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Content

ECJ clears the way for "Third VAT Amending Act"

Shift in the place of service from the country of destination to the place of effective use or enjoyment

Disposal of shares and related input tax deduction

Input VAT refund procedure in Germany – deadline for submission is 30 June 2009



Editorial

VAT law in the European Union is based on the guidelines set out in the VAT Directive, which has to be transformed into the national legislation of all Member States. Nevertheless, national laws are not harmonised in a fully consistent manner. One reason for this is that the VAT Directive affords Member States the right to choose how to shape their national legislation in many areas of regulation. For instance, Member States may elect whether or not to introduce reduced tax rates, tax the transfer of a

business (or a part of it) as a going concern or treat certain tax-exempt supplies liable to VAT. In this respect, the "AB SKF" case on the VAT treatment of the disposal of shares is of importance. We discuss the opinion of the Advocate General on this matter in this edition.

But even provisions which are implemented identically are often interpreted differently by judicial and administrative authorities. From this perspective, harmonisation must be understood as a dynamic process to which significant contributions are made by the European Court of Justice (ECJ) in its capacity as the highest authority on interpretation of the VAT Directive.

For this reason we also present the ECJ rulings in the "Athesia Druck" and "TNT Post UK" cases in this edition. In the "TNT Post UK" case, the ECJ stated its position in relation to the important question of which postal services in the Member States are compulsorily exempt from VAT and which operators qualify for the exemption. The "Athesia Druck" ruling, however, concerns the place of supply in the advertising sector.

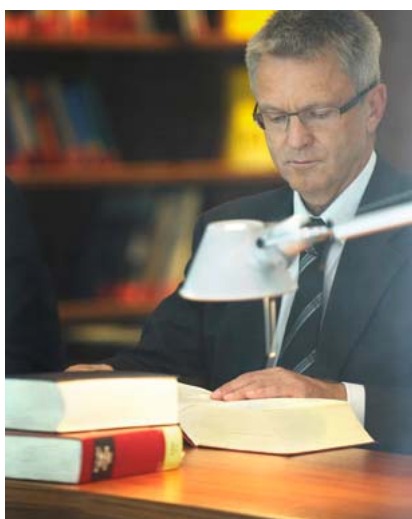
Yours

Gregor Dzieyk
Partner, Hamburg

ECJ clears the way for “Third VAT Amending Act”

The case

In the “TNT Post UK Limited” case (TNT), the ECJ had to state its position on the scope of VAT exemption as provided for in Art. 132 (1) (a) of the VAT Directive (ECJ, ruling of 23 April 2009, case C-357/07). According to this Article of the Directive, “the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto” are exempt from VAT. The claimant TNT took issue with the fact that the VAT exemption was granted only to the Royal Mail, whilst the services of all other providers are liable for VAT. It argued that in a liberalised market – which Great Britain is – “public postal services” no longer exist. TNT holds a licence in United Kingdom for the supply of postal services. The company provides so-called “up-stream” postal services, which include basic mechanised sorting, processing and delivery of mail to a Royal Mail regional depot. Royal Mail supplies the “down-stream” services: direct delivery of the mail to TNT’s customers.



Ruling of the Court

The ECJ interpreted the term “public postal services” in Art. 132 (1) (a) of the VAT Directive to cover public and private operators who undertake to provide all or part of the universal postal service, as defined in Art. 3 of the Directive 97/67 (in the amended Directive of 10 June 2002, Official Journal of the European Communities no. L 2002/176, 21). In accordance with this Directive, in order to be able to claim exemption from VAT, the service an operator provides must be

- comprehensive,
- affordable,
- and one that guarantees a certain basic provision (such as conveyance of letters weighing up to 2 kg and parcels up to 10 kg).

The opinion of Advocate General Kokott on 15 January 2009 stated more clearly than the ECJ that the exemption could only be claimed by the postal operator which itself provides the services directly to the customers. In her view, “up-stream” postal services do not qualify for tax exemption within the meaning of Art. 132 (1) (a) of the VAT Directive.

The second question to be answered by the ECJ concerned the extent of the exemption. In this respect the ECJ made clear that not all the services of an operator as described above – regardless of whether it is a public or private operator – are exempt, irrespective of their nature. In particular, individually negotiated service contracts are in conflict with the goal of the exemption. These individually negotiated services adjusted to the customers’ special requirements do not serve the public interest, as a prerequisite for a tax exempt universal postal service provider.

Note:

The ECJ ruling in the TNT case is considered to a large extent from the proposed amendment to § 4 (11b) UStG (German government bill, Article 1 of the „Third VAT Amending Act“ of 10 December 2008, Official Records of Parliament 16/11340). The liberalisation of the postal service market which took effect from 1 January 2008 in Germany should result in VAT exemption for all universal postal services, regardless who operates them, provided that “all of the universal postal services, as attested by a certificate from the German Federal Central Tax Office,

are offered comprehensively across the whole German territory. Services arising from individually negotiated agreements should be eliminated. It is conspicuous, however, that, in contrast to the ECJ ruling, the wording of the amended § 4 (11b) UStG calls for a comprehensive guarantee that “all” of the universal postal services will be provided. But for the ECJ (see paragraphs 36 and 40 of its ruling) it is sufficient that operators undertake to provide all or part of the universal postal service in a Member State. It remains to be seen whether and how this formulation by the ECJ will be taken into consideration in future legislative procedure.

Further possible changes resulting from the “Third VAT Amending Act”

Further changes resulting from the “Third VAT Amending Act” which shall take effect from 1 January 2010 are up for discussion. A public hearing on this topic and the revision of the laws on tax exemption for universal postal services took place on 18 March 2009. An outline of the subjects covered includes in particular:

- monthly submission of EC Sales Lists
- discontinuation of the permanent extension to the submission deadline for EC Sales Lists
- VAT exemption for benefits provided by associations to their members in the banking and insurance sectors
- tax liability for the recipient of supplies of recyclable and scrap metal and of certain building cleaning services
- time at which tax is incurred in the reverse charge procedure

Shift in the place of service from the country of destination to the place of effective use or enjoyment

Background

Currently – as § 3a ff. of the German VAT Act (UStG) and Article 43 ff. of the VAT Directive (MwStSystRL) indicate – the place of supply of services is only exceptionally determined according to the “country of destination principle”, i.e. on the basis of the place where the recipient is established, c.f. § 3a (3) UStG and Article 56 (1) of the VAT Directive. For this purpose, it is necessary that the service is one of the “listed services” within the meaning of § 3a (4) UStG (Article 56 (1) (a) – (l) of the VAT Directive). In the case under consideration (“Athesia Druck”), the European Court of Justice (ECJ) was required to give a ruling as to whether a service was a listed service of this kind so that the place of supply of services ought mainly to be determined on the basis of the location of the place where the recipient was established. The case also required a decision whether the state in which the service provider was domiciled was – by reason of the use or enjoyment there of the service rendered – entitled to shift the place of supply of service and hence entitled to claim the right to levy tax.



The case

Athesia Advertising, an Austrian business, bought in its own name advertising space in Italian newspaper, magazines, radio and television for itself and for its clients in Austria and Germany. The year in question was 1994, when Austria was not, as yet, a Member State of the European Union. The Italian tax authorities took the view that Athesia Advertising’s turnover to its Austrian and German clients, no less than those of the Italian media, were liable to VAT in Italy, attaching particular significance to the fact that Athesia Advertising had a tax agent in Italy in the shape of Athesia Druck.

ECJ, ruling of 19 February 2009, case C-1/08 (“Athesia Druck”)

It is essential to the legal considerations of the case that a distinction is to be drawn between the two supply relationships, the one being “Italian media to Athesia Advertising” and the other “Athesia Advertising to its Austrian and German clients”. The ECJ stated that the two supply relationships were to be considered separately, and assumed that both provided a service in the field of advertising (§ 3a (4) (2) UStG, Article 56 (1) (B) of the VAT Directive). In so doing it took no account of the fact that Athesia Advertising, in “passing on” the service purchased, was only an intermediate recipient of the advertising service and was not itself acting as an advertiser.

In principle, then, in both cases, the place of supply of service is located where the recipient is domiciled, in other words, in the supply relationship “Italian media to Athesia Advertising” in Austria; in the supply relationship “Athesia Advertising to Austrian clients” likewise in Austria; and, in the case of “Athesia Advertising to German clients”, in Germany. This solution is in line with the existing understanding of German law, while taking into account the rules for commission business, in § 3 (11) of the UStG. It might be added that the ECJ attached no importance to the fact that, in the shape of Athesia Druck, Athesia Advertising has a tax agent in

Italy. Athesia Druck was no more than the national contact point for Athesia Advertising and had no business function in relation to the services supplied.

Next the ECJ comments on the place where the advertising messages were actually used or enjoyed. On this point, the ECJ confirmed the tax authorities' understanding of the law in Section 42 (1) sentence 3 of the German VAT guidelines (UStR 2008). Advertising messages are actually used or enjoyed in the country from which they are broadcast or – in the German understanding – in which they are perceived. There was no doubt in the ECJ's mind that this was the case as regards the services of Italian media bought in Italy.

The last question was about the option of transferring the place where a supply of services is effected from the country of the recipient to the country in which the services are used or enjoyed. Unlike German law, Italian legislation provides for the option of transferring the place where the supply of services is effected to the country in which they are used or enjoyed - in this case, therefore, to Italy - also in cases where that place is determined by reference to § 3a (4) in conjunction with § 3a (3) UStG. The ECJ saw no problem in accepting this sort of relocation for the purposes of the services provided by the Italian media to Athesia Advertising, but it was on the grounds that Athesia Advertising was resident in a third country that it rejected a similar transfer in respect of the supply relationship "Athesia Advertising to Austrian and German clients" in favour of the Italian state.

Note:

Completely new rules will apply to the place of supply of services with effect from 1 January 2010 due to the German Annual Tax 2009. For services to another business for business use (B2B sales) the place of supply of a service – irrespective of the nature of the service – will generally be where the recipient of the service carries on his business, c.f. § 3a (2) UStG and Article 44 of the VAT Directive in the version applicable from 1 January 2010. Only for services to private customers (B2C sales) will the categorisation of a service as a listed service continue to be decisive – cf. § 3a (4) of the UStG and Article 59 of the VAT Directive from 1 January 2010 onwards. On the basis of its current legislation – e.g. § 1 of the German VAT Operating Regulation – Germany has made only limited use of the option afforded by Articles 59a and 59b of the VAT Directive to transfer place of supply to the country of use or enjoyment, and this will continue to be the case even after 1 January 2010. The decision handed down by the ECJ in this case will not therefore affect the scope of the German regulatory.

Disposal of shares and related input tax deduction

In the “AB SKF” case currently pending before the ECJ, the Advocate General Mengozzi has given his opinion on the possibility of input tax deduction on the occasion of the disposal of shares. He largely confirms the fundamental line taken by the Federal Ministry of Finance in its two guidances of 4 October 2006 (ref. IV A 5 – S 7300 – 69/06) and of 26 January 2007 (ref. IV A 5 – S 7300 – 10/07).



The case

The case concerns a Swedish stock corporation, SKF, which, as a parent company, took an active part in the activities of its subsidiaries, not least the foreign ones. SKF performed, for consideration, services for its subsidiaries in relation to management, administration and marketing. As part of its plans for restructuring, SKF intended, among other things, to sell one of its subsidiary companies and sought, to this end, to use services in connection with the valuation of securities, support in the negotiation process and legal advice relating to the drafting of contracts. The matter in dispute with the Swedish tax authorities is the input tax deduction arising from these services on the occasion of the sale of the shares.

Questions referred

The Advocate General gave an opinion on the following questions:

- Did the sale of the shares constitute an economic activity?
- If it constituted turnover, is such turnover tax-exempt?
- Is SKF still entitled to input tax deduction irrespective of the answers to the questions put above?
- Is it, for the purpose of answering the questions put above, relevant whether the shares were sold to a subsidiary company all at once or in several stages?

ECJ, Advocate General’s Opinion of 12 February 2009, case C-29/08 (“AB SKF”)

By its intervention in the management of its subsidiary companies, as described, SKF was engaging in a business activity. The Advocate General took the view that it necessarily followed from this that the same was true for the disposal of shares in such a subsidiary company, which therefore also constituted a business activity. The sale of shares as part of a restructuring by the parent company constitutes the greatest possible intervention in the activity of the subsidiary and hence a management measure. The taxable turnover – i.e. the disposal of the shares – had to be tax-exempt in accordance with Article 135 (1) (f) of the VAT Directive (formerly Article 13 Part B (d) (5) of the Sixth EC Directive). Nor did anything to the contrary emerge from the ruling in the “Kretztechnik” case (ECJ, ruling of 26 May 2005 – case C-465/03) in which the ECJ referred to turnover from securities transactions as part of commercial activity only by way of example. This should not, however, be understood to mean, in a generalised sense, that only commercial sales of securities may be assessed as taxable and tax-exempt sales.

The view of the Advocate General is that ultimately, the input tax deduction is ruled out by the direct and immediate relationship between the input services acquired and the tax-exempt turnover from the disposal of shares. This would give rise to a possible conflict of interest with those sales transactions involving holdings that are capable, in the absence of economic activity, of triggering an input tax deduction. The Advocate General denied that such a conflict of interest occurred, referring to the “logical consistency” of the VAT system, under which the possibility of input tax deduction is necessarily ruled out in the case of output



sales that are taxable but tax-exempt, although not in the case of sales that are exempt from the very outset.

Interesting in this case is the statement of the Advocate General to the transfer of a business as a going concern. As is well known, the disposal of a business as a going concern in this way is not taxable, so that the issue of tax exemption cannot even arise. Member States may elect whether or not to tax the transfer of a business as a going concern, as e.g. Germany made use of it. The Advocate General denies that a disposal of shares is a disposal of a business as a going concern, in the absence of any supply within the meaning of Article 19 of the VAT Directive (formerly Article 5 (8) of the Sixth EC Directive). He did not, however, consider Article 29 of the VAT Directive (formerly Article 6 (5) of the Sixth EC Directive) according to which the rules for the transfer of businesses as a going concern are also applicable to services.

He also regarded it as irrelevant whether the disposal occurred as a single transaction or in the course of a series of several transactions.

Note:

The Advocate General's remarks about the exemption of the disposal from tax and the non-applicability of input tax deduction on the basis of § 15 (2) (1) of the UStG fully confirm the view expressed by the Federal Ministry of Finance, particularly in its guidance of 26 January 2007 (ref. IV A 5 – S 7300 – 10/07, para. 13 in particular). In the meantime, though, it remains to be seen, in the light of its previous rulings, whether the ECJ will agree with what the Advocate General has said about the transfer of businesses as a whole and on the subject of input tax deduction.

The Advocate General has indicated that input tax deduction is a possibility, in the event of shares being sold, if they are acquired by someone or some entity outside the Community (Article 169 (c) of the VAT Directive, Article 15 (3) of the UStG).

An input tax deduction is also possible if a Member State allows the company disposing of the shares to exercise an option in relation to taxability in accordance with Article 137 (1) (a) of the VAT Directive, an option which is little exercised in the Community. Such an option is available in Germany when – as in the SKF case – the shares are held by the parent company as a part of its business, but, under the German rules, this presupposes that the person acquiring them is doing so for his company, which can, in individual cases, be very much a matter of doubt.

Input VAT refund procedure in Germany – deadline for submission is 30 June 2009

Companies doing business outside the country in which they are resident can often, under certain conditions, claim a refund for VAT in the state in which it is incurred. The main opportunity for this is the input VAT refund procedure in EU Member States, including Germany, which applies if VAT registration in the Member State is not required. A similar agreement is in place with certain non-EU states.

For **foreign companies** that have received invoices with German VAT in 2008, the deadline for applying for an input VAT refund is 30 June 2009. A refund will only be issued if the application is received on time and meets all the requirements. According to the current legal situation, business owners are required to sign the application form themselves (see MwSt. Newsletter from January 2009). If the application is not being submitted by the sole proprietor of a small business, the claim has to be signed by the legal representative of the company (chief executive, director) – signatures from any other authorised signatory or accountants or tax advisors are not permitted. The application must be submitted on time and all original invoices containing all legally required details must be enclosed. A so-called undertaking's certificate must also be submitted, issued by the tax authorities in the state in which the company is resident. It relates to the status as an undertaking liable for VAT in 2008 and may not be older than one year. To avoid missing the submission deadline, it is advisable in cases of doubt to recheck the correctness of the application before submitting it. In some cases, companies not resident in the EU do not qualify for or can only claim a limited refund.

Note:

The rules for **German companies** in relation to input tax refunds in other states may be different. This also applies to the application deadlines. We would be happy to advise you with the help of our international network on the refund procedures in other states or to assist you in making an application in Germany.



International Network of KPMG

If you would like to know more about international VAT issues please visit our homepage [KPMG International](#)*. We would be glad to assist you in collaboration with our KPMG network in your worldwide VAT activities.

You can also get up-to-date information concerning Germany, Switzerland, Spain and United Kingdom via the homepage of [KPMG Europe LLP](#)*.

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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

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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** denotes Financial Services Tax

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Wirtschaftsprüfungsgesellschaft

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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