Information on German VAT developments
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VAT News

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VAT exemption for special investment funds: definitions and scope

The Main VAT Directive – and, consequently, the German VAT Act (Umsatzsteuergesetz) – provides for the VAT exemption of "the management of special investment funds as defined by member states". Thus the wording suggests two main conditions for the exemption: a special investment fund of a certain nature must be in place, and the activities subject to the exemption must be certain management activities. Correspondingly, in the case decided by the European Court of Justice (ECJ), the first matter was whether real estate funds (in terms of investment companies set up by a number of investors with the sole aim of investing the assembled assets in immovable property) meet the definition of such a "special investment fund". The second matter was whether the activities actually performed by the claimant in the referred case (and as cited in great detail in the decision) met the definition of management services in terms of the above-mentioned provision.

As for the first matter, the ECJ mentioned that certain investment funds, the so-called "undertakings for collective investment in transferable securities" (UCITS), would be within the scope of the exemption by default. However, in order to avoid distortion of competition, investment funds not classified as UCITS would need to be treated in the same way if they are sufficiently comparable to be in competition with such UCITS. Among other criteria of comparability, this would be the case if these investment funds were subject to specific state supervision. It seems that the administration of closed real estate funds, despite their specific state supervision, generally appear not to be subject to exemption for lack of certain conditions mentioned by the ECJ. As for management activities eligible for the above exemption, the main criterion is (in simplified terms) whether the activity consists in the collective investment of capital raised. Thus, for instance, the actual management of the immovable property of a special investment fund (eg, the strategic planning of the asset management) would not be covered.

Source: ECJ, C-595/13 "Fiscale Eenheid X", judgment of 9 December 2015, available at curia.europa.eu

National case law

Supply of real estate: no option for taxation outside the notarised sales agreement

The Federal Fiscal Court (Bundesfinanzhof, or BFH), by reference to the unambiguous wording of the German VAT Act, has found that an option for taxation of the supply of real estate may only be exercised in the notarised agreement on the sale of said real estate. This means that, for such supplies, an option for taxation must be declared in that notarised sales agreement at any rate and cannot be declared retroactively at a later point in time, not even by means of a notarised amendment or supplement of the original contract. By this decision, the BFH has opposed the hitherto opinion of the tax authorities on this matter.

Source: BFH, XI R 40/13, judgment of 21 October 2015, available at www.bundesfinanzhof.de (in German only)

Non-taxable transfer of a business carried out by a building developer

Building developers often seek to enhance the marketability of their erected or renovated objects by finding tenants before selling the objects to investors. Nevertheless, the sale of a building will normally not qualify for a transfer of a going concern outside the scope of VAT, since the predominant business activity of the seller remains the erection or renovation with subsequent sale of real estate (rather than the rental business). It has been subject to dispute in the past whether, and under what conditions, the rental business connected with erected or renovated buildings could become a "main" business activity that can be subject to a transfer of a going concern if continued by the acquirer if the respective building is sold. In a recent case, the Federal Fiscal Court (Bundesfinanzhof, or BFH) has dealt with the question whether, and under what conditions, this might be the case.

In the case on hand, a group of buildings was renovated and rented out after completion. The buildings were sold three years later. At that time, the vast majority of the space was already subject to long-term rental. The acquirer continued the existing tenancies. As the BFH argued, the building developer, at the time of sale, had transferred into a rental business due to sustainable rental activity. The tax office did not find an attentive ear with its arguments that the intended sale required a long period for the purpose of preparation, so that the rental activity was not considered as the main activity of the developer. While the decision indicates that, as a matter of principle, even building developers may develop a steady rental business, please note that this decision ought to be handled with prudence, since the preconditions for a transfer of a going concern for such cases were not elaborated on in much detail.

Source: BFH, XI R 16/14, judgment of 12 August 2015, available at www.bundesfinanzhof.de (in German only)

Further restrictions on document proof

Over recent years, jurisdiction was believed to have put the very strict and formal rules on documentary proofs for intra-community supplies of goods into perspective, providing more flexibility on the design of said proofs. The term "do as you like" was introduced, meaning that any proof admissible in regular courts was supposed to be eligible to serve as proof for the zero rating of intra-community supplies of goods. This would generally also include the proof by way of a witness report. In a recent decision, however, the Federal Fiscal Court (Bundesfinanzhof, or BFH) has considered a witness report, or any other proof that is not in line with the formal rules, to be inadmissible, except for cases where it is impossible or unreasonable to provide "formal evidence". This means that the applicability of the "do as you like" evidence has been considerably reduced to certain exceptional cases. While there are arguments that this might infringe upon certain principles developed by the European Court of Justice, it is recommended to collect the documentary proof as outlined by the tax authorities in order to avoid any exposure.

Source: BFH, V B 40/15, court order of 8 December 2015, available at www.bundesfinanzhof.de (in German only)

Extended credit of interest on refunds possible

The Federaln Fiscal Court (Bundesfinanzhof, or BFH) has held that in cases where the tax authorities need to refund overpaid duties to a taxpayer on the grounds of an EU regulation being found incompatible with EU law, an extended credit of interest is possible. In Germany, refunds are subject to an interest credit in favour of the taxpayer if the refund is to be paid out only 15 months after the tax has accrued (meaning 15 months after the end of the calendar year in which the tax arose). According to the BFH, this period of 15 months for which the tax authorities do not need to pay interest on refunds is not applicable if the refund is based on the fact that an EU regulation, on which the payment was based, is found to violate EU law. In such a case the interest refund is supposed to be calculated from the day the respective payment to the tax authorities was made until the day the refund is paid over to the taxpayer. While this decision is not directly related to a VAT case, it is considered possible that it is likewise applicable to VAT, since the German VAT Act is based on an EU Directive that may be infringed upon as well.

Source: BFH, VII R 32/14, judgment of 22 September 2015, available at www.bundesfinanzhof.de (in German only)

Basic principles of VAT grouping

VAT grouping means that several legally independent companies may be regarded as a single taxable person for the purpose of simplification in fiscal and administrative matters. While generally speaking, any taxable person regardless of their legal form may act as the head of a VAT group, to date only legal persons are admitted as affiliated members. In addition, whereas the Main VAT Directive only requires that VAT group members, "while legally independent, are closely bound to one another by financial, economic and organisational links", in Germany their participation in a VAT group is subject to particular conditions. The concerned legal persons must generally be integrated into the business of the head of the VAT group in terms of subordination. Following an ECJ ruling in 2015, the Federal Fiscal Court (Bundesfinanzhof, or BFH) has published a number of decisions dealing with basic principles of VAT grouping. Further to these decisions, VAT groups are not restricted to legal persons but may also include partnerships, albeit under very strict conditions. Apart from that, things have remained the same: the senate has defended the hitherto VAT treatment (including the requirement of a vertical structure), mostly arguing that the existing restrictions are required for combat against VAT avoidance. However, it remains to be seen if another senate of the BFH, which has not yet published pending decisions, agrees with this approach. We will inform you about these matters in more detail in another edition of our VAT newsflash.

Source: BFH V R 25/13, V R 15/14, V R 67/14, judgements of 2 December 2015, available at www.bundesfinanzhof.de (in German only)

Non-taxable split-up of a business

In the course of its above-mentioned decisions on VAT grouping, the Federal Fiscal Court (Bundesfinanzhof, or BFH) also decided on a business split-up. The claimant, a sole trader, split up his construction business in favour of two newly established partnerships, a holding and an operating company. The capital assets were transferred to the holding partnership which granted the use of those assets to the operating partnership free of charge, while the operating partnership continued the claimant's construction business. The tax office denied a non-taxable transfer of a going concern but assumed a transfer

within the scope of VAT. However, the BFH did not endorse the tax authorities' view as far as the operating partnership was concerned, as the grant of use in itself would not preclude a transfer of a going concern outside the scope of VAT. However, no transfer of a going concern was acknowledged with regard to the transaction of the capital assets to the holding partnership for a number of reasons, eg, the fact that the holding partnership was (at least initially) no taxable person. The BFH, however, seems to indicate that it might have been willing to allow a transfer of a going concern to the holding partnership as well if it had formed a VAT group with the operating partnership, so that the operating and the holding company were considered as a single taxable person to which the totality of assets were transferred.

Source: BFH, V R 36/13, judgment of 3 December 2015, available at www.bundesfinanzhof.de (in German only)

Correction of VAT which is not legally due

In Germany, a distinction must be made between wrongly charged VAT and unjustified VAT. To put it simply, while the first term concerns a VAT amount which is too high (eg, charging standard VAT for supplies actually subject to the reduced VAT rate), the latter is applicable, for example, in cases where a supply is invoiced but which has never been carried out. In the latter case, a correction is far more cumbersome and requires, for example, an approval from the tax office which will not be granted until the risk of any loss of tax revenues can be excluded. This requires either that the input VAT from the respective invoice has never been deducted by the recipient of the invoice, or that the deducted VAT has been paid back. After the tax office has made sure that one of these two possibilities applies, the tax is to be adjusted for the time the risk of loss of tax revenues was eliminated. Said approval includes details about the amount of adjustment and the taxation period for which the adjustment is to be made. Currently, the VAT Application Guidelines (Umsatzsteuer-Anwendungserlass) issued by the tax authorities stipulate that, in a case where the input VAT has never been deducted, the adjustment has to be made for the period in which the unjustified VAT has arisen (which is generally the time the invoice that shows the unjustified VAT was issued). In a recent decision, the Federal Fiscal Court (Bundesfinanzhof, or BFH) appears to argue that the adjustment cannot be made retroactively, but only for the period in which the invoice was corrected. While there is doubt as to the exact conception of the BFH, this opinion might infringe upon the legislator's intention expressed in the explanatory part of the draft provisions (which came into force back in 2004). Moreover, it seems to ignore the fact that the tax office informs the taxable person of the adjustment period, which would otherwise not be necessary since – of course – the supplier knows the time at which the invoice was corrected.

Source: BFH, XI R 47/13, judgment of 16 September 2015, available at www.bundesfinanzhof.de (in German only)

Construction supplies: new developments with respect to the transitional provision

Back in 2013, the Federal Fiscal Court (Bundesfinanzhof, or BFH), in several respects, had dismissed the opinion of the tax authorities about the conditions of the reverse charge procedure for domestic construction work. This meant that, in many cases, in circumstances where the tax authorities had assumed that the VAT liability was shifted to the customer, the VAT liability had actually remained due by the supplier. Correspondingly, many customers happily claimed back the output VAT paid by them, while the tax authorities tried to claim the VAT from the supplier. The suppliers, however, would in

many cases have been in a position to counter any reclaims by referring to a clause ensuring protection of confidence. This clause implied that the tax authorities, on the basis of an adverse BFH decision, may generally not go back in time as far as they like for retroactively assessing VAT for past years. In order to limit the loss of tax revenue, the legislator has (in simplified terms) excluded, by means of a transitional provision, the application of said protection of confidence clause. Since that time, many tax courts have had the occasion to decide about interim legal protection measures initiated by the suppliers in order to avoid VAT payments of considerable amounts. The picture is all but clear: some of the courts assumed said transitional provision to be unconstitutional, other courts did not, and a third set of courts rejected the interim legal protection for other reasons. Now, the BFH has decided on an application for interim legal protection. In its opinion, the fact that many tax courts have assumed different positions would be a reason for approving such an application, since the legal matter is obviously unclear and since a decision on this matter can only be made in the course of main proceedings. Please note that, in the meantime, the Fiscal Court of Lower Saxony (Niedersächsisches Finanzgericht) has commented on civil legal matters, as did the District Court of Cologne (Landgericht Köln). Both of them have dealt with the possibility for the supplier to reclaim VAT from the customer in such a case, as well as with the time limit that applies to civil legal claims and that may not have elapsed, at least in certain cases, even if the respective work was carried out a number of years ago.

Source: BFH, XI B 84/15, court order of 17 December 2015, available at www.bundesfinanzhof.de (in German only); Niedersächsisches FG, 5 K 80/15, judgment of 29 October 2015; LG Köln, 7 O 103/15, judgment of 30 October 2015

Post office box addresses and the requirement of a "complete" address on a VAT invoice

Unlike the European Court of Justice, the Federal Fiscal Court (Bundesfinanzhof, or BFH) BFH is of the opinion that a purchase invoice can only be considered valid (allowing for input VAT recovery) if all information given on the invoice is correct from an objective point of view. If the recipient of the invoice did not know that the details on the invoice were incorrect, although they did everything possible to check them, they may apply for equitable relief (which is a different procedure).

In October 2015, the BFH re-confirmed this position and explained that the "full address of the supplier" (which is one prerequisite for a valid VAT invoice) needs to be understood as the address where the supplier actually carries out their business. In the course of this decision, the BFH mentioned that a mere post order box would not be sufficient as a proper address of the supplier for a valid VAT invoice. Unfortunately, the opinion of the German tax authorities in this respect is unclear. There are signs that they would like to follow the BFH, and there is an indication that they would approve the naming of a post order box in VAT invoices.

For the time being, until this matter has become more clear, taxable persons who wish to deduct input VAT from invoices showing only a post order box address (of the supplier or the customer) should consider disclosing this to their tax office. The same goes for addresses consisting of the postcode and the location only.

Source: BFH, V R 23/14, judgment of 22. July 2015, available at www.bundesfinanzhof.de (in German only)

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