

Third Educational Session

Significant Recent Developments in International Tax Law

Topic 5: Significant Value Added Tax – VAT Decisions

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A) Introduction

Just before dinnertime it might be interesting for you to talk about the reduced rate of VAT (7 % in Germany) or the standard rate (19 % in Germany) on the supply of food or meals for immediate consumption from snack or mobile snack bars....

Most of you know already that VAT law is harmonized in Europe since 1977.

Concerning the rates applicable to taxable transactions the Member States of the European Union have only reached an agreement about the "minimum" of rates until now:

15 % (standard rate of VAT)

5 % (reduced rate)

In reality the rates are often higher in the Member States of the European Union due to the budget of the respective Member State –for instance 19 % standard rate of VAT and 7 % of reduced rate of VAT in Germany. You should certainly always keep in mind that the revenue of VAT is the highest of all taxes – not only in Germany, as I suppose.

In the VAT directives it is allowed to use the reduced rate of VAT on certain categories of supplies of goods and services. Each Member State may allow the traders in their national law to apply the reduced rate on the supply of food, water, medicine, of books, for the services of charitable organisations, transport of persons on ships etc. It is a long list (Annex III of the Directive 2006/112/EC).

The traders are extremely interested to be allowed to apply the reduced rate on their taxable transactions.

The reason for this lies in the VAT-system: The traders can deduct input VAT on the purchase of goods at the standard rate – at the same time they are only obliged to pay the reduced rate of VAT on the goods sold by themselves. In consequence we have a

lot of VAT-cases at the Finance Courts in Germany about the question which rate should be applied on certain taxable transactions.....

B) Reduced rate for the supply of food or meals for immediate consumption from snack stalls or mobile snack bars?

I. The problem

1. The law

The legal situation in Germany (founded on the VAT-EC-directives) is as follows:

A trader only gets the reduced rate of VAT (7%) if he realizes a supply of food and not a supply of services.

You have a supply of services if you serve food in a sort of a restaurant. In this case the trader has to pay the standard rate of VAT on his taxable transactions. The trader may use the reduced rate of VAT if he realizes just a supply of food.

Now we had an interesting jurisdiction of the Bundesfinanzhof concerning the distinction between transactions relating to takeaway food and restaurant transactions. The Bundesfinanzhof then said in reference to the judgement of the European Court of Justice Case C-231/94 "Faaborg-Gelting Linien":

Restaurant transactions (supplies of services) were characterized by "a series of services ranging from the cooking of the food to its physical service" of which the provision of food was only one component and in which services largely predominated.

On the other hand we had a transaction related to takeaway food (supply of goods) if, in addition to the supply of food, it was "not coupled with services designed to enhance consumption on the spot in an appropriate setting."

F.ex. the Bundesfinanzhof said that the trader has a restaurant and therefore has to use the standard rate, if there are tables around the snack bar or a "board" running around it and allowing to eat the small meals there; with napkins and mustard.... On the contrary we only had supplies of food, if the customer would not eat the meals near the snack bar but took the food with him to eat it just walking away.

Now the practical problems were evident: In reality the financial administration and even judges had to investigate each snack stall or mobile snack bars whether the trader had a board around it which could be used as a table and how the individual circumstances were....Furthermore it was difficult to verify in each individual case how many customers would use f.ex. the board around the snack bar to eat their meal there or not???

The administration and the financial courts therefore had to estimate very often in each individual case of a snack stall or a mobile snack bar the amount of transactions of supply of food (VAT rate 7 %) and the amount of transactions of supplies of services

(VAT rate 19 %). This was certainly not a very good situation – especially for the traders....

2. One of the 4 cases brought to the European Court of Justice (Case C-497/09)

Mr Bog sold drinks and food prepared for consumption (in particular, sausages and chips) from three identical mobile snack bars at weekly markets.

The mobile snack bars were equipped with a sales counter with a splashguard, below and around which ran a "board" which could be used for the consumption of food on the spot. To the sides of the vehicle there was a folding "tongue" which was in the form of a table. The area where customers could consume the food was protected from the rain by a folding roof.

In his turnover tax declaration for 1994 Mr. Bog declared the turnover from the sale of drinks as subject to the standard rate of VAT, while the turnover from the sale of food was declared as subject to the reduced rate.

In a special turnover tax check, the inspector found that Mr Bog's customers generally consumed the goods on the spot. Since Mr Bog did not provide any information on the extent of the consumption taking place at the mobile snack bars, the sales of food subject to the standard rate of tax were estimated to be 70 % of the total sales.

In December 2006 the tax authorities therefore issued an amended turnover tax assessment for 2004. Mr Bog lodged an objection to that decision.

The finance Court upheld Mr. Bog's action against the dismissal of his objection:

He essentially took in view that, in order to distinguish between supplies of food subject to the standard rate of VAT and those subject to the reduced rate the decisive factor was whether the elements of supply of services qualitatively predominated. In this case the supplies were supplies of goods, because, apart from the preparation of the food, the applicant had only provided covered areas of his mobile snack bars where food could be served and bins were placed.

Other elements of supply of services which characterised the overall impression on visiting a restaurant of services offered by the operator (such as service, seating, enclosed rooms at an appropriate temperature and appropriate open-air facilities for consumption, the presence of cloakrooms and lavatories) by contrast, were absent.

The tax authorities appealed on a point of law to the Bundesfinanzhof against the decision of the Finance Court, arguing that the supplies of food had been combined with services (preparation of the foodstuffs to make the food and provision of covered facilities for consumption) which went beyond mere selling.

The Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Is the sale of food or meals prepared for the immediate consumption a supply of goods within the meaning of Article 5 of the Sixth Directive (now Article 14 of the Directive 2006/112/EC)?
2. Does the answer to Question 1 depend on whether additional service elements are supplied (provision of facilities for consumption)?
3. If Question 1 is answered in the affirmative: Is the term "foodstuffs" in category 1 of Annex H to the Sixth Directive (now Annex III of the Directive 2006/112/EC) to be interpreted as covering only foodstuffs to "take away" as typically sold in grocers shops, or does it also cover food or meals which have been prepared for immediate consumption by boiling, grilling, roasting, baking or other means?

II. Answers given by the European Court of Justice in the judgement of the 10. 03. 2011 – C-497/09, C-49/09, C-501/09 and C-502/09 "Bog"

1. Articles 5 and 6 of the Sixth Directive (now Articles 14 and 24 of the Directive 2006/112/EC) must be interpreted as meaning that:

- the supply of food or meals freshly prepared for immediate consumption from snack stalls or mobile snack bars or in cinema foyers is a supply of goods within the meaning of Article 5 if a qualitative examination of the entire transaction shows that the elements of supply of services preceding and accompanying the supply of services preceding and accompanying the supply of food are not predominant;

- except in cases in which a party catering service does no more than deliver standard meals without any additional elements of supply of services, or in which other special circumstances show that the supply of the food represents the predominant element of a transaction, the activities of a party catering service are supplies of services within the meaning of Article 6.

2. In cases of the supply of goods, the term "foodstuffs" in category 1 of Annex H to the Sixth Directive (now Annex III of the Directive 2006/EC) must be interpreted as also covering food and meals which has been prepared for the immediate consumption by boiling, grilling, roasting, baking or other means.

III. Consequences of the judgements of the European Court of Justice in Germany

After the judgements of the European Court of Justice the Bundesfinanzhof now has to decide several cases.

In reference to the judgement of the European Court of Justice I think it is clear that in most cases of snack stalls or mobile snack bars without chairs the traders may use the reduced tax rate <<What a relief for the sellers of sausages and chips...>>

On the contrary in the cases of the "party catering service", where we very often find additional elements of supply of services (f.ex. supply of dishes and glasses and knives and forks) the traders will in most cases be obliged to use the standard rate.

In the mean-time the Member States of the European Union may allow their traders to use the reduced rate of VAT even on the supply of services in a restaurant (Annex III Nr. 12a of the Directive 2006/112/EC). Germany does not use this possibility for budgetary reasons....

Since 1. July 2011 we have a new regulation in the European Union concerning our problem (Art. 6 of the regulation of the Counsel 15. 03. 2011- ABI. EU L 77, 23. 03. 2011): The supply of food without any supply of services is not a restaurant service...

C) Outlook

In Germany we just had a general political discussion about the appliquance of the reduced rates of VAT:

Our government had the idea that the reduced rates of VAT should be abolished (with the exception of the reduced rate for the supplies of food).

The reason for this was first of all to get some money for the general reform of our income tax system which is famous all over the world for its simplicity....

In addition some experts say that the different tax rates violate the principle of equality which is a fundamental principle in our Constitution.

Furthermore the different tax rates sometimes lead to a distortion of competition.

However this discussion was brought to an end by our Minister of Finance who told us that the expected resistance of the lobbiees involved would be so strong that the government now refrains from this reform....

Do you have similar discussions in the countries with a VAT-System?

Thank you for your attention!