KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

April 2023

NEWS FROM THE BFH

On the VAT treatment of heat supplied from a biogas facility
BFH, CJEU submission of 22 November 2022, XI R 17/20

The German Federal Tax Court (BFH) submitted a question to the Court of Justice of the European Union (CJEU) on the VAT treatment of heat supplied from a biogas facility.

The case
The plaintiff operates a biogas facility to produce biogas from biomass. The biogas produced was used for the decentralized generation of electricity and heat in a connected combined heat and power plant (CHP) by being fed to a combustion motor, which operated a generator. The electricity produced in this way was mainly fed into the general power grid and paid for by the operator of the power grid.

The heat that was also produced during this process was used in part by the generation process. The larger part of the heat was provided by the plaintiff to the trader A "free of charge" for the drying of wood in containers, and to B, who used the heat to heat their asparagus fields. Both contracts stipulate that the amount of the payment shall be individually determined according to the economic situation of the recipient of the heat and not fixed in the contracts themselves.

As the plaintiff did not invoice any fee, the tax authorities assumed a free-of-charge receipt of heat in line with § 3 (1b) sent. 1 no. 3 German VAT Law (UStG) for A and B. Due to the lack of a purchase price for the heat, the basis of assessment for this receipt was calculated according to the cost price in accordance with § 10 (4) sent. 1 no. 1 UStG.

The Lower Tax Court partially granted the lawsuit. It reduced the VAT determined. According to § 10 (4) sent. 1 no. 1 UStG, the VAT for a benefit in kind is calculated on the cost price, which is calculated using the so-called market value method. The market value for electricity and heat in the plaintiff's specific location should be applied.

Preliminary ruling questions
The BFH submitted the following questions to the CJEU on the interpretation of Art. 16 and Art. 74 of the VAT Directive:

1. Does an "application of a taxable person of goods forming part of his business assets … free of charge" within the meaning of Art. 16 of the VAT Directive exist, if the taxpayer provides heat from their business free of charge to

Content

another taxpayer for that taxpayer's commercial activity (in this case: contribution of heat from the CHP of a supplier of electricity to an agricultural company for the heating of asparagus fields)? Does this depend on the taxpaying recipient using the heat for purposes which would entitle them to deduct input VAT?

2. Does the fact of a disposal (Art. 16 of the VAT Directive) limit the cost price within the meaning of Art. 74 of the VAT Directive by making it necessary to include only costs subject to input VAT?

3. Does the cost price include only the direct production or generation costs or also costs that can only be indirectly imputable costs such as, for example, financing expenses?

Please note:
The questions that the BFH has posed to the CJEU extend in their significance far beyond the supposed "special topic" of the turnover taxation of combined heat and power plants. In recent times, the BFH has frequently dealt with plants with which an entrepreneur generates electricity and heat, whereby he supplies the electricity subject to tax and consumes the heat, e.g. privately or gives it to other persons free of charge.

The focus was on the question of what effects such a gratuitous supply of heat can have on the input tax deduction. The BFH (ruling of 25 November 2021 - V R 45/20) came to the conclusion that despite private use of heat, the full input tax deduction for the acquisition and operation of the system existed with the delivery of the heat for private residents. The situation is different from the cases of exclusive use of the system for withdrawal if the system is used partly for the supply of electricity against payment and partly for the supply of electricity free of charge. In this case, the full input tax deduction remains.

Since the joint use for free heat supply does not restrict the input tax deduction from the construction costs for the plant, a decision must therefore be made not on input tax apportionment, but on the assessment of this withdrawal in accordance with § 10 para. 4 sent. 1 no. 1 UStG. This distinction is already of great importance for practice.

With its order for reference, the XI Senate of the BFH expands the issue even further. It asks the CJEU whether, if a free supply is made to a taxable person for the latter's economic activity (supply of heat for heating asparagus fields on an agricultural holding), a withdrawal can exist at all under Article 16 of the VAT Directive or whether a distinction should be made according to whether the recipient of the supply is entitled to deduct input tax on the basis of his economic activity. In particular, the BFH wants to know from the CJEU how its ruling of 16 September 2020 (C-528/19, Mitteldeutsche Hartstein-Industrie) is to be understood. Here, the CJEU had denied a withdrawal if the taxpayer, within the scope of its economic activity, carried out work free of charge for the benefit of a municipality to expand a municipal road that was also used by the public. It therefore remains exciting to see whether the CJEU will find that a withdrawal has taken place in the case in dispute, even though the heat continues to be used for business purposes. It is possible that the CJEU will not even need to comment on the details of questions 2 and 3 (scope of the cost price).

NEWS FROM THE BMF

VAT rate for the supply of woodchips

BMF, guidance of 4 April 2023 – III C 2 - S 7221/19/10002 :004

According to the BMF the BFH has ruled on 21 April 2022, V R 2/22 (V R 6/18), subsequent to the CJEU ruling of 3 February 2022 - C-515/20 – B, that woodchips, according to § 12 (2) no. 1 UStG in conjunction with Annex 2 no. 48 (a) of the UStG, are subject to the reduced VAT rate if they are deemed to be firewood if interpreted in compliance with Art. 122 of the VAT Directive within the meaning of the description of goods in Annex 2 no.48 (a) to the UStG. The lack of the customs tariff requirements necessary for this presents no obstacle if the woodchips and the customs tariff requirements needed to be fulfilled to indicate firewood are interchangeable from the point of view of the average consumer.

In doing so, the BFH has completely abandoned its previous legal principles on the application of the reduced VAT rate to the supply of woodchips. The BFH ruling of 26 June 2018 – VII R 47/17 is thus superseded.

According to the German Ministry of Finance (BMF), the BFH ruling of 21 April 2022, V R 2/22 (V R 6/18) should apply solely to the supply of woodchips unless the form or quantity of the delivery upon sale shows that it is not intended to be incinerated.

This BFH case law shall not apply to other goods not contained in Annex 2 to § 12 UStG. The reference to customs tariffs stipulated in the UStG continues to constitute a differentiation criterion that is recognized as being permissible and generally appropriate for the purposes of determining the VAT rate.

The provisions of the BMF guidance must be applied in all open cases.

For supplies carried out before 1 January 2023no objection – including for the purposes of the recipient of the supply's input VAT deduction – shall be raised if the supplying company invokes the application of the standard rate of VAT.

Please note:
The application of the reduced correct VAT rate often causes difficulties in practice because Section 12 (2) Nos. 1 and 2 UStG, with its reference to Annex 2 and the reference to the Combined Nomenclature, is opaque not only for taxable persons but also for the tax offices. This is because customs law interpretation rules, which are necessary for classification in the Combined Nomenclature, are often decisive.

A look at the UStAE confirms the difficulties, because Section 12.1 (1) there refers to an unenlightening BMF letter from 2004, which by its very nature cannot deal with current classification problems. As the years-long dispute about the reduced tax rate for the supply of wood chips shows, a company sometimes needs a lot of patience to get its rights. This is because the non-binding customs tariff information only reflects the (possibly) correct classification under customs law; the principles of value added tax (such as the principle of neutrality in particular) fall by the wayside in this respect. This is clearly illustrated by wood chips, which were initially classified by the VII Senate of the BFH according to the Combined Nomenclature and thus confirmed the standard tax rate. However, it was not taken into account that firewood can be subject to the reduced tax rate according to Art. 122 of the VAT Directive and that it would be contrary to the principle of neutrality of VAT to limit this only to certain marketing products. Following the submission of the V. Senate, this then led to the positive CJEU ruling of February 2022, the subsequent BFH ruling of April 2022 and the present BMF letter of April 4, 2023. The supply of the wood chips took place in 2015. A long dispute, but important because it has now been confirmed by the highest court that the principle of neutrality is also relevant for the reduced tax rate, even if the BMF only wants to limit it to the supply of wood chips.

MISCELLANEOUS

No tax liability in the case of VAT incorrectly shown on invoice to end-user

Federal Tax Court (Vienna), resolution of 27 January 2023 – RV/7100930/2021, P-GmBH

P-GmbH operates an indoor amusement park. In 2019, the year under dispute, P-GmbH levied VAT at the standard rate of 20 per cent on entry fees. P-GmbH corrected its VAT return, as the entrance fees are subject to the reduced VAT rate of 13 per cent. According to Austrian law, the cash register receipts issued by P-GmbH are invoices for small amounts. De facto, no correction vis-à-vis the customers takes place.

Following a submission by the Federal Tax Court, the CJEU ruled that a company that has provided a supply of services and shown VAT in its invoices – calculated on the basis of an incorrect VAT rate – does not owe the portion of VAT incorrectly calculated, if there is no risk of loss of tax revenue because the supply of services was provided solely to end-users who are not entitled to deduct input VAT (CJEU, ruling of 8 December 2022 – case C-378/21 – P-GmbH). The Austrian law must be interpreted as being compliant with the Directive. Even if this were not possible, in this case the direct application of Art. 203 of the VAT Directive should be possible. It is a fact that P-GmbH (as a precaution) directly invoked Art. 203 of the VAT Directive.

As it cannot be fully ruled out that customers of P-GmbH could have deducted input VAT on the invoices, it must be estimated (cf. Advocate General Kokott's conclusions of 8 September 2022, point 43). Due to the overwhelming probability that P-GmbH's supplies are carried out solely for the customers' private use, the Federal Tax Court estimated 0.5 per cent of revenue for which a tax liability exists on the strength of the invoices.

Please note:
The ruling of the Federal Tax Court (Vienna) implements the decision of the CJEU of December 2022, according to which a (small-value) invoice issued to private individuals cannot trigger a tax liability under Art. 203 of the VAT Directive because it does not jeopardize tax revenue.

Still in 2018, the V. Senate of the BFH ruled that a tax liability under Section 14c (1) UStG also arises when an invoice is issued to non-entrepreneurs (ruling of 13 December 2018, V R 4/18). Accordingly, a tax accrual in a lower amount than shown in the invoice for the service only came into consideration on the basis of an invoice correction pursuant to Section 14c (1) sent. 2 UStG for the taxable period of the correction. Such an adjustment

and refund of the tax was thus almost impossible, since the invoice recipients are usually unknown. The BFH then went on to state that even the fact that invoices within the meaning of § 14c UStG cannot lead to an input tax deduction does not prevent this. This ruling has thus been superseded by the CJEU decision. Cases in which private individuals and entrepreneurs can be or are recipients of services in equal proportions may also be of interest. This does not necessarily lead to a full § 14c VAT liability. This is because, as the Advocate General rightly pointed out in her opinion of 8 September 2022, the private individuals' share can also be determined by way of estimation. In the case of the in-door playground from Austria, the Federal Tax Court (Vienna) could not bring itself to fully uphold the claim, but nevertheless assumed a 99.5% share of playground visitors who had bought an admission ticket there for purely private pleasure. The Federal Tax Court (Vienna) also held that Austrian law could be interpreted in conformity with the Directive and based on whether there was a threat to tax revenue. In the same way, Section 14c (1) UStG should also be interpreted in this way. Consequently, its scope of application does not apply if there is no threat to tax revenue. The German administration and also the German courts will have to implement this accordingly.

VAT on a dinner show

Lower Tax Court Saxony, ruling of 6 December 2022, 1 K 281/22, non-admission appeal lodged, BFH ref. XI B 3/23

This ruling from the Lower Tax Court Saxony concerns the VAT rate on the organizing of a dinner show.

The case
A company organizes the dinner show “Y” every year in November and December. For a fee (entrance), it offers its guests a multi-course dinner with entertainment by artists and musicians. Drinks are invoiced separately.

The company believes that the revenues from the sale of admission tickets in 2021 should be subject to the reduced tax rate, contrary to what was originally declared.

The service provided by the company consists of the components "variety show" and "menu accompaniment". The "dinner show" performance was a single, complex performance subject to the reduced tax rate.

Reasons for decision
The Saxon Fiscal Court upholds the company's claim.

The dinner show, for which the company generated revenues through pre-sold tickets, does not consist of several services to be assessed separately, but forms a single, complex service.

The artistic and artistic elements and the multi-course menu had combined to form an inseparable economic process. In view of the desired connection between menu and show, a division into a culinary and an artistic individual (main) performance was just as unrealistic as the assumption that the menu was an ancillary service to the show or the show was an ancillary service to the menu. The show and the menu are coordinated with each other and intertwine in terms of time. Due to the interconnection, the service can only be used as a whole. The visitor wants to experience and enjoy the show and the menu together. It is about the connection of both elements.

The complex performance of the dinner show is not subject to the reduced tax rate pursuant to Section 12 (2) No. 7 (a) UStG, since the theatrical performance is not the main component of the uniform overall performance. The theatrical performance must constitute the actual purpose of the event. The complex performance of the dinner show is also not subject to the reduced tax rate pursuant to Section 12 (2) No. 15 UStG, since the restaurant services are not the main component of the uniform overall performance.

Accordingly, the Tax Court comes to the conclusion that the reduced tax rate is to be applied to the "dinner show" service by way of a broader interpretation because there is an unplanned regulatory gap. A legal loophole would be present in this respect with reference to the principle of equality, as the Value Added Tax Act does not contain a regulation on the application of the reduced tax rate either to a complex service, the elements of which are each subject to a reduced tax rate when considered separately, in general, or to the complex service "dinner show".

An exclusion of a complex service from the application of the reduced tax rate would at least represent a contradiction to the legal regulation if the restaurant or catering service - as in the case in dispute - was an equivalent component of the service in addition to another service component, which in turn was subject to the reduced tax rate if it formed the main component of the complex service.

Please note:
In its ruling of 13 June 2018 XI R 2/16, the BFH decided that a bundle of services consisting of entertainment and culinary provision of guests (so-called

"dinner show") is subject to the standard tax rate in any case if it is a uniform, complex service. The Saxon Tax Court, on the other hand, has affirmed the reduced tax rate for a dinner show as described. The case will now be submitted to the BFH again in the context of a non-admission appeal.

VAT in the case of private use of electric vehicles & Co.

Mecklenburg-Western Pomerania Ministry of Finance, decree of 31 January 2023 – S 7109-00000-2018/001

In connection with the BMF guidance of 7 February 2022 on VAT in the case of the private use of electric vehicles, hybrid electric vehicles, electric bikes and bicycles as well as the transfer of electric bikes and bicycles to staff, the Ministry of Finance of Mecklenburg-Western Pomerania (hereinafter: FM M-V) has commented on some doubtful issues.

In the opinion of the FM M-V, for purchased bicycles with a value of less than 500 euros, an input tax deduction from the input taxed costs is still permissible and neither a service for consideration nor a gratuitous transfer of value is to be subject to VAT (simplification rule).

If an electric or hybrid vehicle or an electric bike is charged at the cost of the company, is this supply of electricity included in the flat rate calculation using the 1% method, similar to the use of fuel used in conventional vehicle? With regard to the deduction of input VAT, the following must also be referred to: If the staff carries out the refueling with electricity at their own cost (for example by using a connection at home), it is not the company but rather the member of staff who is the recipient of the electricity.

It was asked if a lump sum deduction of 20 per cent of the 1% can be applied if, in determining the basis of assessment for the corresponding transactions, the simplification provision in Section 15.24 (3) sent. 3 UStAE can be used. However, the resulting 1% value is to be regarded as the gross value from which the VAT is to be deducted.

Please note:
Until 7 February 2022, the tax authorities - in contrast to income tax law - had not explicitly commented on the use of electric or electric hybrid vehicles, electric bicycles or bicycles for VAT purposes. This BMF guidance has been implemented in section 15.24 UStAE.

Supplies of gas via the natural gas network and heat via a heat network

Regional Tax Authorities of Bavaria, ordinance of 30 March 2023 – S 7220.1.1-11/12 St 33

In connection with the BMF guidance of 25 October 2022 and the FAQs provided on the BMF website according to the Regional Tax Authorities of Bavaria the following shall apply (excerpts):

Supplies of gas via the natural gas network
Besides supplies of natural gas and biogas via the natural gas network (regardless of their usage), the benefit applies to supplies of liquid gas (LNG and LPG) by tanker (both for the production of heat as well as the creation of process heat) as well as the supply of CNG at a garage.

The supply of gas via a private network or a private supply line is equivalent to the supply of gas by tanker.

There is no benefit for the sale of liquid gas (LPG) as a fuel to the garage or the sale of gas in bottles or cartridges.

Supply of heat via a heating network
The term “supply of heat via a heating network” includes both supplies to larger heat generation plants that supply the general public with heat, and smaller systems (e.g. biogas plants or private CHPs) that only supply a limited group of people.

A benefit in kind to be taxed as a result of one’s own private use is, according to § 3 (1b) UStG, equivalent to a supply for a consideration and therefore also subject to the reduced rate of VAT.

Laying a heating home connection
The laying of a heating home connection also counts as a “supply of heat”.

Laying a multi-party home connection
Laying a multi-party connection (for example, water, gas, electricity, telecoms) constitutes a single complex supply “provision of access to all utilities” that is subject to the standard rate of VAT.

Connection to a local liquid gas supply network
Fees for the connection to a local liquid gas supply network are subject to the reduced VAT rate analogous to gas house connections as “supplies of gas”.

No reduction applies to the laying of a connection from a (private) liquid gas tank to the consumer’s pipes in the house or an entry/exit point, as this does not constitute a junction between the pipe network

of the (liquid) gas provider and the consumer's property.

Please note:
This is the opinion of the Bavarian State Tax Office, with which one can confront tax offices outside of Bavaria, but which do not necessarily have to hold the same view if this should not correspond to the BMF letter of 25 October 2022 and the FAQ on the BMF website.

IN BRIEF

Requirement for a proposed amendment for the avoidance of opposing VAT determinations in the case of tax groups

BFH, ruling of 16 March 2023, V R 14/21 (V R 45/19)

Following the CJEU ruling of 15 April 2021 – case C 868/191 – Finanzamt für Körperschaften Berlin – the BFH has ruled that a commercial partnership with a "capitalist structure" can be a subordinate company, if besides the controlling enterprise, shareholders in the commercial partnership are also persons or entities who are not financially integrated in the controlling enterprise's company. To this extent, the BFH is abandoning its case law to the contrary.

If a KG claims as a result of the amended BFH jurisprudence that it is a subordinate company within the meaning of § 2 (2) no. 2 UStG, the revocation of a tax determination issued against the KG requires that the controlling enterprise, for the avoidance of conflicting VAT determinations, files a proposed amendment for the VAT determination it has received.

Controlling enterprises and subordinate companies cannot demand, in the same VAT period, that one part of the group (for example the subordinate company) be taxed on the basis of the previous case law and the other part of the enterprise (for example, the controlling enterprise) on the changed case law. In this respect, the BFH confirms its recent case law (cf. BFH ruling of 26 August 2021 - V R 13/20).

Please note:
Due to the BFH submission (decision of 26 January 2023 - V R 20/22 (V R 40/19) on the taxability of intra-group sales, all contentious proceedings are practically on hold again until the CJEU has ruled on this issue in 2024 at the earliest.

Photovoltaic system: Input VAT deduction from repair costs to roof

BFH, ruling of 7 December 2022, XI R 16/21

According to the BFH, for the deduction of input VAT not only is the use of input supplies utilized by the company relevant but also the exclusive reason for the reason for the input supply.

Accordingly, the following applies: If, as a result of an improper installation of a commercially used photovoltaic system, the roof of a house serving private housing purposes is damaged, the company is entitled to deduct input VAT on the carpenter and roofing work required to fix the damage.

Furthermore, the continued use of the roof for private housing needs is in any case not relevant if the company does not benefit beyond the repair of the damage, for example through an increase it their private assets.

Rejection of input VAT deduction in the case of fraudulent goods in a supply chain

Lower Tax Court Saxony, ruling of 23 February 2022 – 8 K 141/18, appeal withdrawn

Whether the requirements for the creation and exercising of the right to deduct input VAT are in themselves satisfied, must be rejected, according to the Lower Tax Court Saxony, if as a result of the objective facts of the case it is clear that this right was claimed in a fraudulent or abusive way.

This should not only be the case if a company participating in a supply chain itself commits tax fraud, but also if an employee of the company knew or should have known that the company participated, with its purchase, in a VAT fraud as part of a supply chain.

In this case, a rejection of the input VAT deduction is also not excluded if, potentially, the supplier or other companies in the supply chain are also refused an input VAT deduction.

Discussion proposal of the BMF for mandatory e-invoicing for B2B domestic sales as of 1 January 2025

In Germany, an e-invoice obligation for domestic B2B sales shall be introduced as of 1 January 2025. Among other things, the following is proposed: "The invoice for a taxable supply in Germany must be issued as an electronic invoice if the company providing the supply is based in Germany and the supply is not tax-exempt under § 4 numbers 1

to 7. Paper invoices or PDF invoices would then no longer be permitted. The BMF has sent on 17 April 2023 a discussion draft for amendment of § 14 UStG to the associations for comments by 8 May 2023. The proposal should also be seen in the context of the introduction of an electronic reporting system for transaction-related reporting of B2B sales to the tax authorities (VIDA - VAT in the Digital Age, see VAT newsletter February 2023).

Please note that we will discuss this topic in detail at our hybrid VAT annual conference on 23 May 2023. You will find further information on this at the end of this newsletter under Events.

BMF guidance on chain transactions

BMF, guidance of 25 April 2023 - III C 2 - S 7116-a/19/10001 :003

Please note that the long-awaited BMF guidance (draft version already dated 22 June 2022) has now been published.

Section 3.14 UStAE "Chain transactions" has been amended accordingly, new examples have been added or amended.

The principles of the BMFguidance are to be applied in all open cases.

For the period until the publication of the BMF guidance, it is not objected if the allocation of the transport responsibility has been determined by the parties involved by mutual agreement deviating from section 3.14 paragraphs 7 to 11 of the UStAE.

We will discuss the resulting effects on practice in detail at this year's hybrid VAT annual conference on 23 May 2023, both in a presentation and a panel discussion from the perspective of the tax authorities, the courts, and the case law. Further information can be found at the end of this newsletter under Events.

FROM AROUND THE WORLD

TaxNewsFlash Indirect Tax

KPMG articles on indirect tax from around the world

You can find the following articles here.

7 Apr - Saudi Arabia: Third wave of e-invoicing applicability

6 Apr - Switzerland: Reminder of 30 June 2023 deadline to claim VAT refunds

30 Mar - Spain: Services performed by Spanish branch for foreign head office not subject to VAT (National High Court decision)

28 Mar - Poland: New bill on mandatory use of national e-invoicing system

23 Mar - EU: VAT Committee working paper on treatment of NFTs

23 Mar - Israel: Proposed VAT on digital services and goods

22 Mar - Belgium: Draft legislation modernizing “VAT chain” passed by Chamber of Representatives

21 Mar - Egypt: Guidance clarifying VAT on digital services regime

17 Mar - Cyprus: Mandatory use of single tax portal for VAT payments

15 Mar - Poland: Tax consultations regarding introduction of concept of VAT warehouses

EVENTS

VAT 2023 – Hybrid Annual Meeting

Get an update on all relevant developments relevant to your business in terms of VAT on 23 May 2023, on-site in Frankfurt or via live stream! **Ms. Nadine Oldenburg* from the Ministry of Finance of North Rhine-Westphalia** will provide insights into current developments regarding the long-awaited and now published on **25 April 2023 BMF letter on chain transactions** as well as new developments in the area of **mandatory electronic invoicing (cf. draft of 17 April 2023 on amendment of § 14 UStG) and the VIDA considerations**. In his usual entertaining and practice-oriented manner, **Mr. Rainer Weymüller, Retired Presiding Judge at the Munich Tax Court and Of Counsel at KPMG,** will guide the audience through new case law on, among other things, the service commission, cost pass-through within the group, and tax liability under Section §14c UStG.

* in a non-official capacity

Register here.

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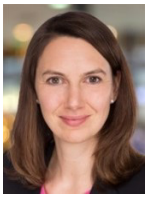

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