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Content

Obligation to provide evidence on intra-Community supplies of goods: umbrella organizations concerned about unreasonable requirements

European Court of Justice: rounding VAT amounts in calculating tax liability

German Federal Tax Court: adjustment of input tax for current assets

European Court of Justice: input tax deduction on buildings leased to legal persons governed by public law



Editorial

The global economic crisis is now taking its toll on German companies in many sectors. Business heads are aware of the serious problems and are working together with their advisors to devise strategies to overcome the crisis. Even the Government has begun to offer assistance in many cases, and not just assistance of financial kind.

The export economy has been especially badly hit by the credit crunch. Most companies conduct their cross-border trade within the EU using standardised, large-scale systems. As long as evidence is provided, intra-Community supplies of goods between companies are zero-rated for VAT. To sustain a functional common market, especially in times of crisis, the requirements to provide evidence must not be too stringent. At the same time it is necessary to keep a close eye – within reason – on the danger of VAT fraud.

In its guidance of 6 January 2009, the German Federal Ministry of Finance (BMF) gave a broad and comprehensive statement of its position on the obligation to provide evidence on intra-Community supplies of goods. But the demands of the financial authorities go far beyond what is practical and are therefore a substantial hindrance to the free flow of goods. With that in mind, the umbrella organizations of the German economy and the German Federal Chamber of Tax Consultants are justified in criticising the BMF guidance. An easing of the guidance would be greatly appreciated. That is the first topic in this issue of our Newsletter.

We also present two rulings by the European Court of Justice. One ruling concerns the issue of rounding VAT amounts, whilst the other covers the VAT treatment of public bodies and their competition with the private economy. Finally, we report on a ruling by the German Federal Tax Court on the scope of the option to adjust input tax deductions (§ 15a German VAT Act (UStG)), which is of significant financial importance in practice.

Yours

Peter Rauß

Director, Düsseldorf



Obligation to provide evidence on intra-Community supplies of goods: umbrella organizations concerned about unreasonable requirements

Guidance of the German Federal Ministry of Finance (BMF)

In its guidance of 6 January 2009, the BMF gave a broad and comprehensive statement of its position on the obligation to provide evidence for zero-rating of intra-Community supplies (see the [February 2009 edition of the MwSt.VAT Newsletter](#)). Although the rulings of the European Court of Justice (ECJ) – of 27 September 2007, case C-184/05 “Twoh,” case C-409/04 “Teleos,” case C-146/05 “Col-lée,” and of 21 February 2008, case C-271/06 “Netto Supermarket,” – fundamentally strengthened the position of the supplier, in particular affirming the protection of good faith and stressing that the burden of risk should not be placed exclusively on the supplier, the BMF guidance comes across as considerably more restrictive.

Statement by the umbrella organizations

In their statement of 7 May 2009, the umbrella organizations of the German economy and the German Federal Chamber of Tax Consultants (Bundessteuerberaterkammer) expressed clear criticisms of some elements of the obligation to provide evidence. Above all, they view them as a violation of the general principle of proportionality. The statement contains the following criticisms:

- the need to supply proof of shipment in German;
- the obligation to provide proof of identity of the buyer or his representative through a continuous chain of authorizations certifying legitimacy; the authorities require an individual power of attorney, a passport copy and a valid excerpt from the commercial register;
- the requirement to provide proof of the place of destination even for chain transactions, even though sometimes it is impossible for the first in the chain to find out where this place is.

The statement rightly holds that the authorities’ view is not feasible in practice. The requirement to supply an individual power of attorney is particularly impractical in mass market business. Furthermore, by demanding this, the authorities are asking for something that is not mentioned in the provisions of §§ 17a to c German VAT Operating Regulation (UStDV). A pending Tax Court (Finanzgericht (FG)) decision backing the supplier (FG Hesse, ruling of 7 November 2006, 6 K 3787/05, BFH file no.: V R 65/06) – will give the German Federal Tax Court (BFH) an opportunity to comment on these problems in the near future.

Please note:

The BMF’s guidance applies to cases that are still open and, especially in respect of events that are in the past, contains strong potential of risk concerning subsequent payment of VAT and interest according to § 233a German Tax Code (AO). For future supplies it will be necessary to conduct a risk assessment reviewing which types of proof can actually be provided, and which requirements necessitate action by the company.

European Court of Justice: rounding VAT amounts in calculating tax liability

The case

This ECJ ruling concerns the question of whether and how a taxable person may round up or down when calculating the tax liability to the fisc on a retail price which is inclusive of VAT. The claimant – J D Wetherspoon – operates more than 670 pubs throughout Great Britain. Most of its revenue is generated by final consumers who are ineligible for input VAT deduction. The price billed to customers was a gross figure, which included the UK VAT at the standard rate of 17.5%. Wetherspoon calculated the VAT due on each transaction by multiplying the total invoice amount by $7/47$, and in doing so rounded the result up or down arithmetically, to the nearest penny. After modernising its electronic till system, the claimant was able to calculate for each invoice the VAT at "line" level, i.e. on each separately identified product supplied. In order to do so, Wetherspoon calculated and rounded down the VAT to two decimal places, namely, down to the nearest tenth of a penny, at the product line level.



ECJ, ruling of 5 March 2009, case C-302/07 ("Wetherspoon")

The question of which rounding method to use can be of great significance for businesses. But according to the ECJ, the VAT Directive 2006/112/EC contains no explicit rule concerning this issue. This was already made clear by the ECJ in its decision of 10 August 2008 (case C-484/06 "Koninklijke"). In the opinion of the ECJ, it is for the Member States to determine the rules and methods for rounding VAT amounts. The only requirement is to observe the broad framework principles of fiscal neutrality and proportionality. Community law permits a national rule which requires an amount of VAT to be rounded up where the fraction of the smallest unit of currency concerned is at or above 0.5. An amount may be rounded on one or several levels of rounding.

Please note:

The German regulations in §§ 10, 12 and 14 German VAT Act (UStG) do not give any indications as to how to round VAT amounts. Where VAT is shown separately on an invoice, there can be no objection from the perspective of Community law to rounding it in compliance with commercial rounding principles – a fraction of a cent below 0.5 is rounded down to a whole cent, a fraction at or above 0.5 is rounded up. In particular as far as invoices for small amounts are concerned (invoices with a gross amount up to € 150 according to §§ 33 German VAT Operating Regulation (UStDV)), the authorities permit calculation of VAT using the slightly rounded rate of 15.97% for the standard tax rate and 6.54% for the reduced rate (cf. BMF guidance of 11 August 2006, IV A – S 7210 – 23/06).

German Federal Tax Court: adjustment of input tax for current assets

The case

In its judgment of 12 February 2009, the BFH stated its view on the scope of Art. 20 of the Sixth Directive 77/388/EEC regarding the adjustment of input tax deduction (implementation of this into German law by § 15a UStG). Art. 20 of the Sixth Directive was replaced by 184 et seq. of the VAT Directive 2006/112/EC. The case in question refers to a time period prior to 1 January 2005. At that time, § 15a UStG had not been changed by the Law to implement EC Directives in national law (EURLUMsG) yet. An agricultural business initially accounted for VAT on its sales by applying flat rates as per § 24 UStG. At the beginning of 2003, the year in question, the business switched to standard taxation. The business then requested an adjustment of the deduction for current asset items in the "field inventory" (e.g. seed, fertilizer, crop protection products). The business had acquired these items in 2002 for one-off transactions.

BFH, ruling of 12 February 2009 (file no. V R 85/07)

The BFH refused an adjustment of the deduction on the grounds that the version of § 15a UStG in force before 1 January 2005 (former § 15a UStG) only permitted an adjustment for fixed assets. Current assets did not fall within the scope of § 15a UStG. The BFH rejected direct invocation of Art. 20 of the Sixth Directive on the grounds of insufficient absoluteness and precision within the Directive. It observed that the Member States have been granted discretion with respect to the implementation of the provisions in Art. 20 of the Sixth Directive into national law. In its view, the restriction to fixed assets renders a corresponding application of the former § 15a (1) UStG to current assets impossible. The former version of § 15a (1) UStG did not expressly refer to fixed assets. But, the BFH has already interpreted that in line with Art. 20 (2) of the Sixth Directive the former § 15a (1) UStG is applicable for capital goods, i.e. fixed assets, only (cf. BFH, ruling of 20 December 2001, V R 8/98). Furthermore, the BFH also ruled that the former § 15a UStG is applicable when a business switches from standard taxation to flat rate taxation or the rules for small businesses and vice versa into, contradicting an express provision in the German VAT Act (cf. BFH, ruling of 16 December 1993, V R 79/91 and ruling of 6 December 2001, V R 6/01). At that time the BFH was not hindered by the discretion cited now.



Please note:

The change made to § 15a UStG, effective from 1 January 2005, allows for adjustments of deductions for assets used for one-off transactions (§ 15a (2) UStG) and adjustments of deductions where a business switches from the standard to the flat rate taxation system or small business rules and vice versa. The BFH's reference to the discretion allowed to Member States with respect to the implementation of the provisions in Art. 20 of the Sixth Directive further precludes any direct invocation and precedence of Art. 184 et seq. of the VAT Directive 2006/112/EC in the future.

European Court of Justice: input tax deduction on buildings leased to legal persons governed by public law

In its judgment of 4 June 2009 in the "Salix" case (C-102/08), the ECJ addressed questions raised in connection with a request for input tax deduction relating to the construction of a building in Germany. Salix leased the building, subject to VAT, to the Industrie- und Handelskammer (IHK) Offenbach (Chamber of Industry and Commerce, Offenbach), a legal body governed by public law.

The case

As lessee under a 27-year lease agreement, the IHK used the building and underground car park constructed by Salix as follows:

- part of the building and some of the parking spaces were allocated to its own use;
- part of the building and some of the parking spaces were sublet to third parties on a long-term basis, subject to VAT;
- the remaining spaces were made available to external customers on a short-term basis (undisputed subject to VAT).

Although the tax authorities responsible for it considered the IHK to be acting as a taxable person, the tax authorities responsible for Salix refused the input tax deduction relating to the construction of the building partly. This concerns the building as far as it was sublet on a long-term basis, claiming that Salix's option to tax was not effective under § 9 (1) and (2) UStG due to the IHK not acting as a taxable person. Insofar the input tax deduction should therefore be refused pursuant to § 15 (2) no. 1 UStG.

Reference for a preliminary ruling from the BFH to the ECJ

The BFH referred to the ECJ the question of how to interpret Art. 4 (5) (4) of the Sixth Directive and the term "significant distortions of competition" within the meaning of Art. 4 (5) (2) of the Sixth Directive. Both regulations were transmitted in Art. 13 (1) and (2) of the VAT Directive 2006/112/EC.

ECJ, ruling of 4 June 2009, case C-102/08 ("Salix")

According to Art. 4 (5) (4) of the Sixth Directive Member States are permitted to regard legal persons under public law to be acting as such, i.e. to treat their activities as non-business activities, when those persons undertake economic activities that are exempt from VAT, such as the letting or leasing of immovable property. The ECJ clarified that the authority to do this requires a legal basis, i.e. a provision within the law. As established by the BFH in its reference to the ECJ and more importantly as demonstrated by the differences in the treatment applied by the two tax authorities involved, German law lacks such a provision.

According to Art. 4 (5) (2) of the Sixth Directive legal persons governed by public law who engage in activities as public authorities shall be treated as traders where treatment as non-taxable persons would lead to "significant distortions of competition."

The tax authorities were of the opinion that the term "significant distortions of competition" is exclusively intended to protect the private economy, i.e. taxable private companies, from competition from non-taxable institutions governed by public law, and is not intended to protect the institutions themselves. The ECJ rejected this interpretation. Distortions of competition that burden the institution governed by public law also fall under Art. 4 (5) (2) of the Sixth Directive if – as in the present case – not regarding the institution as a taxable person would preclude the deduction of input tax for Salix and worsen the position of the latter as a contracting partner on the market.

Please note:

The provision in German law in § 2 (3) UStG should not be in line with the provisions in Art. 13 (1) and (2) of the VAT Directive. In particular, the assessment of whether a legal person governed by public law is functioning in a business capacity, based on the concept of operations of a business nature and the reference to the German corporation tax law, appears questionable from the perspective of Community law.

In its most recent judgment in the "Salix" case, the ECJ has taken its jurisdiction on the scope of the business capacity of legal persons governed by public law further, substantiating its comments in the last judgment in the "Isle of Wight Council" case (ruling of 16 September 2008, case C-288/07), especially in relation to the concept of "significant distortions of competition."

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Contacts

KPMG AG
Wirtschaftsprüfungsgesellschaft

Head of Indirect Tax Services

Wilfried Arbes
Munich
T + 49 89 9282-1040
warbes@kpmg.com

Berlin

Martin Schmitz
T + 49 30 2068-4461
martinschmitz@kpmg.com

Duesseldorf

Peter Rauß
T + 49 211 475-7363
prauss@kpmg.com

Frankfurt

Stephanie Alzuhn
T + 49 69 9587-4909
salzuhn@kpmg.com

Gerald Hammerschmidt
T + 49 69 9587-2047
ghammerschmidt@kpmg.com

Dr. Karsten Schuck**
T + 49 69 9587-2819
kschuck@kpmg.com

Ursula Slapio
T + 49 69 9587-1771
uslapio@kpmg.com

Hamburg

Gregor Dziejek
T + 49 40 32015-5843
gdziejek@kpmg.com

Kay Masorsky*
T + 49 40 32015-5117
kmasorsky@kpmg.com

Monika Zitzmann*
T + 49 40 32015-5116
mzitzmann@kpmg.com

Munich

Dr. Erik Birkedal
T + 49 89 9282-1470
ebirkedal@kpmg.com

Kathrin Feil
T + 49 89 9282-1555
kfeil@kpmg.com

Claudia Hillek
T + 49 89 9282-1528
chillek@kpmg.com

Stuttgart

Dr. Erik Birkedal
T + 49 711 9060-41406
ebirkedal@kpmg.com

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Editor

Ursula Slapio (Responsible*)
Marie-Curie-Strasse 30
60439 Frankfurt
T + 49 69 9587-1771
uslapio@kpmg.com

Christoph Jünger
T + 49 69 9587-2036
ciuenger@kpmg.com

With the collaboration of:

Prof. Dr. Hans Nieskens, Vorsitzender des UmsatzsteuerForum e.V. Vereinigung zur wissenschaftlichen Pflege des Umsatzsteuerrechts (Head of a scientific VAT forum)

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