KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

December 2019

LEGISLATION

Federal Council approves Annual Tax Act 2019

Government document 552/19 of 29 November 2019

On 29 November 2019, the Federal Council approved the Act on Further Tax Incentives for Electromobility and on the amendment of further tax regulations, also known as the Annual Tax Act 2019 (Jahressteuergesetz 2019). In particular, this means that the 'quick fixes' provided for under EU law will be transposed into German law on 1 January 2020.

We have already presented various other significant changes to VAT legislation in the VAT Newsletter August/September 2019 and in the VAT Newsletter November 2019.

It should also be noted that, contrary to the government bill, no new version will be drafted of the VAT exemption for educational services (§ 4 no. 21, 22 a) UStG-E) in order to bring it in line with the requirements of EU law. Entry into force had been scheduled for 1 January 2021. On the basis of feedback received regarding the government bill, no new regulation will be introduced at this time.

Third Bureaucracy Relief Act

Federal Law Gazette 2019 I, p. 1746

On 28 November 2019, the Third Act to Reduce Bureaucratic Impediments in Particular for SMEs, also known as the Third Bureaucracy Relief Act (Drittes Bürokratieentlastungsgesetz) was published in the Federal Law Gazette. This Act contains two practice-relevant amendments to the VAT Act (Umsatzsteuergesetz, UStG):

Raising of the small undertaking threshold as of 1 January 2020

In principle, supplies of goods and other services made for consideration by a business within its own country as part of its business activities are subject to VAT. According to § 19 UStG, VAT is currently not levied for domestic businesses if the turnover (described in more detail there) did not exceed the threshold of EUR 17,500 in the previous calendar year and is not expected to exceed EUR 50,000 in the current calendar year.

Content

In return, no input tax deduction is possible within the system.

With effect from 1 January 2020, the threshold will be raised from EUR 17,500 to EUR 22,000. This is therefore already significant for 2020 in terms of checking whether the previous year's turnover in 2019 exceeded the threshold of EUR 22,000.

Change to the reporting period for start-ups as of 1 January 2021

Pursuant to § 18 (2) sentence 1 UStG, the period for submitting preliminary VAT returns is generally the calendar quarter. If the VAT for the previous calendar year exceeds EUR 7,500, the business owner is obliged to submit monthly preliminary returns. If the tax for the previous calendar year does not exceed EUR 1,000, the tax authorities may exempt the business owner from the obligation to submit preliminary returns and to make advance payments.

In addition, the business owner may choose the calendar month as the reporting period instead of the calendar quarter if there is a surplus in his or her favor of more than EUR 7,500 for the previous calendar year (see § 18 (2a) UStG for details).

A special provision exists in § 18 (2) sentence 4 UStG for start-ups. Business owners must submit VAT returns per calendar month for the year in which they start carrying out a business or commercial activity and for the subsequent calendar year.

From 1 January 2021 to 31 December 2026, the application of § 18 (2) sentence 4 UStG will be suspended in favor of start-ups. Instead, the general rules will apply. In cases where the business owner has carried out his or her commercial or business activity only during part of the previous calendar year, the actual tax will be converted into an annual tax, and in cases where the business owner starts his or her commercial or business activity in the current calendar year, the expected tax for the current calendar year will apply. This will also apply mutatis mutandis to the calculation of any surplus in favor of the business owner.

In contrast, the obligation to submit monthly preliminary returns in the first two calendar years will remain in force in the case of shelf companies which become entrepreneurially active and in the event of any takeover of shell companies.

Update to the E-Invoicing Ordinance

Federal Law Gazette I 2017, p. 3555

The Ordinance on Electronic Invoicing, also known as the E-Invoicing Ordinance (E-Rechnungs-Verordnung), will enter into force gradually. It has applied to all designated federal offices since 27 November 2019. Below is a concise overview of the background, core elements, process requirements, impact on contractors and further developments in the federal states.

Background

The background to the E-Invoicing Ordinance is Directive 2014/55/EU of 16 April 2014 on electronic invoicing in public procurement. The Member States agreed to work together on a common standard for electronic invoicing and to implement this at national level. § 4a (3) of the E-Government Act (E-Government-Gesetz) was then inserted, authorizing the Federal Government to introduce provisions relating to the organization of electronic invoicing that involves federal offices, including orders attributable to the Federal Government from sectoral contracting entities and awarding authorities. This was done with the E-Invoicing Ordinance of 6 September 2017.

Core element of electronic invoices

The core element of electronic invoices is a structured electronic format that enables the document to be processed automatically. PDF files, image documents, and scanned paper invoices are therefore excluded. The invoice must be issued and transmitted in a format for which an appropriate service provider may also be used. Exceptions apply only to invoices which are issued up to an amount of EUR 1,000 following the fulfillment of a direct order, which relate to certain defence and security orders, or which are issued in situations where one body acts in the name of another body.

Process requirements

Invoice issuers must use the current version of the XRechnung data exchange standard for issuing electronic invoices. Another data exchange standard may be used provided that it meets the requirements of the European standard for electronic invoicing. A federal administration portal is available to the issuer and recipient for the transmission of invoices. In this case, the invoice sender must create a user account, otherwise the invoices will be rejected by the invoice recipient. The relevant recipient must view and process the invoice without any media discontinuity using a dialog procedure that is

supported by a web browser, at minimum.

Entry into force of the new regulations
The Ordinance on Electronic Invoicing entered into force on 27 November 2018. Since then, the supreme federal authorities and constitutional bodies of the Federal Government have been obliged to receive and process e-invoices. For sub-central public contracting authorities as well as sectoral contracting entities and awarding authorities, this has only been the situation since 27 November 2019. For business owners themselves, the obligation to issue electronic invoices to public contracting authorities of the Federal Government will exist from 27 November 2020.

Transposition of Directive 2014/55/EU in the federal states
The time frame for transposition is the same for all federal states: In principle, sufficient legal regulations on e-invoicing must be drawn up by 18 April 2020. As a rule, these should be included in the respective e-government acts and separate ordinances.

NEWS FROM THE CJEU

VAT exemption of cost-sharing groups

CJEU, ruling of 20 November 2019 – case C-400/18 – Infohos

This Court of Justice of the European Union (CJEU) ruling concerns a previously applicable Belgian regulation on the VAT exemption of cost-sharing groups. The CJEU reached the conclusion that the regulation contravenes Union law as it ruled out a VAT exemption for a group which also provided services to non-members.

The case
Infohos is an association for hospital information technology. It provides hospital IT services for the hospitals that are its affiliated members, but also provides services to non-members.

In addition, Infohos concluded a cooperation agreement with the IHC Group for the development of new software applications for its member hospitals. Infohos was no longer registered for VAT in Belgium as it considered itself to no longer liable for VAT or at least to be an exempt group. The Belgian tax authorities, however, viewed the IHC Group as a third party and claimed that the mutual provision of supplies between Infohos and the IHC Group was subject to VAT.

Furthermore, supplies subject to VAT for non-members resulted in the transactions effected for Infohos members also being subject to VAT. This stems from the then Belgian law on the VAT exemption of cost-sharing groups.

The Belgian court dealing with this issue submitted a question to the CJEU as to whether Union law permits Member States to lay down a condition of exclusivity for the VAT exemption of cost-sharing groups, with the result that an independent group which also provides services to non-members, will also be fully liable for VAT on the services provided to members.

Ruling
The CJEU rejected this. The Union law VAT exemption can only be granted for the provision of services provided by an independent group of persons to its members. The wording of the Union law cannot be extrapolated to mean that it can only be utilized if these groups are only allowed to provide services to their members.

In connection with other provisions of Union law this shows that the VAT exemption only concerns independent groups of persons whose members engage in activities serving the common good. This connection does not identify anything which could lead to the conclusion that the exemption is limited to independent groups of persons that solely provide services for the benefit of their members. This is also not indicated by the intention of the VAT exemption, to prevent higher costs through a definitive VAT burden for those traders acting for the common good.

Please note:
The so-called German Annual Tax Act 2019 (see article in this VAT Newsletter) will expand the VAT exemption of cost-sharing groups – restricted to the healing professions up to now – from 1 January 2020. According to § 4 no. 29 UStG supplies from independent groups of persons resident in Germany, provided to their members resident in Germany will be exempt from VAT. The members must be engaged in a non-commercial activity serving the common good, or an activity serving the common good which is exempt from VAT in accordance with § 4 no. 11b, 14 to 18, 20 to 25 or 27 UStG. The VAT exemption only applies to the extent these supplies are utilized for the direct purposes of carrying out these activities and that the group only demands the exact reimbursement of the individual portion of the joint costs from its members. Moreover, the

exemption may not lead to a distortion of competition.

According to the grounds given for the law, the VAT exemption should not require that the supplies must always be provided to all members. The supplies shall not, however, be exempt from VAT in the cases in which the group provides them in part or exclusively to third parties or for members' services subject to VAT. To the extent that a VAT exemption shall be ruled out for this reason, if the supplies are provided in part or exclusively to third parties, probably this only conforms to Union law, based on the CJEU ruling at hand, if the remaining part of the services to members is exempt from VAT under the other legal requirements.

NEWS FROM THE BFH

Waiver of back payment of interest in the case of errors of law regarding the identity of the taxpayer

BFH, ruling of 26 September 2019, V R 13/18

The German Federal Tax Court (BFH) has issued an opinion on whether and to what extent a waiver of back payment of interest (§ 233a German Tax Code (AO)) comes into question in the case of errors of law regarding the identity of the taxpayer.

The case

A trader, who was entitled to deduct input VAT on the basis of his sales activities, acquired construction services in the amount of more than EUR 300,000 in the period from 2011 to 2015. The building contractor issued invoices for this showing VAT separately and the recipient of the supply deducted this as input VAT.

Following an external audit, the tax authorities held the view that § 13b UStG must be used for the supplies, that is, that the recipient of the supply owed the VAT. The tax authorities therefore denied the input VAT deduction from the invoices issued to the recipient of the supply and only granted the input VAT deduction with regard to VAT to be levied on the recipient of the supply in accordance with § 13b UStG. The VAT assessment notices, including the determination of interest, were considered final. The building contractor corrected their invoices and transfered the resulting claims against the tax authorities to the recipient of the supply, so that the back payment vis-à-vis the recipient of the supply was thus offset.

The recipient of the supply applied to the tax authorities for a waiver of the interest in the amount of almost EUR 25,000. The action before the Lower Tax Court was not successful.

Ruling

The BFH considered the appeal to have grounds. The tax authorities are required to provide a waiver where reasonable in accordance with § 227 AO. If the provider and the recipient of the supply, as in the case at hand, assume through an error of law, that the supplier is the taxpayer, although the supply is subject to § 13b UStG, the interest arising for the recipient of the supply as a result of the denial of the input VAT deduction must be waived for objective reasons of equity. The additional requirements were also met in the case at hand. The tax authorities had collected the VAT owed for the supply from the supposed taxpayer instead of from the actual taxpayer. Furthermore, the supplier corrected their invoices with the VAT shown and transfered the resulting claim for payment to the recipient of the supply.

The determination of interest in accordance with § 233a AO is generally lawful if the debtor of the tax back payment had enjoyed a liquidity advantage. It is true that the BFH, in its rulings of 24 February 2005, V R 62/03, and of 30 March 2006, V R 60/04, did affirm a liquidity advantage in the case of an input VAT deduction from a non-statutory tax owed despite payment to the invoice issuer. The constellation in the case at hand differs from this, however, in that the supplier and the recipient of the supply jointly misjudged the meaning of the sections (§§ 13a, 13b UStG) pertaining to them. As a result of this particularity, no consideration of liquidity relating to the recipient of the supply must be carried out. With regard to the existing interaction in the case of §§ 13a, 13b UStG, according to which the tax debt can only arise for either the supplier or for the recipient of the supply, the consideration of liquidity is not restricted to the relationship between the recipient of the supply to his tax authority, but must also take the supplier into account.

In the course of examining the equity, it must in particular be taken into consideration that the recipient of the supply and also the building developer, once the error was detected, ensured an appropriate treatment by a subsequent taxation of the recipient of the supply and invoice correction by the building developer.

Please note:
The BFH ruling concerns the particularity of a waiver, for reasons of equity, of the back payment of interest (§ 233a AO) for the recipient of the supply, who has claimed an input VAT deduction from an invoice with tax shown, although the supply is subject to the reverse charge procedure (reversion of the VAT debt to the recipient of the supply). As a result of this particularity, no consideration of liquidity relating only to the recipient of the supply must be carried out.

The BFH holds to the view, moreover, that a so-called "nil-situation" at the supplying trader does not generally lead to a waiver of back payment of interest for reasons of equity. A "nil-situation" can arise if this trader had incorrectly not remitted the VAT from a supply subject to VAT, but the recipient of the supply had not claimed an input VAT deduction due to a lack of invoice.

NEWS FROM THE BMF

Netherlands: New VAT identification numbers on 1 January 2020 for sole traders registered there

BMF, Guidance of 22 November 2019 – III C 5 – S 7427-c/19/10001 : 002

The competent authorities in the Netherlands have announced that sole traders registered there will be issued with a new VAT identification number (VAT ID No.), the use of which will be mandatory for intra-Community transactions from 1 January 2020.

The VAT ID No. for the traders mentioned is structured as follows: After the country code "NL" there are 12 digits of random numbers, capital letters and the signs "+" and "*". The 11th and 12th digits will always be numbers.

The VAT ID No. issued to sole traders up to then will become invalid from the time of the changeover on 1 January 2020. The other Dutch VAT ID numbers are not affected by the changeover and will remain unchanged.

Consequences for traders registered in Germany for transactions with a sole trader registered in the Netherlands
From 1 January 2020 the new Dutch VAT ID No. must generally be used for all intra-Community transactions. Conversely, for periods up to 31 December 2019, the previous Dutch VAT ID No. must be used. To the extent that supplies provided up to 31 December 2019 are only invoiced in 2020, either the VAT ID No. valid before or after 1 January 2020 can be used.

It is recommended that you request the new VAT ID No. from the Dutch sole traders in good time before the first supply in 2020.

Confirmation procedure (§ 18e UStG)

With regard to requests for confirmation made to the Federal Central Tax Office in accordance with § 18e UStG, from 1 January, the competent Dutch authorities shall only confirm VAT ID numbers valid from this point in time.

Conversely, VAT ID numbers which are valid until 31 December 2019 shall no longer be confirmed by the Dutch administration from 1 January 2020. It is therefore recommended that any confirmation requests relating to transactions before 1 January 2020 are carried out by the end of 2019.

EC Sales List (Recapitulative statement) (§ 18a UStG)

For reporting periods from January 2020, it is mandatory to give the new Dutch VAT ID No. in the recapitulative statement (ZM). Otherwise, the Federal Central Tax Office may raise objections vis-à-vis the supplying trader. The competent tax authority must subsequently examine whether the VAT exemption availed of by the supplying trader for intra-Community supplies and intra-Community triangular transactions must be denied, or if the supplying trader needs to tax other intra-Community supplies.

Please note:
The use of the correct VAT ID No. is of particular importance for the tightening of the zero-rating for intra-Community supplies that comes into force from 1 January 2020. From 1 January 2020, an intra-Community supply shall be explicitly made dependent upon the purchaser having used a valid VAT ID No. issued to them by another Member State with respect to the supplying trader. Furthermore, the zero-rating will be denied if the supply is not accurately recorded in the recapitulative statement, whereby a correction of the recapitulative statement can trigger a retroactive zero-rating (VAT Newsletter August/September 2019).

IN BRIEF

Withdrawal of a legal action as a supply subject to VAT

BFH, ruling of 22 August 2019, V R 47/17

The ruling concerns a farmer who wanted to prevent, by means of a legal action against a planning permission decision, the closing of a railway crossing. However, the farmer withdrew the action in 2005 after the railway undertook to build an alternative route and to pay compensation. The compensation payment was to be paid following the closing of the railway crossing in 2006 and was made in several instalments.

According to the tax authorities, it is disputed whether the payment constitutes compensation for damages or a payment for VAT purposes, and whether, in the case of an assumption of a transaction subject to VAT, the transaction should be recorded in the year under dispute, 2006.

The BFH qualified the withdrawal of the legal action as a taxable supply of the farmer subject to VAT. This is the case here because the 2005 agreement meant that the withdrawal of the legal action by the farmer on the one hand, and the undertaking by the railway to build an alternative route and to pay an amount in compensation on the other hand, are directly connected to one another. In doing so the railway obtained planning security and could avoid the risks associated with court proceedings. The provision of the withdrawal of the legal action occurred in 2005 and therefore before the year under dispute, 2006. The point in time at which the payment – here, the compensation payment and the construction of the alternative route – was made, is not relevant for the tax arising upon the taxing of receipts.

Union law does not support any other conclusion. According to this, supplies which give rise to sequential invoices or payments are generally considered to have been effected with the expiry of the period of time to which these invoices or payments relate. In this respect, no time-related performance of the supply is required. This also means that, for example, brokerage services, based on which the performance of the supply is restricted to the arrangement of the occurrence of a particular event, are covered by this rule. This requires that the brokerage service is paid based on the durability of the brokered result (BFH, ruling of 26 June 2019, V R 8/19 (V R 51/16) following the CJEU ruling of 29 November 2018 – case C-548/17 –baumgarten sports & more; VAT Newsletter August/September 2019). The Senate did not decide whether the requirements could be fulfilled in the case at hand. The application presupposes, on the contrary, that the trader is invoking this provision. The farmer had not, however, done so.

Direct right of action in VAT

BFH, ruling of 22 August 2019, V R 50/16

The ruling concerns the recipient – who is entitled to deduct input VAT on the basis of his commercial activity – of an invoice showing non-statutorily owed VAT but which is otherwise in order. The recipient is not entitled to deduct input VAT from such an invoice and therefore generally relies on the issuer of the invoice paying them back the VAT already received.

The BFH maintains that the recipient of the invoice can instead, as part of a so-called right to direct action in accordance with the CJEU ruling of 15 March 2007 – case C-35/05 – Reemtsma , request a "repayment" from the tax authorities, if a clawback from the issuer of the invoice is disproportionately difficult, especially with regard to their inability to pay. This issue must be decided using the process of grounds of equity in accordance with § 163 AO (BFH ruling of 30 June 2015 – VII R 30/14).

According to the BFH, merely showing VAT on an invoice does not suffice for the creation of a right to direct action. In fact, it is necessary that the issuer of the invoice has also provided a supply for which the VAT shown in the invoice has not arisen legally, due to the lack of taxability or as a result of a VAT exemption or a VAT rate reduction. Even a non-taxable transfer of a business as a going concern invoiced with VAT, can lead to a right to direct action, as here there is a supply from the issuer of the invoice

PREVIEW

Guidelines of the VAT Committee on Quick Fixes

VAT Expert Group, draft of 15 November 2019, VEG No 084 REV1

It is possible that this year may still see the publication of the VAT Committee guidelines on the interpretation of the Union law Quick Fixes that will apply from 1 January 2020. The last draft version of 15 November 2019 was discussed in the VAT

Expert Group on 27 November 2019. It is not likely that there will be any further major substantive changes; there are more likely to be additional illustrations.

The VAT Committee was established in order to promote the coordinated use of the provisions of the VAT Directive. As it is solely an advisory committee which does not have any legal authority, the VAT Committee cannot reach any legally binding decisions. However, it can provide guidance on the application of the directive.

Contacts

KPMG AG
Wirtschaftsprüfungsgesellschaft

Head of Indirect Tax Services
Dr. Stefan Böhler
Stuttgart
T +49 711 9060-41184
sboehler@kpmg.com

Berlin
Martin Schmitz
T + 49 30 2068-4461
martinschmitz@kpmg.com

Duesseldorf
Peter Rauß
T +49 211 475-7363
prauss@kpmg.com

Ursula Slapio
T +49 211 475-8355
uslapio@kpmg.com

Frankfurt/Main
Prof. Dr. Gerhard Janott
T +49 69 9587-3330
gjanott@kpmg.com

Wendy Rodewald
T +49 69 9587-3011
wrodewald@kpmg.com

Nancy Schanda
T +49 69 9587-2330
nschanda@kpmg.com

Dr. Karsten Schuck
T +49 69 9587-2819
kschuck@kpmg.com

Hamburg
Gregor Dzieyk
T +49 40 32015-5843
gdzieyk@kpmg.com

Gabriel Kurt*
T +49 40 32015-4030
gkurt@kpmg.com

Antje Müller
T +49 40 32015-5792
amueller@kpmg.com

Cologne
Peter Schalk
T +49 221 2073-1844
pschalk@kpmg.com

Leipzig
Christian Wotjak
T +49 341-5660-701
cwotjak@kpmg.com

Munich
Dr. Erik Birkedal
T +49 89 9282-1470
ebirkedal@kpmg.com

Kathrin Feil
T +49 89 9282-1555
kfeil@kpmg.com

Claudia Hillek
T +49 89 9282-1528
chillek@kpmg.com

Nuremberg
Dr. Oliver Buttenhauser
T +49 911 5973-3176
obuttenhauser@kpmg.com

Stuttgart
Dr. Stefan Böhler
T +49 711 9060-41184
sboehler@kpmg.com

International Network of KPMG

If you would like to know more about international VAT issues please visit our homepage KPMG International**. Further on this website you can subscribe to TaxNewsFlash Indirect Tax and TaxNewsFlash Trade & Customs which contain news from all over the world on these topics. We would be glad to assist you in collaboration with our KPMG network in your worldwide VAT activities.

Our homepage / LinkedIn

You can also get up-to-date information via our homepage and our LinkedIn account Indirect Tax Services.

* Trade & Customs

** Please note that KPMG International does not provide any client services.

Impressum

Issuer

KPMG AG
Wirtschaftsprüfungsgesellschaft
THE SQUAIRE, Am Flughafen
60549 Frankfurt/Main

Editor

Ursula Slapio (Responsible*)**
T +49 211 475-8355
uslapio@kpmg.com

Christoph Jünger
T + 49 69 9587-2036
cjuenger@kpmg.com

VAT Newsletter and Customs & Trade News – Free Subscription

To subscribe, please register here (VAT Newsletter) and there (Customs & Trade News).

*** Responsible according to German Law (§ 7 (2) Berliner PresseG)

www.kpmg.de

www.kpmg.de/socialmedia