PKF

Newsletter

Key Issues:
VAT – New Guidelines for Leases and Lower Requirements for Invoices

02|20

Dear Readers,

At the end of January, the EU Parliament ratified the Withdrawal Agreement and **Brexit was accomplished.** To begin with, there will be no changes because the UK will remain in the single market and the customs union in order to avoid a cliff-edge break for the economy. During the transition period, which is scheduled to last until the end of 2020, comprehensive agreements will be negotiated for the creation of a free trade zone – we will be reporting on this. In this issue of our newsletter (under Latest Reports on p. 13) and likewise in the future we will keep you up-to-date.

The first two articles in our Tax section are positive from the point of view of the taxpayer. The **assessment base** for the non-cash benefit arising from the **use of e-bikes** has been lowered, once again. Furthermore, the conditions for the **transfer of a partnership interest at book value** have been considerably reduced. In our third report – a continuation of the report in the PKF Newsletter 11/2019 – we present the **OECD's concept for a minimum tax**. This was published at the end of 2019 under the title Pillar 2 – Global Anti-Base Erosion Proposal (GloBE) and the aim is to transfer it into legal form this year.

The **Key Issues** in this newsletter emanate from the field of **VAT**. First of all, you can read in more detail about the push by the fiscal authority to establish **separate laws with respect to VAT** for **leases** that would be in parallel to and different from those relating to income tax. Subsequently, you will find confirmation from the Federal Fiscal Court that when it comes to the requirements for proper invoices these may not be too stringent with respect to the **description of the items or service supplied.**

In the Legal section we kick off with a discussion of the main features of the new **Act to Transpose the Second Shareholder Rights Directive**. Under this, quoted companies will have to disclose far more information, than previously, to shareholders and other stakeholders. This is then followed by a report on a tax court ruling according to which, in cases where there are several managing directors, creditors are not completely free in their choice with respect to which **managing director** should be held **liable**.

With our best wishes for an interesting read.

Your Team at PKF

Key Issue

VAT – New Guidelines for Leases and Lower Requirements for Invoices

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TAX

StBin [German tax consultant] Elena Müller

Further concessions for making bicycles and e-bikes available for use

The new rules in the 2019 Annual Tax Act concerning tax incentives for electromobility have created many tax advantages for both employers as well as employees (cf. also PKF Newsletters 06/2019, 07-08/2019 and 12/2019). The fiscal authority has now also expressed its view, in particular, on the tax treatment of the provision of (electric) bikes.

1. Making available for use as a remuneration component

Normally, making available for use is a component of the compensation, as set out in the employment contract, in the form of a salary conversion. Initially, the assessment of the value of the private usage as remuneration was on the basis of 1% of the manufacturer's proportional recommended retail price, rounded off to the nearest € 100, on the date when the bike came into service (including VAT).

Over time, this proportion was gradually reduced. However, the date when the bike was initially made available for use is relevant for the assessment approach:

- up to 2019: based on the full amount of the recommended retail price,
- for 2019: based on half of the recommended retail price,
- from 2020: based on one quarter of the recommended retail price,

in each case, on the date when the bike came into service and with VAT included in the amount.

2. Making available for use in addition to the remuneration that is due

The non-cash benefits arising from the provision of company bicycles by employers to employees – in particular,

for private usage and for use for journeys between the home and the primary workplace location – in addition to the remuneration that is due have been tax-exempt since 1.1.2019 (Section 3 no. 37 of the German Income Tax Act). This tax exemption was extended through to 2030 in the 2019 Annual Tax Act.

3. Acquisition of (electric) bikes by employees

Frequently, when the period during which employers make electric bikes available for use comes to an end, employees are given the opportunity to acquire the electric bikes that they have been using at the residual value, thus, at a price below the standard local final price. In the case of the acquisition of an electric bike, a distinction is likewise made as to whether this constitutes remuneration, or whether the transfer of ownership takes place in addition to the remuneration that is due.

For reasons of simplicity, the standard local final price of an electric bike where ownership is transferred to the employee after three years (36 months) of its useful life may be set at 40% of the manufacturer's, importer's or wholesaler's recommended retail price, rounded off to the nearest €100, (including VAT) on the date when the electric bike came into service. The amount that results after the employee's payment has been deducted will constitute the relevant non-cash benefit for tax purposes.

As of 1.1.2020, if employers transfer ownership of company bicycles to employees, free of charge or at a discount, in addition to the remuneration that would in any case be due then the non-cash benefit can be taxed at a flat rate of 25% and, in this case, no contributions would be payable.

Please note: The tax exemption for usage and the flat-rate tax when ownership of bicycles is transferred apply solely to (electric) bikes that are not deemed to be motor vehicles under transport guidelines, i.e. are able, among other things, to achieve a maximum speed of 25 km/h and are not subject to compulsory registration and insurance cover.

StB [German tax consultant] Dennis Brügge

New Federal Ministry of Finance circular on the transfer of partnership interests for no consideration

In a circular from 20.11.2019, the Federal Ministry of Finance (Bundesministerium der Finanzen, BMF) revised its administrative guidance on Section 6(3) of the German Income Tax Act *(Einkommenssteuergesetz, EStG)* **and, in doing so, implemented the Federal Fiscal Court** *(Bundesfinanzhof, BFH)* **case-law, issued to-date, on the transfer of partnership interests for no consideration. In the following section we present a selection of the key changes and discuss the effects these will have in practice.1. Recognition of the arm's length value (application of Section 1 AStG)**

1. Revisions to reservation of usufruct

In the BMF circular, transfers where usufruct is reserved are discussed within the material scope of application for the first time. Accordingly, the reservation of a usufruct is not an obstacle to the rollover of book values. The transfer of a partnership interest under reservation of usufruct falls under Section 6(3) EStG if the new interest holder becomes a co-partner. The same would thus likewise apply to the transfer of a part of a co-partner's stake. By contrast, there would be no tax concessions for the transfer, for no consideration, of an individual commercial enterprise leased in its entirety under reservation of usufruct.

2. Clarification of treatment of essential special functional business assets

Section 6(3) clause 1 EStG presumes that, besides the share of the joint assets, all of the economic assets in special business assets that are of importance for the functioning of the business, on the transfer date, are indeed transferred.

If, at the time of the transfer of the share of the joint assets, the so-called special business assets that are essential for operations are retained and simultaneously, or on the same day, conveyed to the transferor's private assets then a rollover of book values would not be permitted because, at the time of the withdrawal, the special business assets that are essential for operations will have still been in the transferor's business assets and, in the case of such a constellation, precisely not all of the essential business assets of the existing operation, which are still available at the time of the transfer, would have

been transferred. Such cases would be deemed to be terminations of business with standard concessions.

3. Abandonment of the overall plan view

A radical change and thus a key aspect of the new BMF circular, in accordance with the supreme court ruling, is the abandonment of the overall plan view for the simultaneous transfer of partnership interests pursuant to Section 6(3) EStG and special business assets pursuant to Section 6(5) EStG. Accordingly, it is not an obstacle to the rollover of book values if economic assets that are essential for operations that are held as special business assets are conveyed, simultaneously or close in time, to the taxpayer's other business assets and/or special business assets. Although, the enterprise may not be broken up as a result. The simultaneous use of both tax-neutral privileges presumes that a functioning operating entity will continue to exist and that the taxation of hidden reserves will be ensured.

Furthermore, it would no longer be detrimental from a tax point of view if, on account of a common plan, prior to the date of the transfer of the share of the joint assets, business assets or special business assets that are essential for operations were either withdrawn (e.g. transferred to a relative for no consideration) or sold at their fair market value while realising hidden reserves. However, this requirement would in turn be subject to the condition that the remaining transferred business assets would have to constitute a functioning operating entity.

Conclusion

From a practical point of view, it is a welcome development that case law that has been settled for years will now be adopted by the fiscal authority. This applies especially to the judgements where the BFH had ruled against the opinions held by the fiscal authority. Consequently, in the context of consulting on structuring, the legal certainty in cases of transfers will increase.

StBin [German tax consultant] Sabine Rössler

The OECD has proposed a global minimum tax

Ensuring that businesses that operate across borders pay a global minimum tax is supposed to limit international tax competition. To this end, the OECD presented its Global Anti-Base Erosion Proposal (GloBE), on 8.11.2019, subsequent to our discussion of the 'unified approach' (cf. PKF Newsletter 11/2019). The proposal seeks to extend the taxing rights of countries within the framework of their tax legislation and double taxation agreements (DTAs) in cases where other states are undertaxing, or not taxing at all. Comments had to be submitted by 2.12.2019.

The aim is to publish a coordinated set of rules, still in 2020, that could then provide a basis for the German legislative process and for the renegotiation of DTAs in order to avoid double taxation. 1. Recognition of the arm's length value (application of Section 1 AStG)

1. The OECD's coordinated set of rules

The four components described below make up the OECD's proposed set of rules.

1.1 Income inclusion rule – access to taxation rights

In this way, it will be possible to impose additional tax on the income of a foreign subsidiary whose income was taxed at a rate that was too low, in the state where the head office of its parent company is located. In doing so, the tax rate that was too low, which had been used for the subsidiary, would be hiked up to at least the applicable worldwide standard minimum rate. Furthermore, hiking up the tax rate to match the higher level of that of the parent company is under discussion as an alternative. At present, there is a preference for a standard minimum tax rate, as this would be simpler to manage. This rate could be in a range between 5% and 15%.

Please note: Ultimately, this provision constitutes CFC tax rules that are not based on activity and substance.

1.2 Switch-over rule – changeover to German taxation

Under a DTA, in the case of an exemption for the income of a permanent establishment in a low tax country, it would be possible to switch to a credit method for the purpose

of hiking up the taxation of the profits of the permanent establishment. Here you could expect the tax rate of the German head office to be applied to the income of the foreign permanent establishment.

1.3 Undertaxed payments rule – restriction with respect to the deduction of expenses

In order to compensate for a foreign parent company that had paid "too little" tax the payments of the German subsidiary to the parent company would have tax imposed on them. Besides restricting the amount of operating expenses that a subsidiary company would be able to deduct, it would also be possible to set up withholding tax on the payment to the parent company. In any case, the relevant minimum tax rate of the parent company would have to be provisionally (prior to the completion of the respective assessment procedure) calculated as under section 1.

A particular scope of application for the undertaxed payments rule would be cross-border royalty payments. However, the aim is also to include interest payments or service charges.

Please note: Consideration is even being given to including payments to third parties when auditing the taxation of the recipient of a payment.

1.4 Subject to tax rule – no DTA benefits

Benefits arising from agreements should be linked to additional conditions. Certain DTAs would have to be supplemented to the effect that, for example, reduced withholding tax on royalty and interest payments would depend on adequate taxation of the income in the state where the head office of the recipient of a payment was located. A consequence in Germany could be a return to the withholding tax of 15.825% on payments to foreign companies, as set out in the Income Tax Act *(Einkommenssteuergesetz, EStG)* (national deduction of tax at source under Section 50a (1) no. 3 and (2) EStG plus the solidarity surcharge).

2. Federal Ministry of Finance – Breakthrough on minimum tax

International gaps in taxation were recognised as being a key problem and should be closed for all cross-border company relationships. In the opinion of the Federal Ministry of Finance *(Bundesministerium der Finanzen, BMF)* (cf. the opinion statement from 13.6.2019 that followed the G20 Summit on 8/9.6.2019), taxing income at a rate below a minimum rate constitutes a harmful shifting of profits. The decision on what the standard minimum rate of tax should be is still outstanding. The authority to levy taxes will remain with the individual countries. Comprehensive minimum taxation could make unilateral actions, such as the German royalty barrier (Section 4j EStG), superfluous.

StBin [German tax consultant] Sabine Rössler

Finance leases – New guidelines for classification for VAT purposes

Deciding whether, for VAT purposes, a finance lease agreement should be assessed as being a supply (purchase) or other services (rent) would, at present, be determined by the applicable income tax criteria for beneficial ownership (so-called leasing enactments). A substantial revision to the VAT treatment of finance lease agreements is currently expected. In a draft circular from 3.12.2019, the Federal Ministry of Finance (Bundesministerium der Finanzen, BMF) set out plans to incorporate new ECJ case-law into the ordinance on the application of VAT (Umsatzsteueranwendungserlass, UStAE) and, thus, to move away from income tax criteria. The question of how existing agreements should be treated is just as important here as how to deal with divergences that might possibly occur in the future between income tax and VAT.

1. Finance leases under the current version of the UStAE

At present, the classification of a leased item for income tax purposes also determines the VAT treatment of the lease agreement.

- If the leased item is attributable to the lessee then this constitutes a supply with the consequence that VAT is incurred immediately (cf. Section 3(5) clause 2 UStAE).
- Attribution to the lessor results in a classification of 'other services' for which the respective VAT has to be paid in instalments.

The relevant criteria for the attribution of the item are, among other things, the ratio of the non-cancellable basic lease term to the average operating life as well as the ratio of the purchase price to book value at the date of expiry of the lease term. According to Section 3.5(6) clause 1 UStAE, lease agreements, as defined in Section 535 of the Civil Code (Bürgerliches Gesetzbuch, BGB), with a purchase option will only be deemed to be a supply on the date when there is mutual manifestation of intent to accept the option. The lessor calculates a purchase price subject to VAT as at the date of supply. The lease payments made by the lessee up to that date generally remain classified under 'other services'. If the lease payments made previously are credited against the lessee's purchase price then there can be a retroactive change to the assessment base for VAT.

2. Definition of supplies according to the ECJ

With respect to the question of whether the classification is that of a supply or other service, the ECJ, in its judgement from 4.10.2017 (C-164/16, Mercedes Benz Financial Services) was of the view that there should be a clear decision on this already when the agreement is concluded. Accordingly, a supply can be deemed to have occurred if the lease agreement provides for a transfer of the ownership of the leased item to the lessee.

In this case, a purchase option can be sufficient. Fur-

thermore, when the agreement is signed, the respective clause in the agreement has to provide for the ownership of the leased item to be transferred automatically to the lessee in the case of a scheduled expiry of the agreement. This should be assumed if a purchase option exists and if the exercise of this option is the only economically rational choice the lessee could make.

Please note: This could then be the case, for example, if under the agreement, when the possibility of exercising the option arises, the aggregate of the contractual instalments corresponds to the market value of the goods, including the cost of financing, and that the lessee is not required, as a result of exercising the option, to pay a substantial sum. The term 'substantial sum' potentially still needs to be specified.

3. Planned transposition of the ECJ judgement into the UStAE

In its above-mentioned draft circular, the BMF disclosed that, to some extent, the ECJ ruling clashes with the current assessment of leasing agreements for VAT purposes under Section 3.5 (5) and (6) UStAE. That is why Section 3(5) UStAE will be revised once the ECJ ruling has been included. Moreover, it is envisaged that the scope of application will be extended to rental agreements. In the event of a cross-border provision for use, in cases of doubt, the aim would be to attribute the leased item in accordance with the law of the other member state.

Please note: The principles set out in the new circular, according to the draft version, will be applied to all cases that are still open. However, there will be no objection to transactions executed prior to the publication date of the BMF circular if all the parties involved are in agreement that the old version of the UStAE should be applied.

4. Criticism of the BMF draft

Comments on the BMF circular from 3.12.2019 have meanwhile been published. For example, the Institute of Public Auditors in Germany has pointed out that the wording of the non-objection rule does not cover transactions that were treated as services up to the publication of the draft. If, according to the latest opinion, an agreement should be regarded as a supply then, potentially, the advance VAT returns would have to be amended retroactively.

The German Association of Tax Advisers is of the opinion that difficulties will arise in the accounting process and with the proper issuing of invoices. If, from an income tax point of view, a lease agreement should be assumed to be a purchase then this would enable the lessee to depreciate the leased asset and deduct (only) the interest expense as operating costs. If, under the new rules, the same agreement should be assumed to be a service from a VAT point of view because, for example, no purchase option has been agreed, then the lessee has to deduct the input tax on a monthly basis.

Outlook

It remains to be seen how the changes to the UStAE will ultimately be worded in detail. By contrast, following the ECJ judgement, the change is no longer at issue. We will update you once the final decision has been made at the BMF.

RAin/StBin [German lawyer/tax consultant] Antje Ahlert

Description of items supplied that is shown on invoices – The Federal Fiscal Court rejects excessive requirements

In our newsletter 6/2019, we already reported on a case that was pending at the Federal Fiscal Court *(Bundesfinanzhof, BFH)* where the point at issue was how precise does the description of items supplied have to be in an invoice text in order to ensure that the input tax can be deducted. The BFH, in two rulings from 10.7.2019 (case references: XI R 28/18 and XI R 2/18) has now made a business-friendly decision and eased the situation somewhat in this respect.

1. Issue – Usual commercial descriptions

The case that the court had to rule on – XI R 28/18 – related to the question of whether or not it was permis-

sible to deduct the input tax shown on invoices where merely the product category appeared as the description of items supplied, such as, e.g., T-shirts, sweaters, etc. The Hessian tax court, as the lower court, (ruling from 19.6.2018, case reference 1 K 1828/17) had refused input tax deduction on the basis of an invoice that had accordingly been issued because the terms that had been used were not the usual commercial descriptions. The tax court was of the opinion that it had to be possible to identify the items individually.

2. BFH ruling with reference to commercial practice

The BFH confirmed that the information shown on invoices, as defined in Section 14 of the VAT Act *(Umsatzsteuergesetz, UStG),* has to be such that it is possible to identify what goods or services have been invoiced. However, there is no requirement for an exhaustive description of the specific goods supplied or services performed. The description should make it possible to clearly and easily verify the statement where goods or services that have been invoiced are identified. What is needed to satisfy this condition will be determined by the circumstances in a particular case.

Please note: A point of reference for the issuers of invoices could be the description used by the manufacturer of the goods when they are put on to the market. According to the BFH, the usual description will be the one that is used between business people.

In its argumentation, the BFH explained further that, in view of EU law, the term “usual commercial description” – which was added in brackets and included in Section 14(4) clause 1 no. 5 UStG – should not result in a tightening of the conditions required for an input tax deduction. Anyone who denies that a description is a usual commercial one would, moreover, have to provide documentary evidence of what constitutes a usual commercial description. Therefore, if the local tax office wanted to refuse input tax deduction on the grounds that the description was not the usual commercial one it would, thus, have to provide proof that the description that had been used was indeed not the usual commercial one.

Please note: Given that the BFH has referred the matter back to the lower court for ultimate clarification there is still no definitive legal clarity in this case.

Recommendation

A description that is as clear as possible and a reference to supplementary business records (e.g. delivery notes, orders, or similar) will prevent arguments with the fiscal authority and help to avoid tax risks as far as input tax deduction is concerned. However, if a difference in opinion does occur with respect to the correct description of the items supplied then the taxpayer will be able to invoke commercial practices.

RA/StB [German lawyer/tax consultant] Frank Moormann

Act to Transpose the Second Shareholder Rights Directive – Strengthening shareholder rights

The Act to Transpose the Second Shareholder Rights Directive (Gesetz zur Umsetzung der zweiten Aktionärsrechterichtlinie, ARUG II) came into force at the start of the year. Its particular aim is to improve shareholder involvement in quoted companies as well as to facilitate the provision of cross-border information and the exercise of shareholder rights. Besides shareholder information, the key issues are remuneration policies, related party transactions and transparency obligations.

1. Remuneration for the management board and supervisory board ("say on pay")

1.1 System and levels of remuneration

The passing of resolutions on management board remuneration was a critical issue in the discussions about the new regulations. Ultimately, it was stipulated in law that the supervisory board has to decide on a remuneration system for the management board that is in accordance with the new detailed requirements and that has to include, among other things, the maximum levels of remuneration for the members of the management board. From now on, it will be mandatory to bring about a resolution of the annual general meeting (AGM) on the system and, in particular, when there are any significant changes to it, although a resolution has to be put forward at least every four years. While the supervisory board may disregard a negative decision by the shareholders, nevertheless, it would have to present a revised remuneration system at the subsequent AGM, at the very latest. With regard to the maximum levels of remuneration, the AGM has a legally binding right to reduce these.

These regulations generally apply by analogy for the supervisory board remuneration, however, the competence for setting this has, in any case, been assigned to the AGM. Moreover, many of the potentially possible remuneration components are, in any case, not envisaged for the supervisory boards of German companies.

1.2 Remuneration report

The management board and supervisory board have to prepare a detailed remuneration report annually where the remuneration awarded, in the last financial year, to each individual member of the boards is clearly and comprehensibly shown. The remuneration report has to be examined by the auditor of the annual accounts and made available on the company's website for a period of ten years.

2. "Related party transactions"

The new rules define a threshold value for related party transactions above which supervisory board approval would be required and the transaction would have to be disclosed. The obligations will apply if the commercial value, alone or together with the transactions effected with the same party in the course of the current financial year, exceeds a threshold value of 1.5% of the sum of the fixed and current assets.

Please note: Extensive exemptions are however envisaged, e.g. for transactions in the ordinary course of business at standard market conditions or for transactions with wholly-owned subsidiary companies.

3. Shareholder information and identification ("Know your shareholder")

In future, quoted companies will be obliged to transmit information about corporate events for forwarding to shareholders. Corporate events are such measures that could affect exercising rights linked to shares and the underlying shares. Commissioned third parties can be involved in this information chain so that overarching internet platforms would also be possible.

Under the new rules, companies are now themselves entitled to obtain information about the identity of their shareholders. This entitlement is directed towards the so-called intermediaries that are custodians of a company's shares. Requests have to be forwarded by each intermediary to the next one in each case. The ultimate intermediary has to forward the company's information .

4. Transparency obligations for institutional investors, asset managers and proxy advisers

From now on, this group of persons will be subject to special transparency obligations. For example, institutional investors and asset managers have to adopt an "engagement policy" for themselves and, e.g., report on the exercise of shareholder rights or an exchange of views with the officers of companies. The investment strategy will also have to be disclosed.

Proxy advisers who provide voting recommendations for large investors will basically have to set up a code of conduct for themselves and report on their compliance with it on an annual basis. Moreover, among other things, the voting policy that is followed by a proxy adviser has to be disclosed.

Liability – The extent of the discretionary authority to choose when asserting claims against managing directors

The liability of managing directors is usually more extensive than that of non-managerial employees because managing directors are not dependent employees but, rather, officers of the company. This characteristic is particularly important in the event of a company becoming insolvent because there are also comprehensive rules on liability under tax law. In cases of insolvency, if a managing director, for example, acted to the disadvantage of the local tax office when distributing funds then s/he would be liable. Generally, the local tax office has broad discretionary leeway in such a case, nevertheless, when there are several managing directors the tax office should take into account any allocation of functions.

1. Issue – Liability for tax debts

In a case brought before the Schleswig-Holstein tax court, two managing directors had presided over the fate of a GmbH (a German limited company). The managing director who was the claimant here was not responsible for managing the day-to-day business, in fact, it was his job to ensure that the sale of a shareholding was conducted properly. Although, he did sign the annual financial statements as well as the tax return. When submitting a tax return, the GmbH took a view of the law that was different to that of the local tax office and did not pay the tax on the higher profits that had been determined by the tax office. As the company subsequently became insolvent the local tax office held the claimant fully liable for the foregone tax revenue; however, it did not attribute any liability to the other managing director.

2. Tax court decision – Assertion of the claim was unreasonable

The judges in Schleswig-Holstein ruled, in a final judgement on 5.2.2019, that the claimant had been right to challenge the decision of the local tax office (case reference: 1 K 42/16,). While the local tax office is indeed allowed discretionary leeway, nevertheless, in the case in question this was exploited in a way that was unlawful. All the managing directors should have been held liable to the same extent.

Recommendation

In order to limit liability, the range of responsibilities of each managing director should be clearly defined in an executive organisation chart.

WP/StB [German public auditor/ tax consultant] Daniel Scheffbuch

Brexit – The withdrawal agreement has been passed and yet everything has remained unchanged (to begin with)

On 29.1.2020, the EU Parliament ratified the "Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community" (Withdrawal Agreement). As a result, on 31.1.2020, the United Kingdom (UK) withdrew from the EU.

1. Transition period until 31.12.2020

Arrangements for a transition period lasting until 31.12.2020 were set out in the Withdrawal Agreement and an extension is possible. During this period the aim is to conclude a trade agreement between the EU and UK in order to avoid Brexit turning into a Hard Brexit. Even though the UK is no longer in the EU, nevertheless, EU law will continue to apply during the transition period.

2. Value Added Tax

During the transition period, goods deliveries from the EU to the UK, or vice versa, will continue to be subject to the Directive on the VAT System and will thus still have to be classified as intra-Community supplies. The Withdrawal Agreement merely contains rules for transport or dispatch beyond the point in time when the transition phase has ended. You should take note of the deadlines for VAT refunds; these should be requested for 2020 by no later than 31.3.2021. As regards services, there will likewise be no changes during the transition phase, as far as we can tell.

3. Customs Law

EU customs laws will continue to apply. The free trade agreement between the EU states likewise applies in respect of the UK. There are uncertainties regarding the origin statement. Here, it is of significance that the UK has formally left the EU.

Please note: On 20.1.2020, German Customs provided information on this topic (in German) on their website (see under https://www.zoll.de/DE/Fachthemen/Warenursprung-Praeferenzen/WuP_Meldungen/2020/wup_brexit_sachstand1.html).

Chain transactions – Classifying the movement of goods for VAT purposes

The European Court of Justice (ECJ) currently has to deal with the question of which transaction in a cross-border supply chain with multiple transactions should be regarded as the exempt intra-Community supply if there is only one physical movement of goods.

The request from the Czech Republic for a preliminary ruling concerned a company that carries on business, in particular, in the field of road transport and owns several filling stations. Using its own vehicles, it transported fuel from suppliers in other Member States (Austria, Germany, Slovakia and Slovenia) to the destination (Czech Republic). In the course of this, the goods were repeatedly sold on. However, they were transported only once by the claimant to the end customer in the Czech Republic.

In many cases the claimant itself acted as the end buyer of the fuel, which it purchased from suppliers registered for VAT purposes in the Czech Republic. In such cases the claimant was at the end of the supply chain. In other cases the claimant sold on fuel to its own customers; it was thus in the middle of the supply chain. The claimant collected the fuel directly from refineries in other Member States and transported it to the Czech Republic. After crossing the border the customs clearance was carried out. The claimant continued the journey to the place of

unloading (either its own filling stations or those of its customers). The local tax office did not permit the company to deduct the input tax because it assumed that this constituted an exempt intra-Community supply.

However, in her opinion statement from 3.10.2019, Kokott, the Advocate General in charge of case C-401/18, took the view that the crucial factor was who bears the risk for accidental loss during the cross-border transport of the goods. The exempt intra-Community supply would then be the one whose place was where the transport began. Preceding deliveries in the supply chain will be liable to tax in the member state of dispatch while subsequent deliveries in the supply chain will be liable to tax in the Member State of the destination of the supply. Ownership in civil law during the transport is immaterial here.

Please note: We will have to wait to see what the outcome of the proceedings will be, in particular, whether or not the ECJ will establish clear and easily identifiable criteria for determining the active delivery in a chain transaction.

Bequeathing a family home – The tax emption ceases to apply if ownership is relinquished within a period of ten years

Spouses and life partners are able to bequeath their owner-occupied properties to surviving partners free of inheritance tax provided that the latter decide, without undue delay, that the intended use of the properties will be for their own residential purposes. To this end, the surviving partner has to have the intention to use the property him/herself and actually move into it. However, the inheritance tax exemption would cease to apply retroactively if, within a period of ten years following acquisition, the ownership of the family home was transferred to a third party.

According to a new Federal Fiscal Court *(Bundesfinanzhof, BFH)* ruling, this would apply even if own use for residential purposes were to continue on the basis of a lifelong usufruct. In the case in question, a woman had inherited, from her husband, a single-family home, which they had jointly occupied, and had initially remained living in it. One-and-a-half years after the accrual of the inheritance, she gifted the house to her daughter. Even though she reserved a lifelong usufruct for herself and carried on living in the house the local tax office retroactively revoked the inheritance tax exemption because the claimant had gifted the family home.

The BFH, in it ruling from 11.7.2019 (case reference: II R 38/16, see www.bundesfinanzhof.de) confirmed that the tax concession had ceased to apply retroactively and then pointed out that, through the tax exemption, the legislator had wanted to protect family living space and promote the growth of home ownership by families. That is why the exemption could only be claimed by those surviving spouses or life partners who have become owners of a property and live in it themselves.

Tax-exempt sale of property – Self usage prior to the sale

If property that is held in private assets is sold within the ten year speculation period then the appreciation in value that is realised has to be taxed as gains from private disposals. This does not apply to certain cases of self usage. In a recent ruling, the Federal Fiscal Court *(Bundesfinanzhof, BFH)* has now examined the issue of how extensive this self usage would have to be in order to avoid triggering tax.

In cases where tax is payable, the assessment will be based on the sale price that was achieved minus the cost of acquisition or production for the property and minus allowable deductions for costs incurred. However, no tax would be triggered if a property was sold within the ten year period and if it had previously been used by the owner. To this end the property would have to have been used for your own residential purposes

- over the entire period between its acquisition and sale, or
- in the year in which the sale took place as well as in the two preceding years.

In the case in question, the claimant had acquired a wholly owned flat in 2006 and, initially, had lived in it himself for years. In the eight months prior to selling the flat (in December 2014) at a profit he had however rented it out, which was why the local tax office had assumed that there had not been self usage and had taxed the gain from the private disposal.

However, the BFH, in its ruling from 3.9.2019 (case reference: IX R 10/19), decided that the extent of the self usage was sufficient for a tax-free sale of the property. The statutory requirement for self usage "in the year in which the sale took place as well as in the two preceding years" would already have been deemed to be satisfied if this had been the case

- in the year in which the sale took place and in the year before the previous year on at least one day and
- continuously in the year preceding the year in which the sale took place.

In the opinion of the BFH, for a tax-exempt sale of a property within the ten year time limit, it is sufficient to have a consecutive period of self usage of one year and two days that has to have stretched over three calendar years however. Therefore, in the case in question, temporarily renting out the flat in the last months prior to the sale was not detrimental, from a tax point of view.

Executive compensation – Concurrent receipt of pensions and a regular salary is possible within certain limits

The Federal Fiscal Court (Bundesfinanzhof, BFH) does not usually accept a pension and a regular salary being paid concurrently. A recent ruling from a tax court in North Rhine-Westphalia has now deviated from this.

In the case in question, a sole shareholder and managing director retired from active working life, in 2010, and then started to draw a pension from his company. However, because relations between his successor and the business partners were not very harmonious at the outset, in 2011, the company called him back to work as an additional managing director so that he could get the customer management back on the right track again. Besides his pension, he thus received an active managing director's salary that was merely 10% of the amount he had received prior to his retirement. The local tax office, having made reference to the relevant case-law, wanted to identify the salary payment as a hidden profit distribution; nevertheless, the judges at the Münster tax court ruled in favour of the taxpayer in this case (ruling from 25.7.2019, case reference: 10 K 1583/ 19 K). As his reappointment had not been agreed when his pension payments started and given that the salary amount was very small – it did not really constitute remuneration but rather recognition – it was thus deemed that there was no hidden profit distribution.

Please note: It remains to be seen how the BFH will judge the issue in the appeal that is pending against the ruling under case reference I R 41/19.

AND FINALLY...

"I had no dreams of such economic success. You should have fun and not be so weighed down by expectations."

Sergey Brin (born 21.8.1973 in Moscow), US American computer scientist and entrepreneur, developed the search engine Google together with Larry Page.

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