



International Association of Tax Judges

Court decision Federal Tax Court Germany  
V R 6/15  
28.09.2017

10th Assembly of the IATJ  
Cambridge  
Friederike Grube  
Federal Tax Court Germany

VAT/GST-Case Law

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## Legal background

- German VAT-Code (UStG): § 4 Nr. 8 lit. d  
„Exempt of VAT are the transactions, including negotiation, concerning deposit and current accounts, payments, transfers and the encashment of commercial documents“
- In principle no right to deduct Input-VAT according to § 15 par. 2 S. 1 Nr. 1 UStG
- Exception: Option to taxation (§ 9 par. 1 UStG) and recovery of Input-VAT

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## Legal background

- VAT-Directive: Art. 135 par. 1 lit. d (former Art. 13.B (d) Directive 77/388/EEC):

„MS's shall exempt the transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection.“

- Option to taxation: Art. 137 VAT-Directive
- General principles established by the ECJ:

5.06.1997 *SDC C-2/95*, 13.12.2001 *CSC C-235/00* etc.: „A service exempt must be distinguished from a mere physical or technical supply which does not alter the legal or financial situation...the responsibility must extend to the specific, essential aspects of the transactions...“

## The facts of the case (1)

- The plaintiff *Cardpoint* is a taxable person who supplies technical and administrative assistance concerning cashpoints (ATM) to a banc
- *Cardpoint* set up the cashpoints - including soft – and hardware and the company-logo of the banc - at the foreseen locations and was responsible for their functioning
- *Cardpoint* provided the transport of the cash - still belonging to the banc – to the ATM and filled them
- *Cardpoint* was also responsible for the functioning of the software of the cashpoints and gave advices with regard to their functioning in general

## The facts of the case (2)

- If a customer uses the ATM with his cashcard the relevant data will be read by a special software
- *Cardpoint* checks the relevant data and transmits an authorisation code to the banc including the information about the demanded amount of money
- The banc examines the banc balance of the customer and passes the relevant information back to *Cardpoint* to enable the allocation of the money within a few seconds
- *Cardpoint* creates a daily data-record including all transactions which is transmitted to the banc and forms the basis of the payment-claim of *Cardpoint* versus the banc

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## The facts of the case (3)

- The tax-office thought that *Cardpoint* did not supply any financial services exempt of VAT according to § 4 Nr. 8 lit. d German VAT – Code with the consequence that the services supplied by *Cardpoint* to the banc had to be taxed
- The action against the assessment of VAT was successful
- The Financial Court of First Instance decided that the supplies carried out by *Cardpoint* played a specific and essential part in achieving the changes in the legal and financial situation that are the result of a transfer of ownership of the money and therefore were exempt of VAT

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## Further proceedings

- The tax office lodged an appeal against this judgment to the Federal Tax Court at a point of law (V R 6/15)
- The Federal Tax Court decided to stop the proceedings and to lodge a request for a Preliminary Ruling to the European Court of Justice (ECJ)
- Case C-42/18 – „*Cardpoint*“

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## Question referred for a preliminary ruling

„Is technical and administrative assistance provided by a supplier of a bank operating a cash point (ATM) for cash withdrawals from the bank exempt from tax under Art. 13.B (d) Directive 77/388/EEC in the case where technical and administrative assistance of the same nature provided by a supplier of services for payments by card in connection with the sale of cinema tickets is, in accordance with the judgment of the ECJ of 26.05. 2016, *Bookit*, C-604/14, not exempt from tax under that provision?“

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*Bookit* par. 22: Single supply or a supply which can not be separated from the principal service?

- Every transaction must normally be regarded as distinct and independent (ECJ, 2.12.2010, C- 276/09, *Everything and Everywhere*, par.21 ff.)
- However, a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT-System
- In certain circumstances, several formally distinct services, which could be supplied separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent

*Bookit* par. 22: Single supply or a supply which can not be separated from the principal service?

- That is so in particular in cases where one or more elements are to be regarded as constituting a principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service
- In order to determine whether the taxable person is supplying the customer – envisaged as being a typical customer – with several distinct principal services or with a single service, the essential features of the transaction must be ascertained and regard must be had to all the circumstances in which that transaction takes place

***Bookit* par. 22: Single supply or a supply which can not be separated from the principal service?**

- Court of First Instance decided that the services supplied by *Cardpoint* are the elements of one principal service in form of a package supplied towards the banc
- Neither the Court of First Instance nor the Federal Tax Court or the Advocate General discussed whether the service supplied by *Cardpoint* towards the banc can be separated from the principal tax free service towards the customers who simply withdraw cash at the ATM (reason: 2 different supplies)
- In the preliminary ruling however the Federal Tax Court stated that this aspect in the case *Cardpoint* is different to the case *Bookit* where we have only principal services which had to be taxed (the selling of the cinema tickets etc.)

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***Bookit* par. 22: Single supply or a supply which can not be separated from the principal service?**

**Discussion**

Relevance of the judgment *Everything and Everywhere* (ECJ-C-276/09) under this aspect:

Taking into account that the transactions of the banc concerning the withdrawal of cash from an ATM are generally exempt from VAT – could this also have an impact on the services supplied by *Cardpoint* since the customers fetching their money use these services as well?

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*Bookit* par. 38 ff: Elements of transactions concerning transfers or payments exempt under the VAT-Directive

- In order to distinguish supplies of services which are exempt from the supply of mere physical, technical or administrative services, it is relevant to examine, in particular, the extent of liability of the supplier of the services in question and, inter alia, whether that liability is restricted to technical aspects or whether it extends to the specific, essential aspects characterizing the transactions
- The nature of the services provided must relate to the sphere of financial transactions in order to be exempt

*Bookit* par. 38 ff: Elements of transactions concerning transfers or payments exempt under the VAT-Directive

- Accordingly, the services must be assessed against a functional criterion in order to determine whether they fulfil the specific and essential functions of such transfers or payments, in that they have the effect of transferring funds and entail changes in the legal and financial nature of that transfer
- In this context the extent of the liability borne by the service provider also should be examined

## Opinion of the Advocate General in the Case *Cardpoint*

- The service supplied by *Cardpoint* does not directly entail the act of debiting or crediting an account itself or acting by means of accounting entries in the accounts of the holder of the banc card used to make a withdrawal
- *Cardpoint* transmits the data from the user's card and the request for authorisation for the withdrawal sought by the user, but executes the transaction, in the sense of physically releasing bank notes, only if the request is approved

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## Opinion of the Advocate General in the Case *Cardpoint*

- Only the banc that operates the ATM transmits the data files to the banc system
- The daily non-editable data file containing all of the day's transactions which is generated by *Cardpoint* is intended to notify the authorised transactions carried out and cannot therefore be regarded as fulfilling the specific and essential functions of a payment

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## Opinion of the Advocate General in the Case *Cardpoint*

- The service supplied by *Cardpoint* does not constitute a transaction which has the effect of transferring funds or entails legal or financial changes, but a physical, technical or administrative service, given that that service does not have the effect of actually or potentially transferring ownership of the funds in question or of fulfilling the specific and essential functions of such a transfer
- Account is to be taken only of the legal, rather than physical, ownership of the money- transferred by the bank in this case and not by *Cardpoint*

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## Opinion of Advocate General Bot delivered on 2 May 2019

*„The exemption from VAT which is laid down for transactions concerning payments and transfers does not apply to supplies of services, such as those at issue in the main proceedings, consisting in operating and maintaining ATMs, replenishing them, installing computer and software in them, sending a withdrawal authorisation request to the bank that issued the bank card used, dispensing money and registering withdrawal transactions, by a service provider to a bank operating an automated teller machine.“*

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## Discussion

- What about the fact that the service provided by *Cardpoint* is essential for completing an exempt transaction?
- Is it possible to apply the case-law of the ECJ concerning Art. 148 of the VAT-Directive (*Fast Bunkering Klaipeda* – 3. 09. 2015 - C- 526/13 and A – 4.05. 2017 - C-33/16)
- Does it have any meaning that the operation of ATM's has been outsourced by the banc?

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## Discussion

- Does it have any meaning that the Court of First Instance which examined the complete situation came to an opposite result?

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# Outlook

Thank you for your attention!