT in its VAT returns, and paid it to its competent tax authority (FA X). These invoices contained no details on the place at which the boats were located. The KG deducted the German VAT shown in the invoice in its VAT returns. A few days after this, the GmbH and the KG concluded a mobile leasing contract for the boat in question for a period of 36 months as a monthly leasing rate.

In the course of an external audit carried out at the GmbH for the taxation period 2008 it was determined that at the time of the sale by the GmbH to the KG the boats were not in Germany but rather in Italy, on Lake-Y. The GmbH therefore corrected its invoices to the KG.

The tax authority responsible for the KG (FA) held the view that, as it was a supply without shipment, the supply of boats was not subject to VAT in Germany but rather in Italy. The German VAT charged by the GmbH to the KG was owed by it in accordance with Art. 203 of the VAT Directive and § 14c UStG and was therefore not available for the KG to deduct as input VAT. The KG paid all input VAT back to FA.

Insolvency proceedings were initiated regarding the GmbH's assets. The insolvency administrator for the GmbH cancelled the VAT shown in the six invoices for the supply of the boats. Only the originally agreed net purchase price in question was now shown as the purchase price. FA X, responsible for the GmbH, advised that corrected invoices were presented by the insolvency administrator, the application for a correction in accordance with § 17 UStG was allowed, and the VAT paid was refunded to the estate.

The tax representative of the insolvency administrator was informed that he was obliged to tax the transactions in Italy. According to the KG, the insolvency administrator refused to issue it an invoice with Italian VAT. The KG did not bring a legal action against the GmbH for the issuance of an invoice showing Italian VAT.

The Lower Tax Court dismissed the lawsuit. As a result of the repayment already made to the insolvency estate, the Lower Tax Court did not view FA as having a duty to refund the KG. In addition, the KG did not have any civil law claim against the GmbH for a refund of the unduly paid domestic VAT. The KG is merely entitled to be issued an invoice showing Italian VAT.

Rationale
With reference to the first question, the BFH has doubts as to whether, based on the circumstances of the case, a so-called right of direct action must be affirmed. Taking a Union-wide view, including the Member State in which the supply of goods is actually carried out (in this case Italy), an entitlement to recover the VAT was superseded by the mere entitlement to have an invoice showing Italian VAT issued, which the Lower Tax Court assumed.

However, it may need to be taken into consideration that the supplier in this case was not and is not prepared to declare the transactions in question in Italy and issue a corresponding invoice to the recipient of the supply. The KG would have therefore only found it possible to assert its right to be issued this invoice in civil law proceedings. It did not do so. It appears doubtful to the BFH, from a Union law perspective, if neglecting to do so placed the KG at a disadvantage.

In answering the second question it may need to be considered that a right of direct action arises for the recipient of the supply if the refund chain is disrupted as a result of the inability to pay or insolvency of the issuer of the invoice. This could indicate that a right of direct action be given priority.

In addition, there are some specific characteristics that must be taken into account, which are also present in the case under dispute. In this case, the insolvency administrator initially claimed, as a result of an invoice correction, the right to correct VAT at FA and, consequently received a payment made to the insolvency estate, while the KG only claimed its right to direct action against FA at a later date.

In any case, if in the case of the refund due to a correction of invoices, FA did not yet know about any specific right to direct action (and could not have known of any such right), it cannot, in the BFH's view be obliged to make a second payment.

If, in contrast, FA had at that time known about a specific right to direct action, it could be assumed that FA may only refund the VAT to the supplier if it has been determined that no direct action against FA by the recipient of the supply will arise, so that FA, in the case of a violation of obligations would also need to pay the amount already refunded to the supplier to the recipient of the supply.

From a Union law perspective, it may be necessary to make an entitlement for the issuer of the invoice to correct VAT arising from the correction of an invoice vis-à-vis the FA dependent on the civil law entitlement to a refund arising for the recipient of the supply upon the correction of the invoice having been satisfied by the issuer. In that case there would no longer be any question of an invoice correction by the insolvency administrator as they would have already had to refund the recipient of the supply in order to secure a refund from FA. The BFH has already assumed this requirement in a different case regarding Art. 203 of the VAT Directive, however without ruling on the resulting impacts on the right to direct action (cf. BFH ruling of 16 May 2018 - XI R 28/16).

Heat supplied from a biogas plant

BFH, ruling of 9 November 2022, XI R 31/19

The BFH has ruled on the levying of VAT on heat supplied from a biogas plant.

The case
The plaintiff operates a biogas plant, digestate repository, a combined heat and power plant (CHP), a bunker silo, and a satellite CHP in the yard of a neighbor. From 2009 to 2011 (the years under dispute), the plaintiff sold the electricity generated by the CHP to a local utility company. The heat created by the CHP during this time was used by the

plaintiff, inter alia, for private purposes (heating of the private residence and so-called “elder house”, similarly used for private purposes) on the one hand, and on the other for the apartment leased to the plant manager.

The tax authorities assumed that the supply of heat gave rise to a benefit-in-kind in line with § 3 (1b) sent. 1 no. 1 UStG. In the absence of a purchase price, the cost price was to be used as the basis of assessment in line with § 10 (4) UStG. The tax authorities calculated the cost price for one kWh of heat to be EUR 0.09 and not, as the plaintiff did, EUR 0.01.

The legal action brought against this was granted by the Lower Tax Court. The Lower Tax Court considered the heat privately used by the plaintiff for the residence and the elder house to be a benefit-in-kind in line with § 3 (1b) sent. 1 no. 1 UStG. It assumed that the basis of assessment for the supply of heat, in the case of a split in the cost price, should be calculated taking a market price for heat from biogas plants of EUR 0.03 into consideration. This comes from a federal average energy rate for heat from biogas plants in the amount of EUR 0.0293/kWh, to be rounded up to EUR 0.03/kWh.

In contrast to the private use of the heat from the CHP, while the use of heat for the apartment rented tax-free to the plant operator does not trigger a benefit in kind, the input VAT deduction must be partially denied.

Ruling

The BFH rejected the tax authorities’ appeal as unfounded. The Lower Tax Court correctly used the partial cost price as the basis of assessment for the benefits-in-kind and calculated these in a manner that cannot be objected to in a legal appeal, on the basis of paid electricity supplies and an indicative heat sale.

According to § 10 (4) sent. 1 no. 1 UStG the cost price must be split, whereby this division, in the absence of any legal regulation on the division of cost price, is determined in accordance with § 15 (4) UStG. The appropriate estimation to be carried out on the basis of this provision is essentially up to the trader, who must decide which method they will chose for the estimate, whereby the tax authorities and therefore also the Lower Tax Court can review the appropriateness of the estimate. If the trader does not calculate any estimate, or if the estimate is not appropriate, the tax authorities must calculate it.

In the case at hand, no significant legal errors giving rise to an audit can be detected in the decision regarding the split, which the Lower Tax Court had to make due to a lack of an appropriate estimate by the plaintiff. The Lower Tax Court correctly decided against a split solely on the basis of energy values in accordance with the administrative opinion in Section 2.5 (22) sent. 6 and 7 UStAE. The split of the cost price could be carried out on the basis of an indicative sale price for heat of EUR 0.03/kWh. Because in the case under dispute, the Lower Tax Court – with no error in law – used, to calculate the portion of district heating in the cost price, the federal average energy price for heat from biogas plants calculated as part of a scientific survey.

With reference to the use of heat for the apartment rented tax-free to the operator of the plant, the Lower Tax Court assumed a VAT-exempt ancillary supply to the rental. While it may be doubtful if utility services for the use of a rental property that are billed on the basis of actual use are exempt from VAT in the same way the rent is, the Lower Tax Court did not ascertain that billing on the basis of usage existed and, in the case under dispute, is to be considered missing, following the question being asked in the oral proceedings before the BFH but none of the parties claiming it did.

Consequently, § 15 (4) UStG must accordingly be applied doubly in the case under dispute and thus, with regard to the VAT-exempt use of heat directly used to calculate the non-deductible portion of the input VAT amounts (as well as the underlying costs thereof), and in addition for the division of the cost price remaining. The Lower Tax Court, however, estimated the amount of the reduction of input VAT for the plant operator’s apartment in accordance with the basis of assessment for the retrieval of heat. This estimate, in the same amount, is warranted, as an exception, because there was no separate calculation for the heat used in the private areas and the plant operator’s apartment, and such a calculation in the tax court proceedings for which any additional attempt at clarification by the Lower Tax Court remained unsuccessful, could no longer be conducted.

In splitting the cost price, the Lower Tax Court carried out an estimate on the basis of a “mixed energy sale” and thus did not take a solely sales-related division as the basis. In the BFH ruling of 15 March 2022, V R 34/20, conversely, the BFH considered an estimate solely related to sales (with no consideration for unused heat) to be appropriate, which the Senate agrees to in principle. Both methods of division give rise, however, to a similar cost price close to EUR 0.02/kWh and therefore similarly to a valuation below market price.

Please note:
In its ruling of 9 November 2022, XI R 38/20, the BFH also ruled on the free of charge distribution of heat from a CHP. In this case, if the cost price must be split between electricity and heat, the division must be carried out not on the amount of electrical and thermal energy (in kWh) produced, but rather on the basis of the actual, or if applicable indicative, transactions (market values).

Passing on costs is not a supply subject to VAT

BFH, resolution of 11 October 2022, XI R 12/20

The BFH has ruled on how the passing on of costs must be qualified from a VAT point of view.

The case

The corporate objective of the company, A, is the operation of large-scale abattoirs in its own and external slaughterhouses, the selling of livestock and meat and other foodstuffs and agricultural products, as well as the production and sale of meat products of all kinds and other foodstuffs.

A purchased certain animals for slaughter (either from a farmer or a purchasing cooperative). The billing of the supplies was carried out by means of A self-billing (invoicing by the customer). In doing so A deducted from the price for the individual animal (besides the transport costs actually incurred) other "advance costs". In this respect advance costs were:

- the costs for quality control management (including veterinary costs),
- the costs for auditing of the operations of the plaintiff's customers,
- the costs for complying with increased hygiene regulations, and
- the costs of guaranteeing the traceability of the animals.

The supply of the animals was carried out "free to domicile" (frei Haus). In its VAT returns A considered any transport costs deducted as payment for independent supplies provided to the suppliers to be subject to the standard VAT rate. Conversely, it considered the advance costs deducted to be a reduction in earnings, which reduced the basis of assessment of the partial supplies (taxed at 7% or 10.7%). The input VAT deduction was claimed only using a basis of assessment that was reduced by the advance costs.

In contrast, the tax authorities considered the advance costs deducted to be a payment (subject to the standard VAT rate) for supplies provided by A to the suppliers. At the same time, they increased the input VAT deduction as the advance costs did not reduce the fee for the supplies of animals (taxed at 7% or 10.7%).

The Lower Tax Court affirmed A's legal action. An appeal by the tax authorities at the BFH was not successful.

Resolution

The BFH has ruled that a slaughterhouse that, in the case of purchasing animals intended for slaughter, deducts the costs arising as part of that slaughter (so-called "advance costs") from the purchase price for the individual animal, does not provide a supply to the supplier of the animals in doing so, if the processes underlying these expenses are in the slaughterhouse's own interest.

Despite the ongoing lack of a civil law transfer of risk, A was acting for itself, that is in its own interest, as these processes were crucial in determining what meat A could sell at what price and thus what A wanted to buy. Just the circumstance that a supply received is contractually passed on to another person does not lead to that supply having to be provided by the supplier directly to the payer.

The BFH case law that, in the case of supplies – the execution of which the parties to a contract undertake in reciprocal agreements – the required use of the supply fundamentally exists and does not lead to any different judgement in the case under dispute as A did not undertake vis-à-vis the supplier to carry out the activities forming the basis of the advance costs. The Lower Tax Court did not, in any case, establish that the individual suppliers would have been entitled to this.

Similarly accurate is the Lower Tax Court's assumption that A was required to ensure that the pertinent EU hygiene regulations were satisfied for all levels of production, processing and distribution under its control. Furthermore, according to EU law, it must ensure, for all levels of production, processing and distribution under its control, that foodstuffs meet the requirements of food laws applying to its activities and monitor compliance with these requirements. Among other things, it would need to be in a position to ascertain every person from which it received an animal intended for the production of food, and establish systems and procedures with which this information can be shared with the competent authorities upon request. The supplies leading to the creation of the advance costs to be passed on were therefore purchased in its own interest,

which does not indicate the existence of a supply to the supplier (cf. BFH resolution of 13 September 2022 - XI R 8/20).

To the extent the tax authorities indicated that the “audits” were also to the economic benefit of the suppliers, by allowing them to achieve higher selling prices for higher quality products, this applies equally to A so that this was also in its own interests (cf. BFH resolution of 13 September 2022 - XI R 8/20).

Please note:
The BFH decisions of 13 September 2022, XI R 8/20 and of 9 November 2022, XI R 38/20 are relevant in practice for all constellations in which remuneration is also paid by the service provider to the service recipient. Here, the question regularly arises as to whether this is a reduction in remuneration for the service or remuneration for a service to be considered separately. Such constellations are very frequently encountered in trade in the form of agreements on conditions, refunds, bonuses and subsidies.

NEWS FROM THE BMF

Business characteristic and input VAT deduction in the case of research institutions

BMF, guidance of 27 January 2023– III C 2 - S 7104/19/10005 :003

The German Ministry of Finance (BMF) has ruled on the matter of research institutions’ characteristic as a business and ability to deduct input VAT.

Background
For years, the BMF has neglected to implement uniform rules on input VAT deductions in the case of research institutions. According to the German Federal Court of Auditors, this could potentially lead to significant tax losses.

The BMF has deleted examples 6 to 9 in Section 2.10 (9) UStAE and added the sub-title “Research institutions” and the paragraphs (10) and (11) after (9).

Research institutions
Research institutions are entities that carry out research projects or research programs. Depending on their organization structure, research institutions can be legally independent traders or a dependent part of the business or non-business section of another legally independent institution.

In the case of research institutions, a business section includes in-house research, commissioned research as well as the broader transfer of technology, to the extent it is intended that the results of the research be used to generate revenue over the long term. Even fundamental research must be included in the business section if it serves to increase the commercial sales activities and strengthen market position.

This does not apply if fundamental research is carried out in separate departments without any intention to generate sustainable revenue. Separate departments can be organizational entities such as, for example, institutes.

The provision of independent supplies that do not constitute research activities and the reason for which can be found in articles of association, constitution or affiliation with research organizations, to the extent there is, from the beginning, no intention to market these supplies for a fee, must be allocated to the non-business section. The non-business section usually includes pure teaching (especially teaching positions and student supervision), education beyond operational requirements, public relations work with a broad reach (for example, open days, visitor programs, schoolchildren labs), as well as the development of the scientific system. If the constitution of a research institution forbids the exploitation of research findings for a fee, these must also be allocated to the non-business section.

The BMF has outlined the principles using five examples.

Calculation of input VAT not related to the business

According to the BMF, in the case of research institutions it is often difficult to delineate the business section from the non-business section. To simplify matters, the percentage of input VAT related to the non-business section can be calculated using a given calculation, which the BMF goes into further detail on.

The provisions of this BMF guidance must be applied to all open cases.

IN BRIEF

Fact sheet on VAT in the construction industry (USt M 2)

The BMF has published the fact sheet on VAT in the construction industry (USt M 2) in the January 2023 version. This replaces the data sheet from 2009 (see BMF guidance of 12 October 2009).

The changes contain, inter alia, an amended definition of work deliveries, the UStAE issued since then, which replaced the 2008 VAT Regulation (UStR), as well as the expansion of the section “tax debt of the recipient of the supply”.

FROM AROUND THE WORLD

TaxNewsFlash Indirect Tax

KPMG articles on indirect tax from around the world

You can find the following articles here.

14 Feb - Poland: Draft legislation implementing new reporting obligations for digital platform operators (DAC7)

13 Feb - EU: New excise duty rules in updated directive effective 13 February 2023

10 Feb - France: Tax-related provisions in finance law for 2023

9 Feb - Switzerland: New obligation for streaming services to invest in Swiss filmmaking determined by VAT return

9 Feb - Bolivia: Extended deadline for certain taxpayers to register in purchases and sales registry

7 Feb - Colombia: Guidance on new single-use plastic products tax

3 Feb - Cyprus: New single tax administration portal

2 Feb - India: Tax measures in budget 2023-2024, including GST-related measures

2 Feb - Poland: Mandatory e-invoicing postponed until 1 July 2024

1 Feb - Sweden: Proposal for modernized VAT law

EVENTS

VAT 2023 – Hybrid Annual Meeting

Event on 23 May 2023

Webcast Live: Trade Compliance: ESG in the context of export control, customs and excise duties

Event on 22 March 2023

Further information and the registration forms for the events can be found here.

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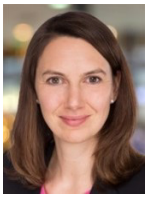

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