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Editorial

The fact that the question "For here or to go?" carries some weight from a VAT perspective is common knowledge among tax experts. By contrast, the so-called "average consumer", to whom the German Federal Tax Court (BFH) and the European Court of Justice (ECJ) usually refer, will probably not be aware of this when making his order. From an economic point of view, however, this question makes a difference to the supplying business's margin of 12 percentage points. The financial authorities and the fiscal jurisdiction may in hindsight decide to reassess the company's decision to apply a VAT rate of 19% or 7%. This can jeopardize the existence of a business in case it is practically impossible to charge the retrospectively levied VAT to the end user.

The businesses concerned are therefore looking with anticipation to Luxembourg, where the BFH has referred to the ECJ a total of four cases for a preliminary ruling. Only at first glance do the referral orders of the two VAT senates of the BFH appear to pose the same questions. In fact, both senates seem to approach at least one legal matter differently – specifically, whether the preparation of food in itself can alter a supply of goods (taxed, if applicable, at 7%) into a supply of services (taxed at 19%). The key issue is the question of how many service elements a supply of goods can "tolerate" before it becomes a supply of services. This does not just cast doubt on previous rulings but may also have sparked a trend, the future extent of which remains unknown.

In this issue we present these four references for a preliminary ruling. Alongside this we focus in particular on the BMF guidance on the "new" input VAT refund procedure which came into force on 1 January 2010. This edition also contains a report on the amendment to the BMF guidance on the place of supply of services effective from 1 January 2010, and we take a look at the latest ECJ ruling on the topic of personal signatures on input VAT refund applications.

Yours
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Partner, Hamburg

AUDIT ■ TAX ■ ADVISORY

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Economic Growth Acceleration Act enters into force

Article 5 of the Economic Growth Acceleration Act (Gesetz zur Beschleunigung des Wirtschaftswachstums) of 22 December 2009, German Federal Law Gazette 2009 I, 3950

The amendment to the German VAT Act entered into force on 1 January 2010. By introducing this change, the legislators are implementing an option provided by Directive 2006/112/EC, the VAT Directive. With effect from 1 January 2010, accommodation services will only be taxed at a rate of 7% (§ 12 (2) no. 11 German VAT Law (UStG)). This will also apply to short-term leases of camping areas. Classic services ancillary to the pure provision of accommodation, such as catering, TV and Internet usage, wellness products, etc., will be excluded from the rate reduction.

Please note:
The restriction of the rate reduction to pure accommodation services does not influence the systematic distinction between principal and ancillary supply. The rate reduction only applies to short-term leases of no longer than six months' duration. The German Federal Ministry of Finance (BMF) intends to publish an introductory guidance. It remains to be seen whether the BMF agrees with the judgement of the BFH dated 15 January 2009 (ref. no. V R 9/06) concerning catering services provided to hotel guests.

Draft law on the implementation of EU tax provisions and the amendment of tax regulations passed by the Cabinet

On the basis of a draft dated 17 November 2009 (see the VAT Newsletter of December 2009), the Cabinet passed a draft on 16 December 2009, containing the planned changes to VAT law, which will take effect from 1 July 2010 (or, in the case of
§ 27a UStG, from 1 January 2010). These relate in particular to the reform of the exemption for universal postal services (§ 4 (11b) UStG draft) and on the submission deadlines for EC Sales Lists (§ 18a UStG draft).

Supplies of new cars to be reported from 1 July 2010

From 1 July 2010 a new Operating Regulation comes into force (German Federal Law Gazette 2009 I, 630). In particular businesses have to report intra-community supplies of new cars in a special procedure, as far as the customer does not use a non-German VAT identification number of an EU member state. The businesses have to submit the data for each transaction electronically to the German Federal Central Tax Office ("Bundeszentralamt für Steuern") – but not to include the data in the EC Sales List ("recapitulative statement").

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German Federal Ministry of Finance specifies its position on the place of supply of services from 1 January 2010

BMF guidance of 8 December 2009 (ref. no. IV B 9 – S 7117/08/10001)

In its additional guidance concerning the new regulations on the place of supply, effective from 1 January 2010 (cf. BMF guidance of 4 September 2009 – IV B 9 – S 7117/08/10001 and the October 2009 edition of the VAT Newsletter), the BMF has now made clear that, for a service allocated to both the business and non-business activities of the recipient, the overall place of supply must always be determined in accordance with § 3a (2) sent. 1 UStG (generally this is the place from which the customer runs his business).

However, in certain cases where, on the basis of § 3a (2) UStG, the place of supply is in Germany, the authorities will not charge VAT in Germany. The precondition is that the supply was provided exclusively outside of the EU. Above all, this affects transportation of goods in a non-member country where the recipient has its registered office in Germany. It applies regardless of whether the supplier or – by means of the reverse charge procedure – the recipient is liable for the VAT.

Please note:
The new provisions governing the place of supply pursuant to §§ 3a et seq. UStG apply to all services performed after 31 December 2009. The date of invoicing and the date of payment are irrelevant.
Furthermore, the German Annual Tax Act 2009 has hugely expanded the scope of application of the new B2B business rule (services rendered to taxable persons for their businesses) – see the January 2009 edition of the VAT Newsletter.

German Federal Ministry of Finance on the input VAT refund procedure from 1 January 2010

BMF guidance of 3 December 2009 (ref. no. IV B – S 7359/09/10001)

As well as changes to the rules on the place of supply of services, 1 January 2010 also sees new regulations governing the input VAT refund procedure for companies established within the EU. In its guidance of 3 December 2009 the BMF gave a detailed statement of its position on the changes.

The main change is the easement for taxable persons to apply for refunds via the Member State in which they are resident. The refund application has to be submitted via an electronic portal. Businesses established in other EU Member States must provide electronic copies of the invoices or import documents with the application (and the basis of assessment must be at least EUR 1,000 or EUR

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250 for fuels) concerning VAT refund in Germany. The same applies to businesses established in Germany where required by the Member State of refund. For technical reasons, the size of the file attachments accompanying the refund application may not exceed 5 MB. Evidence of business capacity (by way of certificate of taxable status) is only required for German refund applications from businesses established in non-member countries and non-member countries applications from businesses established in Germany.

Please note:
The input VAT refund procedure only applies when the business entitled to the refund carries out no taxable transactions within the country of refund for which it owes VAT.
Furthermore, the German tax authorities treat a business that owns and lets or intends to let real estate in Germany as established in Germany.

European Court of Justice rejects German legal practice requiring the business owner's personal signature on input VAT refund applications

ECJ, ruling of 3 December 2009 (case C-433/08 "Yaesu Europe BV")

On 3 December 2009, the European Court of Justice issued its judgment in a case involving an input VAT refund claim that had been rejected by the German Federal Central Tax Office. Contrary to § 18 (9) sent. 5 UStG in the version valid until 31 December 2009, the ECJ ruled that an application for a VAT refund must not necessarily be signed personally by the taxable person, but that the signature of an authorized person is sufficient. The ECJ interpreted the concept of "signature" as uniformly autonomous within Community law. In the absence of a provision demanding a personal signature from the taxable person, the ECJ concludes that the signature of an authorized person must also be permissible.

Please note:
Since the statements of the ECJ in the case at hand pertain to an interpretation of the Eighth Directive (Directive 79/1072/EEC of 6 December 1979), they will initially affect refund applications from businesses established within the EU. On 1 January 2010, the Eighth Directive was superseded by new provisions governing the input VAT refund procedure, implemented because of the VAT package. Refund applications from that date onwards must be submitted electronically. A signature – irrespective of whose – is no longer necessary.

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German Federal Tax Court refers four cases involving "restaurant and catering services" to the ECJ for judgment

BFH, decisions of 15 October 2009 (ref. no. XI R 6/08 and 37/08) and 27 October 2009 (ref. no. V R 3/07 and 35/08)

On the basis of four referral orders, the Federal Tax Court (BFH) has appealed to the ECJ to provide a uniform definition of the scope of restaurant and catering services (to which the standard rate of 19% applies) and that of the supply of foodstuffs (which often qualifies for the reduced rate of 7%).

The ECJ will be faced with the question of what the term "foodstuffs" means within Community law. The supply of foodstuffs can trigger application of the reduced rate of VAT as provided for in Art. 98 (2) in conjunction with the first Category of Annex III of the VAT Directive. It will have to clarify whether the term is restricted to takeaway foodstuffs or whether it also extends to dishes and meals prepared for immediate consumption by cooking, baking, frying or other processes. In particular, the ECJ will be called upon to make a statement as to whether the preparation of the food itself constitutes a service element material enough that the addition of just one further service element, such as the provision of tables, chairs, or other furniture, could render the entire supply one of "restaurant and catering services." While the judgment of the Fifth Senate of the BFH considers the preparation of food for immediate consumption to be a material service element that bestows a character of restaurant/catering supplies on the transaction regardless of any other service elements, the Eleventh Senate – at least in the case of supplies via a party service – assumes that restaurant and catering services are provided only if service personnel are involved.

The four referrals relate to two cases of the provision of food from a snack van with partially covered eating counters or boards, one case of the provision of food in a movie theater foyer, and one case of supplies by a party service.

Please note:
The Fifth Senate of the BFH only recently made its former rulings more concrete, with the two decisions of 18 December 2008 (ref. no. V R 55/06) and 18 February 2009 (ref. no. V R 90/07) to the effect that it had already qualified the preparation of meals and dishes as a material service element. The addition of just one further (material) service element would render the supply one of restaurant and catering services. This (altered) ruling of the Fifth Senate is not incorporated into the BMF guidance of 16 October 2008 (ref. no. IV B 8 – S 7100/07/10050).

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The Federal Tax Court in brief

BFH, ruling of 15 October 2009 (ref. no. XI R 52/06)

The BFH has classified supplies in connection with a mailshot campaign as a single supply of services subject to the standard rate of VAT. The supplies concerned were related to planning, creating, and distributing standard letters to potential donors for the purposes of providing information and collecting donations. The place of supply – according to the law in force until 31 December 2009 – was Germany (in accordance with § 3a (1) UStG), whereas the supply was made to a non-profit organization registered in another Member State. It was not necessary for the BFH to check whether in contrast to § 3a (1) UStG the service classified as advertising service according to § 3a (3) sent. 1 UStG in conjunction with § 3a (4) UStG.

Please note:
From 1 January 2010, the new provisions for the place of supply of services as per § 3a (2) UStG may be applicable where the recipient of the supply is acting in a business capacity.

BFH, ruling of 25 September 2009 (ref. no. XI R 14/08)

The BFH has rejected a claim for input tax from a real estate group relating to supplies for which only one of the group members was the recipient and where only his name appeared on the invoice. The BFH continues its previous approach of assuming the recipient to be only the person who, as a result of the obligations underlying the supply, is entitled and committed as the purchaser. The critical factor here is entering into transactions with third parties in one's own name. Furthermore, only the recipient of the supply named on the invoice is entitled to input tax deduction.

Please note:
The ruling of the ECJ in the HE case (ruling of 21 April 2005 – case C-25/03 – HE) only related to a reversed case in which a group acted as the recipient of a supply without engaging in any economic activity itself. The group member behind the group was the only one acting in a business capacity and the only one entitled to input tax deduction. The BFH expressly rejected the application of these principles to the current case since the two cases are not comparable.

BFH, ruling of 19 November 2009 (ref. no. V R 41/08)

The judgment of the BFH concerns questions around input VAT deduction in case of too much shown VAT on an invoice and questions about subsequent increased prices. If there's more VAT shown on an invoice as allowed then the customer is entitled to deduct as input VAT the correct VAT amount included in the wrong amount. An input VAT deduction in case of increased prices requires a subsequent agreement and the real payment of the customer.

Please note:
We received the judgement just after editorial deadline so that the next VAT newsletter will include more information about this topic.

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Seminar Notes

Breakfast Meetings: Reduced tax rate for accomodation services - impact on VAT and wage tax

09 February 2010 in Duesseldorf
10 February 2010 in Frankfurt
10 February 2010 in Berlin
11 February 2010 in Munich
12 February 2010 in Stuttgart
17 February 2010 in Hamburg

For more information to the seminars listed above
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VAT 2010

18 February 2010 in Frankfurt
23 February 2010 in Duesseldorf
24 February 2010 in Berlin
25 February 2010 in Munich
2 March 2010 in Hamburg
3 March 2010 in Nuremberg
4 March 2010 in Stuttgart

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