KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

April 2021

NEWS IN LEGISLATION

VAT exemption for essential goods and services provided by the EU in times of crisis

EU Commission, press release of 12 April 2021 on a proposed directive

The European Commission has proposed making exempt from VAT, goods and services that the European Commission and other EU bodies and agencies make available to the EU Member States and citizens in times of crisis. This is in response to experiences during the Coronavirus pandemic. Among other things, these experiences demonstrated that the VAT levied on some transactions becomes a cost factor in procurement processes that puts pressure on limited budgets. The initiative is therefore intended to contribute to maximizing the efficient use of EU funds used in the public interest to combat crises such as natural catastrophes and emergencies in the area of public health.

After the measure comes into effect, the Commission and other EU agencies and bodies will be allowed to import and purchase goods and services free of VAT, if these are subsequently distributed as part of an EU emergency response to, for example, Member States or third parties such as national authorities or organizations (for example hospitals, national health authorities or disaster response authorities). The goods and services that would come under the proposed provision include, for example:

- Diagnostic tests and test materials as well as laboratory equipment
- Personal protective equipment such as gloves, respirators, masks, gowns, disinfectant products and materials
- Tents, camp beds, clothing and food
- Search and rescue equipment, sandbags, life jackets and inflatable boots
- Antimicrobial products and antibiotics, counteragents for chemical threats, radiation injury treatments, antitoxins, iodine tablets
- Blood products and antibodies
- Radiation measuring devices
- Development, manufacturing and procurement of necessary products, research

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and innovation activities, strategic stockpiling of products, pharmaceutical licenses, quarantine facilities, clinical studies, disinfection of premises.

Project funding through public financing

Ministry of Finance Lower Saxony, press release of 26 March 2021 on motion for a resolution

Bavaria and Lower Saxony have tabled a joint motion for a resolution at the Bundesrat (German Federal Council) that project funding through public financing should not be subject to VAT. Based on current case law in the Lower Tax Courts (for example Lower Tax Court Schleswig-Holstein, ruling of 16 May 2016, ref. 4 K 46/16) a service subject to VAT exists if the recipient of the funding fulfills specific project tasks in order to receive the funding. Consequently, those receiving funding must pay VAT from the funding amount to the tax authorities. Project sponsors appear to be frequently baffled by this development and as a result of the threat of financial risks are increasingly withdrawing from projects.

"It is obviously absurd if public financing funds a project and at the same time receives a portion of this funding back in the form of VAT. However, softening up the existing funding guidelines does not make sense. These guidelines ensure an effective and targeted deployment of limited funds. It is unequivocally in the interests of the taxpayer and public budgets for the use of these monitoring tools for project management to continue. Instead, we need a change to the VAT law", explained the Lower Saxon Minister for Finance, Reinhold Hilbers at the tabling of the motion.

The Bavarian Minister of State for Finance and the Homeland, Albert Füracker added: "State project funding must also be received in full. We support many important projects in order to, for example, achieve health, economic or sociopolitical goals. With an amended VAT law, 100% of the funds can be used to do good. At the same time, we will remove the burden of the unnecessary bureaucracy tied up in handling VAT for all those involved – that's a real win-win situation for everyone!"

To do this, the European law, the VAT Directive, must be amended. The resolution at hand urges the Federal Government to advocate for a corresponding change to the VAT Directive at the European Commission.

NEWS FROM THE CJEU

Partnerships as subordinate companies in a VAT group

CJEU, ruling of 15 April 2021 – case C-868/19 – M-GmbH

In response to the submission from the Lower Tax Court Berlin-Brandenburg, the Court of Justice of the European Union (CJEU) rules that the current practice in relation to partnerships as subordinate companies in a VAT group is not compatible with Union law.

The case

A GmbH (as general partner) and five limited partners (that is, a GbR (private corporation), three individuals, and M GmbH) hold shares in a GmbH & Co. KG.

Based on the articles of association, each partner holds one vote except for M-GmbH (six votes). Apart from certain exceptions, all company decision are reached using a simple majority.

The GmbH & Co. KG holds the view that a VAT group status in line with § 2 (2) no. 2 German VAT Law (UStG) exists between it and M-GmbH. Besides the – indisputably existent between the participants – economic and organizational integration, financial integration must also be affirmed.

However, the tax authorities denied, with reference to Section 2.8 (5a) sent. 1 VAT Application Decree (UStAE) and the German Federal Tax Court (BFH) ruling of 2 December 2015, V R 25/13, the financial integration of the GmbH & Co. KG into M-GmbH. The financial integration of a partnership requires that the shareholders in the partnership, besides the controlling enterprise, be only persons that are themselves financially integrated in the business of the controlling enterprise.

This ensures the controlling enterprise has the necessary power of intervention even in the case of the – always possible – application of the principle of unanimity. Thus, no individuals may participate in the financially integrated partnership. As, in the case at hand, apart from M-GmbH, there are also limited partners of the GmbH & Co. KG who are individuals no financial integration applies.

The Lower Tax Court has doubts that the BFH case law mentioned above is compatible with Union law and has submitted the issue to the CJEU for a preliminary ruling.

Ruling
Art. 11 of the VAT Directive stipulates in para. 1 that every Member State can treat persons resident in its territory, who may be legally independent, but are closely connected through mutual financial, economic and organizational relationships, together as one taxable person; according to Art. 11 (2), a Member State that makes use of this possibility can take the necessary steps to prevent tax evasion or avoidance through the application of this provision.

The CJEU concludes that the requirement for the existence of a close connection through financial relationships may not be interpreted in a restrictive manner. It is not clear from Art. 11 of the VAT Directive that persons who are not taxable persons cannot be involved in a VAT group. Entities that, like partnerships, are not legal persons, are also not excluded from the scope of application of this provision per se. While a subordinate relationship permits the assumption that close relationships exist between the persons in question, it cannot generally be viewed as a necessary requirement for the creation of a VAT group.

In the case at hand, the M-GmbH may be able to use majority resolutions to impose its wishes in the case of the GmbH & Co. KG, so that the existence of close connections through financial relationships may be presumed. The mere circumstance that the shareholders in Gmbh & Co. KG could theoretically use verbal agreements to change the articles of association such that decisions in the future must be reached unanimously, does not suffice to weaken this presumption.

Excluding a partnership, whose shareholders besides the controlling enterprise include not only persons that are financial integrated into the business of the controlling enterprise, from the VAT group does not result from the conditions laid down in Art. 11 (1) of the VAT Directive with regard to the existence of close connections through financial relationships. Nor is such a measure covered by Art. 11 (2) of the VAT Directive on the prevention of tax evasion or avoidance.

Please note:
The CJEU ruling demonstrates that the legal institution of a VAT grouping in Germany urgently requires reform. In particular, as the necessity for a close financial connection in a VAT group may not be interpreted restrictively, to achieve a legally certain treatment the legislator could introduce an application process. Thus, the German cabinet adopted a comprehensive package of 22 measures to simplify bureaucracy in April 2021. Following preliminary work in the federal-state working groups on the basis of this, an application process will be introduced allowing a VAT grouping to ideally only be created upon application and by means of a corresponding confirmation from the tax authorities on the existence of the legal criteria.

Place of supply of service to a trader

CJEU, ruling of 17 March 2021 – case C- 459/19 – Wellcome Trust Ltd

This CJEU ruling concerns the interpretation of the location regulation of Art. 44 of the VAT Directive. According to sent. 1 of this provision, the place of supply of a service to a taxable person, who trades as such, is the place at which that taxable person has the location of their commercial activities.

The case
Wellcome Trust Ltd. (WTL) is the sole trustee of a charitable foundation in the United Kingdom, Wellcome Trust, which provides grants for medical research. WTL generates revenue from investments and also carries out some minor activities such as the sale of items, catering operations, and the letting of property, for which it is registered for VAT. The investment returns that constitute the larger part of the grants issued, arise primarily from investments abroad, for which WTL makes use of asset management services within and outside the European Union.

In its ruling of 20 June 1996 – case C-155/94 – Wellcome Trust, the CJEU concluded that an activity that consists in a trustee buying and selling shares and other securities as part of the management of the assets of a charitable trust, does not constitute a commercial activity. As a result, WTL was denied a refund of input VAT with regard to the totality of costs arising in connection with its portfolio outside the European Union.

Since 2010, WTL declares the VAT on the services purchased by the asset managers that are resident outside the Union using the reverse charge procedure in accordance with Art. 196, 44 of the VAT Directive – assuming that the place of supply of these services is the United Kingdom. Later, WTL claimed that no VAT arose on the services as WTL is not a taxable person “that trades as such” in line with Art. 44 of the VAT Directive.

Ruling
The CJEU did not accept the Upper Tribunal's submission. While WTL, in the course of the management of the assets of its charitable trust buys and sells stocks and other securities, is not a "taxable person that trades as such" in line with Art. 2 (1) (c) of the VAT Directive, from Art. 43 of the VAT Directive it can be seen that the Union legislator wanted to attribute a different meaning to the term "taxable person that trades as such" in line with Art. 44 of the Directive, than that corresponding to Art. 2 (1) of the Directive.

In light of Art. 43 (1) of the VAT Directive, a taxable person can, even in line with Art. 44 of this Directive, be treated as such if they are trading for the purposes of their non-economic activities.

However, a trader is not a "taxable person that trades as such" if they trade not only for the purposes of their non-economic activities but also for non-commercial activities, especially for private purposes. The fact that in its management of a securities portfolio, WTL carries out activities corresponding to those of a private investor, does not however mean that WTL carries out these activities privately.

Please note:
The German VAT Law and the CJEU case law assume, that for services to a person that is exclusively not commercially active, who has received a VAT identification number and, in the case of services to a legal entity that is active both commercially and non-commercially that the principle of the location of the recipient does not apply only if the services are intended solely for the private use of the staff or a shareholder. Conversely, in the case of supplies to other persons in line with § 3a (2) sent. 1 and 2 UStG whether the other supplies are intended for the business of the recipient or for its subsidiary must be examined in detail.

NEWS FROM THE BFH

Retraction of the granting of collection basis in the year of foundation

BFH, ruling of 11 November 2020, XI R 41/18

This BFH ruling concerns the question of how the revenue limit is calculated in the year of foundation when it comes to the taxation of payments received (so-called collection basis) and what requirements are needed for the granting of this to be retracted.

The case
In this case a private partnership (GbR) was founded in September 2011. In the questionnaire for the tax registration they stated revenue for the first year of operations in the amount of EUR 30,000. The tax authorities agreed to the GbR's application for the collection basis while reserving the right to revoke it at any time. They assumed that the anticipated total revenue for the ongoing calendar year, converted to an annual amount, would not exceed EUR 500,000.

In November 2011, the GbR undertook to erect a photovoltaic system for A. They issued an invoice to A for a partial delivery in the amount of EUR 450,000 plus EUR 85,500 VAT in December 2011. Thereupon, a credit in the amount of EUR 77,350 was received to the GbR's account on 21 December 2011. In its VAT return for the year 2011, the GbR declared revenues at 19% in the amount of the payment received of (net) EUR 65,000 and calculated a VAT refund. This return was not accepted by the tax authorities. Following a field audit the tax authorities revoked the grating of the collection basis with retroactive effect. They calculated the VAT in accordance with agreed fees (so-called target basis). In this respect they assumed revenue at 19% with a basis of assessment of EUR 450,000. An appeal and legal action were not successful. In the course of the tax court proceedings, the management of the GbR indicated, inter alia, that there was no specific basis for the detail given in the questionnaire (total of revenue for 2011: EUR 30,000).

Ruling
The appeal before the BFH was also unsuccessful. The tax court recognized correctly that the withdrawal of the granting of the collection basis is lawful.

According to § 20 sent. 1 no. 1 UStG, the tax authorities can grant, upon application, that a trader may calculate VAT not on the basis of agreed payments but on the basis of the actually received payments (collection basis) if the total revenue (§ 19 (3) UStG) in the previous calendar year did not exceed EUR 500.000 (since 1 January 2020: EUR 600,000).

The decisive total revenue for the granting of the collection basis must be calculated pro rata for the year of foundation, if the trader only begins their activities in the course of the year. For this prognosis, a total revenue in line with the principles of the target basis must be estimated. In the case at hand, the anticipated revenue from September to December

2011 had to be assumed to be in the amount of (net) EUR 450,000, so that the rounded up for the total year, the decisive total revenue amounted to EUR 1,350,000.

§ 130 (2) no. 3 German Tax Code contains specification on how to estimate; a balancing opinion from the tax authorities for the retraction of a beneficial administrative act that was wrongfully obtained by giving incorrect information is not required, if the beneficiary, as in this case, knew or at least should and must have known about the inaccuracy of their information.

IN BRIEF

Roaming in mobile networks in the EU for those belonging to a non-EU country

CJEU, ruling of 15 April 2021 – case C-593/19 – SK Telecom

The CJEU ruling concerns an Austrian submission on roaming services that are provided by a mobile operator located in a non-EU country to its customers, also resident in a non-EU country or residing or having their habitual place of residence there, and that makes it possible for these customers to use the national mobile networks of the Member State in which they are temporarily located (here: Austria).

Art. 59a (1) (b) of the VAT Directive must be interpreted such that these roaming services are considered to be supplies of services, the "actual use or enjoyment" of which, in line with this provision, is the territory of a Member State, so that the Member State can treat the location of the roaming services as if it were in its territory if this will ensure the non-taxation of the roaming services in the Union is prevented.

In this respect it is not important what tax treatment the roaming services are subject to under the national tax law of the non-EU country. In particular, the fact that a service in a non-EU country is subject to VAT in accordance with the provisions applicable there should not prevent a Member State from taxing this service if the actual use and enjoyment takes place in its territory.

The ruling also is significant for the interpretation of German law, as German has made use of the authority of Art. 59a (1) (b) of the VAT Directive through § 3a (6) no. 3 UStG.

Implementation of the second stage of the digital VAT package

BMF, guidance of 1 April 2021 – III C 3 - S 7340/19/10003 :022

The second stage of the so-called digital VAT package was implemented from 1 April 2021 (respectively from 1 July 2021) by means of the German Annual Tax Act 2020.

The second stage of the so-called digital VAT package contains the following in particular:

- Changes in the case of mail-order business
- Including operators' electronic interfaces in fictitious supply chains
- 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 paying import VAT
- Abolition of the EUR 22 exemption limit

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

In comparison to the draft guidance, of particular note are the comprehensive explanations on the inclusion of operators' electronic interfaces in fictitious supply chains (Section 3.18 UStAE) and the special provisions in the case of imports of consignments with a value of maximum EUR 150 (Section 21a.1 UStAE).

Please note:
It is now urgently necessary to analyze the business transactions in order to determine the extent to which changes arise due to the digital VAT package, in order to adapt the processes including documentation requirements and registration procedures in the form suitable for the individual case in good time and thus ensure a smooth customs and VAT processing of the concerned business transactions under the new regulations from 1 July 2021.

Liability for VAT in the case of trading goods on the internet

BMF, guidance of 20 April 2021 – III C 5 – S 7420/19/10002 :013

Through the so-called Second Digital Package, from 1 July 2021, a fictitious supply will be inserted in the case of an electronic interface.

Two groups will be differentiated in relation to the relevant

supplies in accordance with § 3 (3a) UStG:

Sent. 1: Suppliers from a non-EU country that carry out supplies of goods to non-traders (and certain legal persons with a VAT identification number, as well as certain non-legal persons with commercial and non-commercial activities – recipients in accordance with § 3a (5) UStG), the dispatch/transport of which begins and ends in Union territory

Sent. 2: Distance selling of items imported from a non-EU country with a value of maximum EUR 150 to recipients in accordance with § 3a (5) UStG (see above, especially non-traders) or recipients in accordance with § 1a (3) no. 1 UStG (traders with solely VAT-exempt exclusion transaction, small traders, etc.), that do not exceed the purchasing threshold nor waive it.

To the extent that the facts of the case eliminate a fictitious supply in line with § 3 (3a) UStG, an online marketplace operator continues to be liable in accordance with § 25e UStG. The provisions of §§ 22 et seq. and 25e UStG were amended in line with the newly inserted § 3 (3a) UStG. The BMF guidance clarifies these changes with sample cases and is available to download from the BMF website.

Please note:
In this context, too, the processes in the remaining two months must be adapted to the changed framework conditions that must be observed from July 1, 2021 by, for example, instead of the previous certificate of the merchant's tax registration, the VAT ID no. must be recorded in order to avoid liability as an electronic interface.

Zero-rating for supplies of goods for the supply of ships

BMF, guidance of 26 March 2021 - III C 3 - S 7155/19/10004: 001

In the BMF guidance, the statements on the zero rating in Section 8.1 Paragraph 4 UStAE were formulated as follows:

Objects for the supply of ships are the technical consumables - for example fuel, lubricants, paint or cleaning wool - the other items intended for consumption by the crew members and the passengers - for example provisions, luxury items, toiletries, newspapers and magazines - and the goods for Ship pharmacies, canteens and on-board shops, if these are usually intended for use or consumption by the crew members or the passengers on board.

These principles are to be applied to transactions that are carried out after 31 March 2021 and thus have to be considered for the first time in the preliminary VAT return April 2021.

Input VAT deduction of a municipality arising from the production costs of a multi-purpose hall with carpark

Lower Tax Court Baden-Württemberg, court order of 7 December 2020, 1 K 2427/19, binding

If a municipality entrusts a multipurpose hall it has built on a public legal foundation (communal rules governing usage) to various users, the municipality is conducting business, even if the individual user groups only pay a fee that does not cover costs, according to the Lower Tax Court Baden-Württemberg in this court order.

Even the case of a transfer of a hall for only hours or days is, despite the short amount of time, a VAT exempt rental, if besides that no other significant supplies are provided. Operating facilities being transferred at the same time (here: lighting, sound system, kitchen, stage and lift apparatus) is only a subordinated ancillary supply to the rental of the space if they are utilized by the individual users to carry out the necessary activities for the events in question.

The municipality's input VAT deduction for the production costs of a carpark dedicated to the public and provided to it free of charge is permitted if the construction of the carpark was a necessary and appropriate regulatory building requirement for the approval of the multipurpose hall and its use.

It is not generally possible to allocate establishments and facilities dedicated to general or other public use to the commercial area. The dedication to such a use results in principle in the object being deprived of a commercial use. This only applies, however, if the commercial use is congruent with the use as part of the common utilization. To the extent that a fee-based special use that goes beyond the common utilization exists, a different decision must be reached.

Deduction of import VAT as input VAT

Lower Tax Court Hamburg, ruling of 18 December 2020, 5 K 175/18; BFH ref.: VII R 9/21

In the view of the Lower Tax Court Hamburg, a taxpayer who submits a customs declaration as an indirect representative, and whose activities in connection with the importation of goods is limited to taking over the customs formalities, can at best deduct the import VAT they have paid as input VAT if a direct and immediate connection to certain output transactions or to the economic overall activity of the taxpayer can be proved. A potential connection with the overall economic activity is, in the view of the Lower Tax Court Hamburg, superseded in any case by the connection of the import VAT to the specific output transaction of the foreign supplier.

As the supplier of services, the plaintiff submitted a customs declaration in her own name for A (Turkey), based on a commercial invoice from A to German resident E GmbH. For this, the plaintiff was to receive EUR 35 plus a refund for the import VAT disbursed. The Central Customs Office subsequently assessed import VAT for the plaintiff, which she claimed as input VAT in her VAT return, after she received no payment from A. The tax authorities did not allow the input VAT deduction. In the proceedings, the plaintiff referred to the fact that while the goods were in fact unloaded in Austria, they never arrived at E GmbH. In its ruling of 8 October 2020 – case. C-621/19 – Weindel Logistik Service, the CJEU determined that to claim an input VAT deduction, the trader must have the authority to dispose or carry the costs of import. Thus the plaintiff does have a right to deduct input VAT. The Lower Tax Court Hamburg dismissed the case for the reasons given above. An appeal against the ruling has been lodged.

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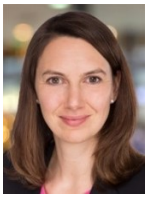

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