NEW IN LEGISLATION

Changes to the regulations for distance sales from 2021
ECOFIN Council, decision of 12 March 2019

On 5 December 2017, the Council of the European Union adopted regulations for distance sales from 2021, which are intended to simplify the VAT system for online companies in the EU (see VAT Newsletter January/February 2018).

Although not yet in effect, the ECOFIN-Council has already adopted improvements to the regulations, which concern the VAT Directive and the Implementing Regulation (EU) No. 282/2011.

Taxation if using an electronic interface

Regulations which have already been agreed

Article 14a of the VAT Directive stipulates that traders who facilitate distance sales through the use of an electronic interface – for example a marketplace, a platform or a portal – of items imported from non-EU territories or countries, in consignments with an intrinsic value of not more than EUR 150, be treated as if they had themselves received and supplied these items. The same applies for the intra-Community supply of items to a consumer by a trader that is not resident in the Community.

This means that the supply of a company to a consumer (B2C supply) is, in effect, divided into two supplies: one supply by the suppliers to the electronic interface (B2B supply) and one supply by the electronic interface to the purchaser (B2C supply). Therefore, it must be ascertained which of these supplies the shipment or transport of the items will be attributed to so that the place of supply can be properly determined.

New regulations:

Article 36b of the VAT Directive stipulates that the shipment or transport be attributed to the supply from the electronic interface to the purchaser.

Please note:

This has the result that, in accordance with Art. 33 of the VAT Directive, derogating from Art. 32 of the VAT Directive, the supply from the electronic interface to the consumer – in the case of an intra-Community distance sale, is subject to VAT in the place in which the shipment ends;
— in the case of a distance sale from a non-EU country, is subject to VAT in the place in which the shipments ends, if the import takes place into that Member State and the supply has to be declared in the MOSS process. This place of supply also applies if the importation is to another Member States regardless of whether the supply must be declared in a MOSS procedure.

The new regulation does not contain any statements in relation to the place of supply of the supplier to the electronic interface. As the transport/shipment is not attributed to this supply, in accordance with Art. 31 of the VAT Directive the place in which the items are located at the time of the supply must apply.

This may be the place where the shipment begins. This is borne out by the foreseeable exemption from VAT in Art. 136a of the VAT Directive, which merely refers in Art. 14a (2) of the VAT Directive to the intra-Community supplies to the interface, and thus assumes that supplies exist which are taxable in a Member State. Conversely, there is no reference to distance sales in accordance with Art. 14a (1) of the VAT Directive from non-EU countries to the interface, which evidently should be generally taxable in the non-EU country.

VAT exemption on the supply to the interface / supplier’s input VAT deduction / expansion of the MOSS procedure
According to the ECOFIN Council, the direct use of Art. 14a (2) of the VAT Directive would involve an additional administrative burden for the companies concerned and the risk of VAT losses, as the VAT would be paid from the electronic interface to the supplier which sells items through the use of the electronic interface.

New regulations:
To simplify things for the companies concerned, the following regulations will be introduced:
— the supplier’s B2B supply to the electronic interface will be exempt from VAT (Art. 136a of the VAT Directive);
— the supplier is entitled — despite this exemption — to deduct input VAT that he has paid himself in purchasing or importing the supplied items;
— electronic interfaces shall also be allowed to use the MOSS procedure for domestic supplies to consumers in accordance with Art. 14a (2) of the VAT Directive.

Please note:
The ECOFIN Council apparently assumes that an “intra-Community supply” in line with Art. 14a (2) of the VAT Directive also includes a supply within a Member State, as this article will not be changed. That is, in these cases, if an interface is used, the supply will also be split into two supplies.

Amendment of the deadline for payment of import VAT
The deadline for payment of import VAT to the customs authorities will be amended to come in line with the deadlines for customs duties set down in Art. 111 of Regulation (EU) No. 952/2013, if the special provisions for the declaration and payment of import VAT are availed of.

Further decision by means of changing the Operating Regulation (EU) No. 282/2011
The new regulations contain the following provisions in particular:
— definition of the supplier’s significant indirect share in the shipment or transport in the course of distance sales as referred to in Art. 14 (4) of the VAT Directive;
— definition of the circumstances in which it will be assumed that a trader facilitates the sale of items through the use of an electronic interface;
— provisions on the determination of the point in time at which the payments will be accepted in order to determine at what point in time supplies via the electronic interface must be declared;
— type of information that the electronic interface must record;
— no liability for the electronic interface in relation to payment of VAT amounts in excess of those amounts it has declared and paid for in respect of sales made on this interface;
— for suppliers that sell the items via the interface, it will be assumed that they are traders and that their purchasers are consumers. Using this assumption, the interface will be exempt from having to provide proof of the status of the seller and purchaser.
— provisions relating to the expansion of the scope of application of the MOSS procedure and further practical regulations on the MOSS procedure.

NEWS FROM THE BFH
Input tax deduction in the case of investment fraud using non-existent thermal power stations
BFH, ruling of 5 December 2018, XI R 44/14
The German Federal Tax Court (BFH) has concluded that an input VAT deduction from the advance payment be granted to the purchaser of a thermal
power station – which was later not supplied – if, at the time of the payment, the supply appeared to be certain. For this purpose, it is necessary that they could be considered to be aware of all significant elements of the future supply. Furthermore, that on the basis of objective circumstances, it cannot be proved that at the time the payment was made they knew or could reasonably have been expected to know, that it was uncertain whether or not the supply would be carried out.

The case
A customer had paid the purchase price for the acquisition of a thermal power station to the seller (A-GmbH) in advance. The supply, lease and operation of the thermal power station – as in numerous other cases – did not take place. Those responsible at the A company group had in fact never intended to supply the thermal power station. On the contrary, they had established a fraudulent “snowball system” and were later convicted on criminal charges in this respect. The payments (including VAT) which A-GmbH made to the customer, supposedly as monthly lease payments, were declared by the customer and they paid the VAT accordingly to the tax authorities. A short time later, A-GmbH became insolvent.

The tax authorities did not permit the customer’s input VAT deduction on the purchase price paid. The lower tax court upheld the claim. In the appeal proceedings, the BFH had some doubts about the appropriate interpretation of the VAT Directive and referred questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling.

Ruling
Following the pronouncement of the CJEU ruling of 31 May 2018 in the related cases C-660/16 – Kollroß – and C-661/16 – Wirtl – (see VAT Newsletter June 2018), the BFH rejected the tax authorities’ appeal as unfounded. As a trader, the customer is entitled to the disputed input VAT deduction. At the time of their payment, the promised supply appeared to be certain, as the plaintiff could be considered to have been aware of all the major elements of the future supply. In addition, they did not know at that point in time that the carrying out of the supply was uncertain, nor could they have been reasonably expected to have had to know this.

Ultimately, the customer also does not have to (retroactively) adjust the input VAT deduction, as A-GmbH did not repay the purchase price paid. The input VAT adjustment is clearly inappropriate and therefore excluded if, following an adjustment from the tax authorities, a purchaser were able to claim a refund of the VAT payable in relation to an adjustment of that nature.

Please note:
Corresponding decisions were reached in the parallel proceedings XI R 8/14 and XI R 10/16. The BFH’s Senate XI explicitly agrees with the case law of the Senate V, according to which the VAT, as well as the input VAT adjustment arising from (advance) payments, requires a repayment. It remains to be seen what additional decisions the Senate V will subsequently make on the CJEU ruling of 31 May 2018 in the related cases C-660/16 – Kollroß – und C-661/16 – Wirtl.

No VAT on prize money from television show
BFH, ruling of 25 July 2018, XI B 103/17

As a result of the recent CJEU case law in relation to horse-racing (see CJEU, ruling of 10 November 2016, case C-432/15 – Bastova; VAT Newsletter December 2016), the BFH has concluded that prize money from a television show is not subject to VAT.

The case
An advertiser participated in a television show in which, out of a number of participants, a total of twelve candidates moved into a house and the winner of the show was selected using a series of elimination games. According to the contractual agreements with the producers, the participants had to make themselves available for preparations for the project, for example photoshoots, interviews, filling out questionnaires or events with the press. In addition, the participants transferred all rights to footage or audio recordings. The participants had not entitlement to move into the house; on the contrary, the twelve candidates were determined at the discretion of the producers. Upon moving into the house, the participants had the opportunity to win a prize. Furthermore, they received a weekly lump-sum for expenses and a flat-rate reimbursement for damages and wear and tear to clothes. The advertiser won the show and in addition to the prize, received the weekly lump-sum payment for seven weeks.

The tax authorities took the view that through his participation in the film production and the related granting of rights the advertiser had rendered a taxable supply subject to VAT. The tax court upheld the claim and did not allow an appeal.
Ruling
The complaint from the tax authorities due to the non-admission of the appeal was not successful. In accordance with the CJEU Bastova ruling, in a case in which neither entry fees nor another form of direct consideration are paid to participate in a competition, and in which only participants who are successfully placed receive prize money, it cannot be assumed that (mere) participation meant that a corresponding supply was actually rendered.

The lower tax court applied these legal principles to the case at hand. The lower tax court considered the winnings, the lump-sum expenses and the flat-rate reimbursement for damages to constitute prize money for moving into and remaining in the house rather than an expense allowance. This assessment was reached in a procedurally sound manner and also does not contravene laws of logic or general experience and therefore binds the BFH as the court of appeal in accordance with § 118 (2) Procedural Code for Tax Courts (FGO), even if the lower tax court’s assessment is not compulsory but merely possible.

Please note:
According to the BFH, the fundamental importance of the legal case also does not arise from the fact that in the tax authorities’ opinion, the lower tax court should have taken the granting of the rights of use of footage and audio materials into consideration for the exchange of services. The lower tax court ascertained that this service took place; however, it decided that there was no direct connection between the services of the plaintiff and the services of the producers.

NEWS FROM THE BGH
Reclaiming VAT despite agreement on gross prices

BGH, ruling of 20 February 2019, VIII ZR 7/18, VIII ZR 66/18, VIII ZR 115/18, VIII ZR 189/18

The Federal Supreme Court (BGH) has ruled that VAT (not actually incurred) billed by a hospital pharmacy for cytostatics produced for individual patients must, subject to certain conditions, be refunded to the patients or their private health insurers, less the input tax deducted by the hospital operators. This is the result of a required supplementary interpretation of the agreements entered into (see BGH press release no. 17/2019 of 20 February 2019).

The case
The four cases decided are based on requests for refunds by private health insurers from rights devolving from patients insured by them. The patients paid VAT to their hospital operators for the in-house pharmacy production of individual cytostatics administered in outpatient treatment. The defendant hospital operators raised invoices for issue of such drugs in 2012 and 2013 to patients receiving outpatient treatment in the hospitals which included VAT at 19% on the issue price, either shown separately or included. The tax authorities and relevant parties assumed at the time that there was a corresponding obligation to pay VAT. The defendant hospital operators forwarded the VAT in the invoices to the responsible tax offices. The defendants have failed to prove that the VAT assessments were final. The patients’ health insurers reimbursed the invoice amounts either in full or in part, depending on the specific policies taken out.

On 24 September 2014 the BFH ruled (V R 191/11) that administration of individual cytostatics produced for individual patients by a hospital pharmacy in the course of outpatient therapy at a hospital is not subject to tax as it constitutes revenue closely associated with medical treatment. This was followed on 28 September 2016 by a letter from the BMF stating that the tax authorities are following this BFH ruling. At the same time the BMF noted the possibility of correcting amounts owed under the German VAT Act because of an incorrect statement of tax and a consequent retroactive exclusion of the related input tax deduction.

Ruling
The BGH reversed all appealed rulings and referred the cases back to the relevant appeals court. The agreements entered into between patient and hospital operator on payment for the administration of cytostatics must be classified as agreements on gross prices. In contrast to an agreement on net prices, this means that the unincurred VAT is not automatically reclaimable.

However, the agreements on gross prices do not prevent (partial) reclaiming of the VAT portion paid. Under certain circumstances the price agreements show an unintended lacuna that must be closed by supplementary interpretation of the agreement. The decisive question here is whether the parties to the agreement would, if they had known the correct tax law situation at the time of entry into the agreements and the subsequent actual developments in the legal position (change in tax practice), have hypothetically agreed a different price as honest parties to the agreement. This hypothetically agreed price cannot be equated to the net price without further ado. This is
because in the course of reversing the tax treatment the hospital operator retroactively loses any input tax deducted on the purchased ingredients. It should therefore be assumed that the parties to the agreements would hypothetically have agreed a price reduced by the difference between the VAT portion and the input tax deducted, instead of the actual price. The appeals courts are accordingly required to determine – unless they have already done so – whether and in what amount input tax has been deducted by the defendant hospital operators.

In certain cases, however, the hospital operators may face substantial financial disadvantages from the assessment of interest on payments in arrears (§§ 233a, 238 AO) due on the retroactive exclusion of input tax deductions. If the interest reaches a level corresponding to the difference between paid VAT and excluded input tax deductions. If the interest reaches a level corresponding to the difference between paid VAT and excluded input tax deductions, the parties to the agreement would hypothetically have reached a different agreement on prices, so that a supplementary interpretation of the agreement would be unnecessary.

NEW FROM THE BMF

Liability for VAT when trading goods on the internet

German Ministry of Finance (BMF), guidance of 21 February 2019 – III C 5 - S 7420/19/10002:002

Due to the law for the prevention of VAT deficits when trading goods on the internet and for the amendment of additional provisions of 11 December 2018 (see VAT Newsletter December 2018), special duties for the operators of electronic marketplaces (see § 22f German VAT Law (UStG)) and liability provisions when trading on an electronic marketplace (see § 25e UStG) have been introduced to the German VAT Law.

According to this law, the liability provisions must generally be used for the first time for transactions since 28 February 2019. If the supplying trader is resident in Germany, the EU or the EEA, the liability provisions only apply for transactions after 30 September 2019.

Conversely, the obligation to keep records in accordance with § 22f (1) to (3) UStG has already applied since 1 January 2019. Against this backdrop, for the purposes of simplicity, the tax authorities will not object if the operator of an electronic marketplace does not fulfill the obligation to keep records until 1 March 2019 for traders that are not resident in Germany, the EU or the EEA and until 1 October 2019 for other traders (see BMF guidance of 28 January 2019; VAT Newsletter January/February 2019).

The “certificate on the registration as (a trader) liable for VAT in line with § 22f (1) sent. 2 UStG” – USt 1 TI – serves to allow a trader to prove to the marketplace operator that they are registered for tax. The application can be made using form USt 1 TJ.

With regard to the obligation to keep records for suppliers that are not resident in Germany, the EU or the EEA, the BMF guidance of 21 February 2019 contains a regulation regarding non-objections: Up to 15 April 2019, no objection will be raised if, instead of a certificate on the registration as (a trader) liable for VAT in line with § 22f (1) sent. 2 UStG, the operator of an electronic marketplace is in possession (in an electronic format or as a print-out) of an application (before March 2019) to the competent tax authorities for the issuance of a certificate.

IN BRIEF

Breakfast services as an ancillary service of a hotel

Lower Tax Court of Berlin-Brandenburg, ruling of 28 November 2018, 7 K 7314/16; appeal permitted

In accordance with § 12 (2) no. 11 sent. 1 UStG short-term accommodation services such as hotel stays are subject to the reduced VAT rate (7%). This does not apply, however, to services which are not directly related to the rental, even if these services are paid along with the fee for rental (§ 12 (2) no. 11 sent. 2 UStG). According to BFH case law this also includes breakfast services, which must be taxed at 19% (see BFH, ruling of 24 April 2013, XI R 3/11).

In § 12 (2) no. 11 sent. 2 UStG, the BFH sees a requirement to separate supplies which do not directly serve the purposes of the rental. The principle, that the (dependent) ancillary service shares the fate of the principal service, is superseded by the requirement to separate. This conforms to Union law. In its ruling of 13 June 2018, XI R 2/16, the BFH left open the question of whether, even after the pronouncement of the CJEU ruling of 18 January 2018 – case C-463/16 – Stadion Amsterdam (VAT Newsletter January/February 2018), the requirement to separate is compatible with European provisions. The lower tax court of Berlin-Brandenburg affirmed that question in this ruling.

In the case at hand, a hotel only offered overnight stays including breakfast. The hotel agreed package prices with the guests for the overnight stay including breakfast. A small, fixed portion was invoiced as the breakfast part at 19% VAT, the portion for the overnight stay at 7%. The tax authorities did not agree and divided the price proportionately.
Interest payable from start of proceedings for a violation of EU law

Lower Tax Court of Hesse, ruling of 23 July 2017, 7 K 1579/17; BFH ref. no.: VII R 38/18

The Lower Tax Court of Hesse concludes that there is a claim for interest under EU law if import VAT must be reimbursed due to a violation of EU law.

In the instant case the violation of EU law is a violation of the returned goods regulation in Art. 185 Community Customs Code (CCC) (replaced on 1 May 2016 by Art. 203 Union Customs Code (UCC)). Pursuant to Art. 185 (1) CCC Community goods exported from the customs area of the Community and reimported into the customs area within three years and introduced into the free movement of goods under customs law were exempted from import levies on application by the parties concerned. This also includes VAT on imports.

In the case at dispute the customs administration had wrongly assumed that application of the returned goods regulation was exceptionally excluded by § 12 Import VAT Exemption Regulation (EUSTBV). The administrative act accordingly violated the returned goods law (Art. 285 CCC) and so EU law.

Although the claim to interest under EU law in the CJEU ruling of 18 January 2017 (case C-365/15, Wortmann) related to import duties, the Lower Tax Court is of the opinion that the import VAT assessed in the instant proceedings is also subject to interest. The regulations for import duties pursuant to § 21 (2) first half of sent. 1 UStG accordingly apply analogously to import VAT. Further, in the view of the Lower Tax Court the considerations of the purpose of the claim to interest can be applied to import VAT because it makes no difference from the point of view of the disadvantaged taxpayer whether the capital is unavailable because of payment of import VAT or import duties.

The Lower Tax Court notes that the CJEU also ruled in favor of an obligation to pay interest on other levies, such as production levies in the sugar sector and for environmental tax.

In the instant case the Lower Tax Court left open the question whether the obligation to pay interest arose at the time of the payment or only when the tax administration assessed the levies not actually due despite retrospective control. This is because the appeal ruling as the completion of the defendant’s retrospective control is in any event prior to the sought start of interest from the commencement of proceedings. An appeal has been lodged against the ruling.

Requirements for items in transit

Lower Tax Court of Hamburg, ruling of 10 August 2018, 2 K 82/18, legally binding

Companies must generally charge VAT on the amount of their remuneration. Remuneration is everything which the customer uses to receive the supply, however does not include VAT (see § 10 (1) sent. 1 and 2 UStG). Transitory items are not included in the remuneration. That is, amounts which the trader takes in and pays out in the name and for the account of another trader (see § 10 (1) sent. 6 UStG).

The advance payment in the name and on account of a third party requires that a legal relationship exists between both parties in which the trader is only active as an intermediary (paying agent). In addition, for reasons of transparency and legality of the taxation, the person liable for payment and the person entitled to payment must each learn the name of the other and the amount paid (see Section 10.4 (2) VAT Application Decree).

According to BFH case law, the trader must also have treated the amount received in the name and on account of a third-party as transitory items in their accounting. Ultimately, the trader has the right to choose if he wants to see the amounts advanced in the name and on account of his recipient of supply captured as part of the tax base or not (see BFH ruling of 4 May 2011, XI R 4/09, not published in the Federal Tax Gazette). If he does not undertake this treatment in his accounting, the amounts will fall into the tax base for his transactions.

In the case at hand, the two requirements for transitory items were absent. The trader acted in his own name. And in his accounting, to the extent available, he did not distinguish between transitory items and regular transactions. Consequently, the items which – from an economic point of view – were only transitory, belonged, in VAT terms, to the payments to be taken into consideration. Taking these transactions into account, the trader exceeded the revenue threshold of EUR 17,500 in the previous year and could not make use of the small business provision in accordance with § 19 UStG.
Zero rating of aviation security checks
Schleswig-Holstein Ministry of Finance, VAT brief information no. 2018/04 of 27 November 2018

According to § 4 (2), § 8 (2) UStG, revenue for aviation is zero-rated (exempt from VAT, however entitled to an input VAT deduction (see § 15 (3) UStG)). The beneficiaries of this are aircraft from companies which primarily carry out carriage by air internationally. Furthermore, the zero-rating is dependent on the company only carrying out an immaterial amount of VAT exempt ambulance services domestically, in accordance with § 4 no. 17b UStG.

Among others, according to § 8 (2) no. 4 UStG, services which are zero-rated for VAT include those which are intended for the direct needs of aircraft, including their equipment and their cargoes.

As a result of the newly-structured aviation security checks, the Schleswig-Holstein Ministry of Finance issued an opinion on the VAT treatment of these services. According to this, supplies for passenger and baggage screening as well as the operation and managing of aviation security checks must be treated as a service package, and serve the direct (security) needs of aircraft and their cargoes in line with § 8 (2) no. 4 UStG. The service package, in accordance with the other requirements of § 4 no. in conjunction with § 8 (2) no. 4 UStG, is exempt from VAT.

Thus, services rendered at a previous trade level could also be zero-rated (see BMF guidance of 6 October 2017 – III C3 – S 7155/16/10002; VAT Newsletter November 2017).

EVENTS

VAT 2019 - current developments and key issues

VAT law is complex and subject to constant change. Apart from legislative amendments on 1 January 2019, it is already clear that several immediate measures on the reform of trade in goods must be urgently implemented by EU member states at the beginning of 2020. Administrative directives and case law must also be taken into account in practice. The event offers a compact overview of current issues and potential solutions to meet the compliance requirements for affected companies.

Further information on the event can be found here.

26 March 2019 – Munich
26 March 2019 – Bremen
26 March 2019 – Leipzig
27 March 2019 – Kiel
02 April 2019 – Mannheim
04 April 2019 – Ulm

* Please note that the language of this event is German.
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