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Editorial

With the start of 2009, the BMF has published guidance on intra-community supplies of goods, which lays out, in particular, the authorities' view on the obligation to provide evidence for the zero-rating. The at times rather restrictive interpretation of the relevant rulings by the European Court of Justice of this topic places a heavy burden on companies. Every company must face the situation. It is likely that external auditors from the tax authorities will place a strong emphasis on this in their audits.

In addition, in a recent judgement, the Federal Tax Court addressed the issue of appropriate service descriptions on invoices. The Court denied the claimant input tax deductions on the grounds of ambiguous information. This again shows just how important the formal requirements are in VAT law.

These are just some of the more recent developments we have addressed in our MwSt.VAT Newsletter this month.

With all these developments, it is easy to forget that in eleven months, the most comprehensive changes to VAT law since the introduction of the single market in 1992/93 will come into force: the new regulations governing the place of supply of services. The implications for business transactions need to be analysed and systems and processes adjusted, so that, whilst meeting the updated legal requirements, invoicing also fully complies with the new reporting duties, which come into force in January 2010. There is an urgent need for action in this regard, especially since various areas within a company – particularly Finance, Sales and IT – will be required to work together to implement adjustments.

Overall, the VAT requirements for companies are set to increase; ignoring them can be costly, whilst dealing with them can ultimately lead to cost savings.

Yours

Stephanie Alzuhn

Partner, Frankfurt am Main

The German Federal Ministry of Finance (BMF) on the obligation to provide evidence of zero-rated intra-community supplies of goods

The tax authorities have now responded to the various rulings by the Federal Tax Court (BFH) and the European Court of Justice (ECJ) on for the zero-rating of intra-community supplies of goods. At the same time, the obligation to provide evidence for the zero-rating is also, in practice, being considerably tightened up.

Main statements by the authorities

The most important statements in the 21-page BMF guidance dated 6 January 2009 can be summarised as follows:

- Accounting and documentary proof must complement each other.
- Documentary proof must show clearly, and in a manner that is easily verifiable, the physical movement of goods from within the country to elsewhere within the Community.
- The supplier alone bears the burden of proof.
- Only undisputed documentary proof may be used to fix errors in accounting proof, whilst errors in documentary proof cannot be fixed.
- In principle, the form, content and scope of documentary proof should follow §§ 17a to 17c of the German VAT Operating Regulation (UStDV). Although other forms of proof are also permitted, the letter gives little indication of what these might look like.
- Accounting and documentary proof must be complete for the law to protect a supplier who acted in good faith.

Practical implications

Based on the tax authorities' view of the matter, a business can therefore continue to zero-rate intra-community supplies as before, provided it produces complete evidence according to §§ 17a to 17c UStDV. In particular, it must produce confirmation of receipt by the purchaser and proof of shipment (in cases involving collection), as well as document the exact destination. Of particular importance is the purchaser's valid VAT ID number at the point of delivery, as well as compliance with a variety of formalities, such as in relation to proof of shipment, identity, authorisation to act as representative, etc. In cases involving dispatch, generally the business must have a completed white carrier's receipt ("Weiße Spediteursbescheinigung"); at times, a completed CMR waybill is sufficient. The law will protect its acting in good faith only if it can produce the required pieces of evidence, but was deceived by the recipient with respect to certain details.

Recommendation:

Since the BMF guidance does not contain any transitional arrangements and is therefore applicable to all pending cases, the tax authorities will likely be keeping a closer eye on compliance with the obligation to provide evidence. For this reason, businesses should check whether their current approach to accounting and documentary proof meets the tax authorities' requirements and to make adjustments, where necessary, for the future. It should also be considered to what extent proof can be adjusted retroactively for past periods to meet the new standards.

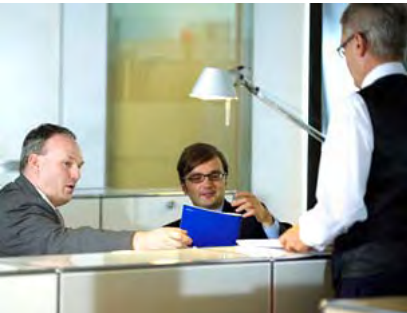
The German Federal Tax Court (BFH) on the obligation to produce evidence of zero-rated exports

The case

In this case, a business was trading in used vehicles and had customers outside the EU. Although the business met the obligation to provide evidence as defined in the UStDV, the tax authorities denied zero-rating, arguing that, contrary to the VAT guidelines (UStR 2008), neither an international licence nor export licences were provided as proof. According to the authorities, export declarations alone are insufficient proof that use of the goods remain outside the Community and hence insufficient proof of an export as defined by § 6 (1) of the German VAT Act (UStG) having taken place. Otherwise, reckon the authorities, the door could be opened to potential abuse, particularly as concerns cars with their own engine, as these could re-enter the country immediately.

BFH interprets Section 135 (9.1) of the UStR 2008 in favour of the taxpayer

If the supplier can prove – using a stamped export document, as in the disputed case - that a used car was exported from the country, this is sufficient to claim zero-rating in accordance with § 4 (1)(a), together with § 6 (1) UStG. In this case, the international licence and export licences routinely demanded by the authorities under Section 135 (9.1) UStR 2008 are waived. The BFH views the abstract possibility of abuse as insufficient justification for the tax authorities' requirements (BFH, ruling of 31 July 2008 – V R 21/06).



Note:

The BFH states that only accounting and documentary proof with the correct content constitutes proof of export. If concrete evidence of incorrect export certificates exists – unlike in the case described above – proof of export must be established by means of further certificates, where necessary. The judgement shows that the tax authorities may not demand proof beyond that required by the UStDV regulations. However, the ruling does state that certificates must be checked for discrepancies and, where necessary, further obligations to provide evidence must be met.

New ruling by the European Court of Justice (ECJ) in relation to the place of supply of services

The case

The request by Sweden for a preliminary ruling (case C-291/07 – TRR) concerns a Swedish foundation which qualifies as a business for VAT purposes. The foundation has two distinct activities; one of which is done in a business capacity, the other in a non-business capacity. With regards to the latter (non-business) activity, the foundation used the advisory services of a Danish company. This raised the question as to whether, as in the other case, the place of supply of these advisory services was in Sweden and hence, as a subsequent question, whether the foundation was liable to VAT in Sweden (reverse charge procedure).

Judgement of the Court

The ECJ answered in the affirmative to both questions in its ruling of 6 November 2008. The decision on the scope of application of the reverse charge procedure is consistent with German law. In contrast, Germany has, until now, applied the place of supply rules under § 3a (3) Sent.1 UStG (in relation to the services listed at § 3a (4) UStG) to situations whereby the recipient of such a listed service was a business and procured the service for use in a business activity. By way of example, a German lawyer representing another EU business in a traffic law dispute would have had to handle the matter differently depending on whether the traffic accident was caused in the course of a business or a non-business activity. Only in the first instance (business activity) would the place of supply of services be in the other EU State (where the recipient of the services is located) and the German lawyer have had to bill a net amount, transferring the VAT liability to the recipient of the services. The ECJ overruled such an approach in its decision. As the wording of the corresponding regulation in the VAT guidelines (see Art. 56 (1)(c) MwStSystRL) – service rendered to the recipient's company - do not contain any such restriction on the use of the service for the business of the recipient, such a legal prerequisite does not comply with EU regulations.

Revision of the place of supply of service rules from 2010

The revision of § 3a (2) UStG, which comes into force on 1 January 2010, reflects the narrower German definition - the provision of services to another business for business use. The revised version relies on amended Art. 44 of the VAT Directive (MwStSystRL), which requires the recipient to simply "acts as such" (i.e. a business). According to the official justification accompanying the 2009 Tax Act (JStG 2009), businesses should be able to rely on the aforementioned constituent element as having been satisfied, if the recipient presents a foreign EU VAT identification number. How this will evolve at the European level remains to be seen.

Note:

According to current legislation, for customers domiciled outside the EU (contrary to those within the EU) in receipt of one of the listed services, the place of supply is currently where the recipient is established, regardless of whether it is a business or a private consumer.



BFH on adequate service descriptions on invoices

The case

In 1996, a manufacturer of confectionery received the following invoice:

“...For technical advice and technical checks in 1996, there is a charge of DEM 100,000 plus 15% VAT of DEM 15,000; total invoice amount of DEM 115,000 ...”

The invoice did not contain any further details about the services provided, nor did it refer to any other business records. It did not give any indication of the corporate purpose of the invoicing party (neither of the holding company, nor its subsidiaries). The manufacturer claimed the VAT shown on the invoice as input tax. While the tax authorities denied input tax deductions in its decision of January 2003, the regional Saxon Tax Court was of the view that the details on the invoice relating to what services were provided “just about” met the requirements for the purposes of input tax deductions. The tax authorities’ appeal against this was upheld by the BFH.

Judgement of the Court

The BFH denied an input tax deduction, citing inadequate service description on the invoice. The Court ruled that the service description “for technical advice and checks in 1996” was not sufficient for identifying the service(s) invoiced without additional details or reference to specific business records that could provide further indication of the exact nature of the service(s). The BFH points to its ruling which states that invoices must contain factual details which make it possible to identify the service being billed. The invoice details provided should minimise the time and effort required to identify the service invoiced, by providing specific and easily verifiable information. What exactly is needed to satisfy these requirements will depend on the specific circumstances of each individual case. In this case, the invoice issued by the holding company or its subsidiary, which failed to provide details regarding the entity’s corporate purpose, was not sufficient given the meaningless formulation it contained (as quoted above).

Please note

that, in this particular case, the BFH denied the input tax deduction, although it acknowledges the “brevity of the descriptions called for in invoices and the occasional problem of finding suitable short codes for service descriptions” (BFH, ruling of 8 October 2008 – V R 59/07). Companies should make sure that invoices contain all details required by law for input tax deductions. While input tax deductions may be possible once invoices are amended, particular attention should be paid to the potential interest applicable under § 233a of the General Tax Code.



Seminar Notes

VAT 2009

11 February 2009 in Stuttgart

12 February 2009 in Hamburg

17 February 2009 in Nuremberg

18 February 2009 in Frankfurt

18 February 2009 in Berlin

Your contact for organizational queries

Angela Heinrich

T +49 30 2068-1510

aheinrich@kpmg.com

For more information

www.kpmg.de/Umsatzsteuer2009.html

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Contacts

KPMG AG
Wirtschaftsprüfungsgesellschaft

Head of Indirect Tax Services

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

Berlin

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

Düsseldorf

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

Bernard Morris*
T+ 49 69 9587-2710
bmorris1@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 Dziejyk
T + 49 40 32015-5843
gdziejyk@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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KPMG AG
Wirtschaftsprüfungsgesellschaft

Editor

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

Christoph Jünger
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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