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German Tax and Legal News

BFH refers question to CJEU on VAT exemption for outsourcing in the banking sector

The BFH's action is significant for banks that rely on service providers for cost optimization purposes.

In a resolution dated 28 September 2017, Germany's federal tax court (BFH) referred a question to the Court of Justice of the European Union (CJEU) for a preliminary ruling on whether an external service provider supplying services to the banking sector involving the operation of automated teller machines (ATMs) may benefit from the VAT exemption applicable to certain financial transactions under the EU VAT directive.

Background

Article 135(1)(d) of the EU VAT directive provides for a VAT exemption for certain transactions involving payments and transfers, which has been implemented into German domestic law through section 4(8)(d) of the German VAT act. Based on CJEU case law, service providers working for banks can benefit from the VAT exemption applicable to banks if their services for the banking sector are substantial and specific, while services of a purely technical and administrative nature are subject to VAT.

In its decision dated 26 May 2016 (C-607/14), the CJEU ruled in a UK case that the VAT exemption provided for transactions involving payments and transfers did not apply to the service of "processing of debit or credit card payments" carried out by a taxable person that sold cinema tickets via debit or credit card transactions on behalf of, and for the account of, another company. To qualify as transactions in credit transfers, the court opined that the services must be essentially carried out by an independent entity fulfilling the specific and essential functions of a credit transfer, thereby causing the transfer of funds and leading to legal and financial changes in the position of the parties. In this respect, the VAT-exempt service must be distinguished from the provision of a purely administrative or technical service. It is a question of the extent of the responsibility of the service provider and whether this responsibility is limited to purely technical aspects or covers specific and essential functions of the transfer.

Based on these principles, it is questionable whether the operation of ATMs by an external service provider on behalf of a bank would constitute taxable services for VAT purposes.

Facts of the case

The taxpayer placed functional cash dispensers with soft- and hardware bearing the bank's logo at designated locations and was responsible for the proper operation of the banking services provided through the ATMs. In addition, the taxpayer transported cash owned by the bank to ATMs and took over the cash refilling of the ATMs. It installed and maintained the software necessary for the proper operation of the ATMs and advised on the ongoing operation of the ATMs.

When a customer withdrew money from an ATM, the taxpayer's software read certain data from the debit card and sent it to the taxpayer for verification and the subsequent generation of an authorization request via the banking publisher and the relevant banking association to the card-issuing bank. The bank sent an approval/rejection of the request back to the applicant via the same chain. In the event of an approval, the taxpayer would pay out the money and generate a record of the data, which it would send to the commissioning bank. In addition, the bank would receive a daily record of all transactions carried out through the taxpayer. The data records subsequently would be imported by the commissioning bank into the system of the German central bank for processing the transaction between the participating banks.

The taxpayer assumed that its services were exempt from tax under section 4 of the German VAT act, but the tax office considered the services to be subject to VAT. The taxpayer appealed the decision to the lower tax court, which held that the services were VAT exempt, and the tax authorities appealed this decision to the BFH.

BFH's referral of the case to the CJEU

The BFH questioned whether, given the CJEU's 2016 decision in the case involving cinema tickets, the taxpayer's support services provided to a bank relating to the operation of ATMs should be VAT exempt if the taxpayer is merely technically implementing the instructions contained in an authorization code. The BFH considers that the situation in the present case differs from the circumstances already ruled upon by the CJEU only to the extent that the intended transaction does not consist of the purchase of a cinema ticket, but of cash withdrawals via ATMs. Accordingly, the BFH referred the following question to the CJEU for a preliminary ruling: Are technical and administrative steps taken by a service provider for a bank operating an ATM to carry out cash withdrawals through the ATM exempt under article 135 (1)(d) of the VAT directive, if similar technical and administrative steps taken by a service provider for payments on the sale of tickets are not VAT exempt under that provision?

Comments

The CJEU will have to deal with the question of the extent to which its jurisprudence on VAT-exempt outsourcing in the banking sector should be applied to the case referred to it by the BFH. The BFH's decision to refer the case to the CJEU is of great importance to banks that involve service providers in the performance of their services for cost optimization purposes. The desired cost savings would be called into question if a service provided by the service provider results in a VAT liability, since banks are not entitled to deduct input tax on the purchase of such services.

Legal norms

Article 135(1)(d) EU VAT directive

Reference

BFH, resolution of 28.09.2017, [V R 6/15](#)

FG Rhineland-Palatinate, verdict of 24.10.2014, 6 K 1465/12

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