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## Editorial

The consistent application of European VAT law across Member States is significantly influenced by the European Court of Justice (ECJ), whose interpretation of the provisions of the VAT Directive directly affects Member States' application of VAT law to a considerable number of VAT issues.

To this end, the ECJ uses the preliminary ruling procedure (amongst other things), to resolve questions from national courts that are relevant to concrete cases. The consequence on individual judgements is

seen in subsequent decisions by the presenting courts.

A good example of this is the recent decision by the German Federal Tax Court (BFH) in the "Netto-Supermarkt" case subsequent to the ECJ judgement. According to the court, the question of whether the basic principle of protection of trust can require zero-rating to be granted even when the conditions for a zero-rated supply have not been fulfilled can only be decided on the basis of fairness. This is because the German legislator does not explicitly regulate the observance of the protection of trust and good faith principles in the case of exportation. On the other hand it does explicitly set out the legal preconditions for intra-Community supplies of goods. Nevertheless, in order to guarantee the protection of trust (as called for by the ECJ), a judgement on the basis of fairness is given. This is only granted where the taxable person has taken every reasonable measure at his disposal to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion.

The Court's follow-up verdict in relation to "Netto-Supermarkt" was a surprise at first. However, it is understandable on the basis that the claimant did not apply its rights on the back of legislative provisions but on the basis of fairness. The decision shows once again how important it is to keep a close eye on the developments of European and national case-law.

Yours

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# German Federal Tax Court (BFH): Protection of legitimate expectations for exports

The German VAT Act (UStG) does not contain specific regulations to protect exporters acting in good faith. This is in contrast to the provisions for intra-Community supplies of goods (§ 6a (4) UStG). In “Netto Supermarkt”, the claimant was misled by export papers on which the custom’s office stamps had been forged. The claimant refunded the VAT collected on sales of goods to its Polish customers and requested the tax authorities to treat the sales as zero-rated exports. The authorities rejected this request as, objectively speaking, they had not received a valid export certificate (§ 6 (4) UStG in conjunction with §§ 8 ff. German VAT Operating Regulation (UStDV)). An abatement of the assessed tax in accordance with § 227 of the German Tax Code (AO) on the basis of fairness and any corresponding application of § 6a (4) UStG was also refused. As per previous decisions, the BFH refused the zero-rating in the absence of a valid export certificate. It did, however, put the question to the European Court of Justice (ECJ) as to whether, based on the general principle of proportionality, suppliers’ legitimate expectations and good faith should be protected. In its ruling of 21 February 2008 (case C-271/06), the ECJ confirmed that, if the supplier, acting with due care and diligence, failed to detect forgery, then zero-rating should be granted, even if objectively speaking the legal prerequisites are not met.



## BFH ruling of 30 July 30 2008 - V R 7/03 (“Netto Supermarkt”)

In its subsequent ruling, the BFH adopted the legal view held by the ECJ and upheld the protection of legitimate expectations in relation to exports. However, this protection was not derived as a general principle from VAT law, and in addition the BFH rejected any corresponding application of § 6a (4) UStG to exports. It also clarified once again that, in the absence of export certification (as in this case), the prerequisites for zero-rating under § 4 (1) (a) in conjunction with § 6(1) sent. 2 UStG are not satisfied; only on the basis of the general principles of legal certainty, reasonableness and protection of legitimate expectations that constituted a decision based on fairness (§ 163 and § 227 AO), and only if the due commercial care had been exercised, could the supplier’s good faith be protected in this case.

## Evidence relating to the protection of good faith

The case was referred back to the Financial Court (FG) as, according to the BFH, it was not yet ripe for decision and the FG should consider the fact that the malpractice had occurred over a long period of time, the VAT refunds had doubled from one year to the next and that some export certificates had contained spelling errors. The court held that this suggested a lack of due care and diligence on the part of the claimant.

### Note:

The ruling illustrates the importance of obtaining valid export certificates. As the requirements for the protection of legitimate expectations and good faith are very strict, the granting of zero rating on the basis of fairness is only considered in special cases.

# New Directive on combating tax fraud in intra-Community transactions

By 1 January 2010 Germany is required to have implemented the Directive passed on 16 December 2008 (2008/117/EC) into national law, for the purposes of combating tax fraud connected with intra-Community transactions.

## Purpose of the Directive

The most important regulatory change is the intention for a real-time exchange of information relating to intra-Community transactions, declared by both supplier and recipient for both goods and services. The time lag between the taking place of a transaction and the completion of reporting requirements (and the corresponding exchange of information) is an obstacle to the effective use of the information to tackle tax fraud.

## Monthly EC Sales List ("recapitulative statement")

To this effect, the EC Sales List is to be submitted each month. Only where the intra-Community supplies and intra-Community triangular transactions do not involve a significant amount of money can Member States revert to quarterly reporting. For these purposes, supplies of goods totalling more than EUR 50,000 (net of VAT) over each of the current or one of the four previous quarters is not considered insignificant. Until 31 December 2011, Member States are permitted to set this limit up to EUR 100,000 (net of VAT). In principle, the requirement to submit EC Sales Lists is intended to apply in addition to cross-border services for which the place of supply is another EU country and the liability to tax falls on the recipient (Art. 196, VAT Directive 2006/112/EC).

## Time of supply of services

The Directive removes Member States' right to choose the time of supply of cross-border services for which the service recipient is liable to pay tax in accordance with Art. 196 of the VAT Directive 2006/112/EC. Furthermore, such services provided continuously for more than one year, during which no invoices or payments are made, are deemed to have been supplied at the end of each calendar year, so long as the provision of the service does not cease.

### Note:

In accordance with the German Annual Tax Act 2009, as of 1 January 2010, all taxable services supplied to other EU countries for which the recipient is liable to local VAT must be itemised on the EC Sales List. This extends beyond the scope of Art. 196 of the VAT Directive 2006/112/EC, which refers to Art. 44 of the VAT Directive (general rule for the place of services) but not to particular provisions for the place of services (e.g. services with a direct connection with real property). Finally, it has to be noted that in contrast to the Commission's suggestion, the time period for submitting VAT returns will not (yet) be aligned.



# Main assertions of the German Federal Tax Court on VAT grouping

## Simplified case

The claimant was a proprietor of a small business who had leased his stock to a limited liability company, of which he was the sole shareholder and sole director. The claimant sold an undeveloped piece of land to a buyer VAT free. At the same time, a contract was formed between the company and the buyer for the erection of a building on said piece of land. The company charged VAT on the construction work. Both contracts with the buyer were incorporated into one single deed, in which the claimant was identified as both a small business proprietor and the director of the company. The cost of the construction work and the purchase of the piece of land were combined into one total price.



## Ruling by the German Federal Tax Court

In its ruling of 29 October 2008 (ref. no. XI R 74/07), the BFH firstly reiterated some basic yet important VAT principles relating to VAT groups. According to the BFH, a less obvious economic integration is not detrimental to the granting of a VAT group status, if the financial and organisational integration is clearly advanced. As a result, anything more than just "insignificant business ties" is sufficient evidence of economic integration. Because of the VAT group status this confers on the companies, the BFH denied the claimant the right to choose whether the legal consequences of such grouping should come into effect or not. This opinion, mentioned at times in literature with reference to a ruling by the ECJ (ruling of 22 May 2008, case C-162/07, Ampliscientifica and Amplifin) and further advocated by the Rhineland-Palatinate Financial Court (ruling of 11 March 2008, ref. no. 6 V 2395/07), is not shared by the BFH, who does not even see any case for submission to the ECJ. Thus, if all defining elements of a VAT group, as set out in §2 (2) sent. 2 UStG are present, then the legal consequences of a VAT group come into effect, regardless of whether or not this was intended by the proprietor.

Due to the grouping, the German claimant and the German limited liability company are to be treated as one company (i.e. one supplier). The purpose of the service provided was in fact the transfer of a developed piece of land as an "integrated service". Consequently, the entire service should be either taxable or exempt. According to the BFH and by reference to the ECJ ruling in the case of Breitsohl (ruling of 8 June 2000, case C-400/98), any breakdown of the service into service 1 (supply of an undeveloped piece of land) and service 2 (development of the land) is prohibited. The service is tax exempt in accordance with § 4 (9) (a) UStG, as no option to tax had been applied for.

### Note:

According to the BFH, the term "insignificant business ties" may relate in particular to assuming duties which are only of an administrative nature (e.g. accounting) and which may preclude a VAT grouping. Classification as an "integrated service", in the BFH's view, only comes into consideration if the services are provided to the customer by one supplier. If more than one supplier is involved, splitting up the services may constitute abuse (ECJ, ruling of 21 February 2008, case C-425/06, Part Service).

## New responsibilities for providing tariff information

As of 1 January 2009, the responsibilities for providing binding customs tariff information and non-binding customs tariff information relating to VAT have been completely revised. The addresses of the relevant offices and application forms can now be found at [www.zoll.de](http://www.zoll.de).

The main customs office (Hauptzollamt) in Hanover provides binding tariff information on request. Non-binding customs tariff information relating to VAT, however, must be requested from one of six different offices (depending on type of good) of the centre of commerce and learning of the German Federal financial authorities.

If any doubts exist as to whether the intended import of a certain good is subject to the reduced rate of VAT, it is possible to obtain binding tariff information. Where doubts relate to an intended delivery or an intended intra-Community purchase, then only non-binding tariff information relating to VAT is permissible.

### Note:

A copy of the non-binding tariff information relating to VAT will also be sent to the relevant tax authorities with jurisdiction over the applicant's place of residence. The tax authorities are not bound by the tariff classification and may find, for example, that in a transaction which otherwise would be classified as a supply of goods taxable at the reduced rate (7%), the service element in fact outweighs all other aspects and therefore the standard tax rate (19%) applies. It should also be noted that a necessary inspection of the goods will depend on the applicant's declaration of the expected costs.



## International Network of KPMG

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