

August/September 2009

Content

German Federal Tax Court: protection of legitimate expectations for incorrect invoice details only in equity proceedings

German Federal Tax Court confirms restrictive ruling on catering revenue

German Federal Tax Court states its position on questions relating to zero-rating exports

News from Berlin

Evidence of export for VAT purposes when using the online export registration system IAA Plus

Seminar Notes



Editorial

Good faith is not protected with regard to the fulfillment of the requirements for input VAT deduction. This, at least, is the title of the press release by the German Federal Tax Court (BFH) on a ruling of 30 April 2009. Fundamentally, it is in line with previous BFH rulings on this matter. But it is important to note that, although the BFH does not permit protection of legitimate expectations in the process of assessing whether the requirements for input VAT

deduction have been met in accordance with § 15 German VAT Act (UStG), an equity ruling on the basis of the German Tax Code would definitely be a consideration. If the business is unable to detect the inaccuracy of the invoicing details despite having exercised the due care and diligence of a prudent businessperson, it is entitled to claim on the basis of equity. However, the standards of due care and diligence expected by the BFH appear to be so high that they might frequently render such an equity claim irrelevant in actual practice. This ruling by the BFH is the topic of the first article in this issue of the VAT Newsletter.

We also review three rulings by the BFH on zero-rated cross-border supplies of goods, in which the BFH establishes its position on the provision of evidence to support application of the zero rate and on the restrictive line taken by the tax authorities. Significant elements of these BFH rulings run counter to the guidance issued by the German Federal Ministry of Finance on 6 January 2009.

On 1 July 2009, uniform European Union customs law made participation in the electronic export procedure ("ATLAS-Ausfuhr") compulsory. This new ruling also has an impact on evidencing exports for VAT purposes. In this issue we present an inexpensive option for online export registration – IAA Plus. And finally, we take a brief look at the new guidance issued by the German Federal Ministry of Finance on the expansion of the scope for taxation based on consideration actually received, which took effect on 1 July 2009. From a cash flow perspective, this option is certainly worth considering in individual cases.

Yours

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German Federal Tax Court: protection of legitimate expectations for incorrect invoice details only in equity proceedings

BFH, ruling of 30 April 2009 (ref. no. V R 15/07)

In its ruling of 30 April 2009, the German Federal Tax Court (BFH) confirmed that, for an invoice to qualify for input VAT deduction, the correct address of the supplier must always be indicated on it. Only if this is the case the tax authorities can verify whether the invoicing business actually carried out the transaction shown on the invoice. It is of no relevance to the BFH whether the supplier can be identified in some other way despite the address being incorrect. It is important that the BFH also derives this guideline from Art. 226 (5) of the VAT Directive – cf. § 14 (4) no. 1 UStG – for requirements of input VAT deduction to old cases, i.e. invoices which were issued before the "Invoicing Directive" (Directive 2001/115/EC) was implemented on 1 January 2004. Since in the case at hand no business activities were taking place at the address of the supplier at the time of invoicing the BFH ruled that a correct indication of the supplier's address on the invoice – a necessary criterion for input VAT deduction – was not existent.

Protection of legitimate expectations only as a measure taken in the interests of equity

Furthermore, the BFH rejects the application of legitimate expectations with respect to the fulfillment of the requirements for input VAT deduction in accordance with § 15 UStG. By doing so, it is continuing in the vein of its previous jurisdiction and rejects the principle of good faith in procedures for determining eligibility not only for zero-rating exports (BFH, ruling of 30 July 2008, ref. no. V R 7/03) but also for input VAT deduction. However, on the grounds of the general legal principles of legal certainty, reasonableness, and protection of legitimate expectations under Community law, the BFH grants protection of legitimate expectations in the context of a measure taken in the interests of equity as defined in §§ 163, 227 AO (German Tax Code). If the principle of protection of legitimate expectations is applied, the discretion granted to tax authorities is reduced to zero. If, as in the reference case, taxable persons claim aspects of the protection of legitimate expectations in the procedure for determining eligibility, the decision on measures to be taken in the interests of equity in accordance with § 163 (3) AO is to be consistently connected to the establishment of eligibility.

Please note:

In this ruling the BFH also appears to attach very stringent requirements to the protection of legitimate expectations, even if the equity approach is adopted. The Tax Court responsible in the first instance is obliged to clarify whether the underlying transactions were cash sales or not, as very strict conditions are to be imposed on the protection of legitimate expectations for this type of transaction. In the view of the BFH, an undertaking's certificate which is more than six months old does not constitute evidence for protection either, i.e., it does not prove that the registered office of the supplier listed on this certificate still existed at the time the invoice was issued. Even when presented with correspondence from the former German Federal Office of Finance (Bundesamt für Finanzen) addressed to the supplier, the BFH expects the Tax Court to establish how the correspondence came to be in the possession of the recipient of the supply.

German Federal Tax Court confirms restrictive ruling on catering revenue

BFH, ruling of 18 February 2009 (ref. no. V R 90/07)

The BFH ruling of 18 February 2009 (ref. no. V R 90/07) reinforced the Court's restrictive interpretation of the relationship between supply revenue taxed at the reduced rate and catering revenue taxed at the standard rate. In contrast to the guidance from the German Federal Ministry of Finance (BMF) of 16 October 2008 (IV B 8 - S 7100/07/10050), the BFH regards the preparation for consumption at a certain point in time of foodstuffs as not necessarily linked to the marketing of the food (supply of goods element). When considering the overall situation, the BFH in fact assigns this activity to the area of services. While the BMF guidance of 16 October 2008 interprets the preparation of food in the context of the necessary consideration of the overall situation as an essential precursor to marketing food, the BFH holds that the concept of preparation should only be understood from the tariff perspective. The assessment of the overall situation from the perspective of an average consumer should furthermore be based on the service elements of the catering outweighing the aspects relating to food production from a qualitative and not a quantitative point of view. In this regard the BFH's latest ruling requires that there be at least two service elements, i.e. a further element in addition to preparing the food, for the transaction to be subject to the standard rate of tax for catering revenue.

The case

The case under consideration concerned the sale of popcorn, nachos, sweets, hot dogs, and ice cream in the entrance area of a movie theater complex. Although the preparation of the food must be classified as a service element, no further 'services' were provided, so the BFH confirmed that the sales were subject to the reduced rate. The BFH expressly rejected the classification of the seating in the theater as specifically intended for the consumption of food and adjudged the provision and cleaning of toilets and theater auditoria as service elements that should be attributed to the running of the movie theater and not primarily to the revenue generated by the sale of food.

Please note:

A further BFH case with a similar background (ref. no. V R 3/07) is pending. Unlike the resolved case, movie theater customers are offered – in parallel to the preparation for consumption – various options for consuming the food in the form of high tables, bar stools, in some cases benches, chairs, tables and so-called wall counters.

German Federal Tax Court states its position on questions relating to zero-rating exports

In three rulings published simultaneously (BFH, ruling of 23 April 2009, ref. no. V R 84/07; BFH, ruling of 12 May 2009, ref. no. V R 65/06; and BFH, ruling of 28 May 2009, ref. no. V R 23/08), the BFH elucidates, adds to, and alters its previous stance on the obligations to provide evidence in order to apply the zero rate of VAT to exports (§ 4 no. 1 a), § 6 UStG) and intra-Community supplies (§ 4 no. 1 b), § 6a UStG).

Conclusive requirements derive from UStDV (German VAT Operating Regulation)

In all three cases the BFH initially notes that the regulations on the obligations to provide evidence – for exports in accordance with § 6 (4) UStG in conjunction with §§ 8 to 17 UStDV, for intra-Community supplies pursuant to § 6a (3) UStG in conjunction with § 17a to § 17c UStDV – are compatible with Community law. It makes clear, however, that the authorities may not unilaterally introduce further stipulations in addition to the proof required by legislators.



Contrary to the tax authorities' requirements, proof of power of attorney issued to a representative acting on the purchaser's behalf is not a prescribed form of documentary proof. A CMR waybill on its own is fundamentally sufficient as proof of dispatch according to § 17a (4) UStDV in conjunction with § 10 UStDV. Field 24 (confirmation by the recipient of receipt of the goods) does not have to be completed to suffice for this evidence. Provision of a written power of attorney to demonstrate that the person who collects the delivery is authorized to do so does not constitute one of the requirements for proper documentary proof as defined in § 17a (1) and (2) UStDV.

Consequently, the BFH's opinion on intra-Community supplies is particularly in opposition to that of the tax authorities, which was expressed in the BMF guidance of 6 January 2009.

Verification by tax authorities

The BFH makes clear that, once they have fulfilled the legal obligations regarding evidence, suppliers are initially entitled to treat their supplies as zero-rated. However, the documentary and accounting proof furnished by the business is only of a preliminary nature, since the tax authorities may choose to re-examine the available information based on the documentary and accounting proof. If the proof is found to be incorrect, or if there is at least justifiable reason to doubt its accuracy, the business must undertake to eliminate these doubts in accordance with the general rules and principles of evidence, or else payment of VAT on the supply becomes mandatory. This means that the business bears the risk of the clarification being unsuccessful, for instance because there are doubts as to whether the goods were delivered to their destination or whether the purchaser's representative holds a valid power of attorney.

Protection of legitimate expectations

If the legal preconditions for the zero rate of VAT have not been met, protection of legitimate expectations only comes into consideration if the business has fulfilled its obligations to provide evidence completely. Legitimate expectations may be protected if the supplier relied on information provided by the buyer but was unable to detect its inaccuracy despite having exercised the due care and diligence of a prudent businessperson. If the case concerns an intra-Community supply, the zero rate will be granted on the basis of § 6a (4) sent. 1 UStG. Export supplies will be zero rated in accordance with §§ 163, 227 AO, taking into account the fundamental principles for the protection of legitimate expectations developed by the European Court of Justice (ECJ). If the obligations to provide evidence have not been fulfilled, the zero rate can only be applied if objective evidence has established that the requirements for an export or intra-Community supply have been met.

Time scale for providing documentary and accounting proof

The BFH takes as a starting point the following principles for determining when documentary and accounting proof should be provided, although these obligations to provide evidence are no longer of a substantive legal nature, even for exports:

Unlike documentary proof, accounting proof – if it is to be deemed legitimate – must generally be on hand by the date the business is required to submit a VAT return for the VAT period to which the export is subject. The documentary proof, on the other hand, may be submitted up to the conclusion of the final oral negotiations at the Tax Court.

After the deadline for submitting the VAT return, the supplier is no longer permitted to record transactions for the first time, but may only correct or add to them. Corrections or additions may only be made, however, if the delayed submission of the accounting proof does not jeopardize the tax revenue or have a detrimental effect on the collection of the VAT. From a procedural point of view, the conclusion of the final negotiations at the Tax Court marks the last date on which it is possible to make corrections.

If, however, no entry has been made in the accounts at the time of submission of the VAT return, the supply is only zero rated for VAT if objective evidence establishes that the legal requirements for zero rating have been fulfilled. A sign of objective evidence would be if the tax authorities voiced no justifiable doubts that the material requirements for zero rating had not been fulfilled, the BFH expressly stated in respect of export supplies.

Please note:

The authorities are yet to give their reaction with regard to the applicability of these rulings, which in part restrict the instructions given in the BMF guidance of 6 January 2009. It is therefore to be expected that the tax authorities will continue to adopt a restrictive approach to recognizing the validity of CMR waybills. Please note, additional cases are currently pending with the BFH which deal with the extent of the protection of good faith in accordance with § 6a (4) UStG, on the validity of CMR waybills as proof of dispatch, and the obligations to provide evidence for cross-border chain transactions.

News from Berlin

Citizen Relief Act Health Insurance

The so-called Citizen Relief Act Health Insurance has effected a change in German VAT law in § 20 (2) UStG. With retroactive effect from 1 July 2009, and applicable until 31 December 2011, taxation calculations may be based on consideration actually received in cases where the more closely defined "total turnover" in the previous year did not exceed EUR 500,000.

Until now, this limit only applied in the German eastern federal states; in the other areas of the country, the limit was EUR 250,000. In its guidance of 10 July 2009 (IV B 8 - S7368/09/10001), the German Federal Ministry of Finance (BMF) stated that the new regulation only applies to transactions executed after 30 June 2009. Retroactive changes for accounting periods ending before 1 July 2009, are not permitted.

The business capacity of insolvency administrators

On 28 July 2009, the BMF issued guidance (IV B 8 - S7100/08/10003) stating that revenues generated for a law firm by a lawyer acting as an insolvency administrator should be attributed to that law firm. This applies to both employees and lawyers who are partners in the law firm, even when the latter are acting on their own behalf. This must be observed by companies applying for input VAT deduction on invoices relating to the activities of an insolvency administrator.

The law firm is accordingly obliged to account for the VAT on its own behalf and under its own VAT number. However, the BMF will not object if a lawyer issues invoices for activities as an insolvency administrator on its own behalf relating to transactions executed before 1 January 2010.

Turnover in the maritime industry – definition of "operator of a seagoing vessel"

In its guidance of 24 July 2009, the BMF issued a new interpretation of the term "operator of a seagoing vessel" (§§ 4 no. 2, 8 (1) UStG; section 145 (1) of the VAT Guidelines (UStR 2008)).

Under the new definition, both the owner of the ship and the ship manager are considered operators provided that the turnover to be zero-rated is directly attributable to the purchase in the maritime industry. Ownership ratios and interim warehousing are insignificant for the purposes of § 8 (1) UStG. However, to the extent that turnover pertains to a previous trade level (e.g., to agents or ship brokers commissioned by ship owners or managers), it cannot be zero-rated.

The BMF will not object if VAT is shown separately on invoices relating to supplies made before 1 August 2009, if the term "operator of a seagoing vessel" was interpreted differently.

It should be noted that ship managers are generally described as ship owners who arrange the operation of a ship for third parties.



Supply of electricity as ancillary to the lease

The BMF took on board the statements made by the BFH in its ruling of 15 January 2009 (ref. no. V R 91/07 – see June 2009 edition of VAT Newsletter), in which it ruled that the supply of electricity via the landlord is considered ancillary to that of the lease (generally exempt from VAT under § 4 no. 12 sent. 1 UStG). In this respect, the conflicting Section 76 (6) sent. 1 UStR 2008 is no longer applicable.

However, the BMF will not object if electricity supplies made on or before 30 September 2009, are treated as independent, taxable supplies.

Intermediary services as per § 4 no. 8 and 11 UStG – impact of the BFH ruling of 30 October 2008

The BMF embraces the core statements made in the BFH ruling of 30 October 2008 (ref. no. V R 44/07), and therefore intends to disallow application of its guidance of 9 October 2008, to turnover generated after 31 December 2009. The BMF holds that the term “intermediary services” as part of financial or insurance transactions as per § 4 no. 8 and 11 UStG must be subject to a standard interpretation. As a prerequisite, these intermediary services must involve a middleman who neither takes the place of one of the parties to the contract nor provides services identical to those of the parties. The aim of the intermediary services is to do everything necessary to bring two parties to close a contract. The intermediary is not permitted to have an interest in the content of the contract. Pure consulting services are therefore not classified as intermediary services. Managing, monitoring, or training more junior independent intermediaries may fall under the intermediary services in § 4 no. 8 or 11 UStG to the extent that the business who provides these services can indirectly affect the parties to the contract by reviewing the respective proposed contracts. It is key that the opportunity to conduct such a review exists in each individual case. In contrast, it is irrelevant whether a contract is actually concluded.

Introductory guidance on § 4 no. 14 and § 4 no. 16 UStG

In its guidance of 20 July 2009 (IV B 9 - S 7172/09/10002) and 26 June 2009 (IV B 9 - S 7170/08/10009), the BMF stated its fundamental views on § 4 no. 14 UStG and § 4 no. 16 UStG as they appear in the version in force from 1 January 2009 (German Tax Act 2009). The revised texts affect activities related to medical care in the area of human medicine and care provided to those in need of help. Official VAT guidelines contrary to the new legislation are no longer applicable. However, the BMF will not object if taxable persons base their treatment of activities conducted on or before 31 December 2009 on the exemption granted in § 4 no. 16 d) and e) UStG in the version valid until 31 December 2008.

Introductory guidance on place of supply of services

Guidance by the tax authorities relating to the place of supply of other services, per §§ 3a, 3b, and 3e UStG from 1 January 2010 (IV B 9 - S 7117/08/10001) are now available. The very detailed guidelines with 147 margin notes will replace Sections 33 to 42 in UStR 2008. The BMF guidance will be topic of the coming edition of VAT Newsletter.

Evidence of export for VAT purposes when using the online export registration system IAA Plus

IAA Plus, the online export registration system

Since 1 July 2009, EU customs law has required export declarations to be submitted in electronic format. As an alternative to installing their own software programs or contracting an IT service provider, companies can process all the relevant data via the internet. The online export registration system IAA Plus grants users with ELSTER certificates access to the IT system "ATLAS-Ausfuhr" where they can complete the export procedure required by customs law. Export declarations can be created online by exporters and cleared for export with the German customs office independently. IAA Plus, the online export declaration system, also forms part of the ATLAS-Ausfuhr back-up concept. The back-up plan comes into play in the event that data intended for ATLAS cannot be transmitted with the ATLAS export system due to technical malfunctions.

Evidence of export for VAT purposes

Supplies of goods that are transported or dispatched by the supplying business or the recipient in a third country may be zero-rated under § 4 no. 1 a), § 6 UStG. In accordance with § 8 ff. UStDV, the exporting business must evidence zero-rated exports dispatched from the European customs territory in Germany by providing the documentation. Generally, the export confirmation of the export customs office suffices as evidence of export as per § 9 (1) no. 4 UStDV (Section 131 ff. of UStR 2008 to § 6 UStG). The customs offices play an important role in evidencing exports for VAT purposes by providing the relevant customs office confirmations.

Evidencing exports with IAA Plus

IAA Plus, the online export declaration system, provides the endorsed export document for VAT purposes as a printable pdf document. The downloadable pdf document is sent as an attachment to the response from the customs office. It must be ensured that the Movement Reference Number (MRN) in the form of a barcode is also printed on the export document. After downloading the necessary text file from the customs office website, the barcode should automatically appear on the printout of the export document.

Please note:

As well as providing a back-up to ATLAS-Ausfuhr, IAA Plus is a good and inexpensive alternative to installing proprietary software programs for ATLAS-Ausfuhr or contracting an IT service provider. This will be of particular interest to small and medium-sized businesses.

As per § 147 AO, the company must archive all correspondence with the customs offices and especially the evidence for VAT purposes. Businesses should therefore regularly check whether they have received a response from the customs office.

Further details about export evidence in the electronic system ATLAS-Ausfuhr and information about alternative evidence can be found in the BMF guidance of 17 July 2009 entitled "Zero-rating exports for VAT" (ref. no. IV B 9 - S 7134/07/10003).

Please also note that the BFH does not permit any analogous application to exports of the principle of good faith in § 6a (4) UStG for intra-Community supplies (ruling of 30 July 2008, ref. no. V R 7/09; ruling of 23 April 2009, ref. no. V R 84/07). Instead, the BFH endorses protection of legitimate expectations via the equity approach (§§ 163, 227 AO).



Seminar Notes

We would like to inform you about the following seminar with KPMG contacts as speakers:

FORUM Seminar **VAT 2010** on 25 November in Cologne

As speakers – among representatives from the tax authorities, industry and tax courts – participate inter alia Ursula Slapio and Peter Rauß (both KPMG)

Topics:

- VAT Package: legal changes and effects for practice
- Guidance of the tax authorities concerning place of services
- Intra-Community supplies of goods: Practical experience and recommendations
- Latest jurisprudence
- VAT in corporate groups (combined with a case study)

Click here for more information: <http://www.forum-institut.de>

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* denotes Trade & Customs
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Imprint

Issuer

KPMG AG
Wirtschaftsprüfungsgesellschaft

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* Responsible according to German Law (§ 7 (2) Berliner PresseG)

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