E-Commerce: New provisions in the EU for the exchange of payment data from 2024


On 18 February 2020, the Council adopted a set of rules intended to ensure that tax fraud in the case of cross-border electronic transactions can be more easily uncovered (see press release from the same day).

The new measures will apply from 1 January 2024. They enable Member States to capture the records provided electronically by the payment service providers (e.g. banks) in a uniform manner. In addition, a new central electronic system will be created for the storage of payment information and further processing of this information by national anti-fraud units.

First, there will be a change in the VAT Directive which will oblige payment service providers to keep records on cross-border payment in connection with electronic trading. This data will then be made available – under strict conditions, including data protection aspects – to the national tax authorities. Second, the regulation on the cooperation of administrative authorities in the area of VAT will be amended.

Please note:
These changes supplement the legal VAT framework for electronic trading, which was introduced with the new VAT obligations for online market places from 1 January 2021, and simplified VAT provisions for online companies. Thus, the Council adopted various legal acts on 5 December 2017 concerning the taxation of distance selling. In this respect, this means in particular changes to the VAT Directive and revocation of the VAT exemption on imports of small value shipments, as well as amendments to the Regulation on Administrative Cooperation (see VAT Newsletter January/February 2018). Finally, on 21 November 2019, the Council’s Directive (EU) 2019/1995 and Implementing Regulation (EU) 2019/2026 introduced additional changes, which serve to correct or clarify the new provisions.
Small enterprises: New provisions in the EU from 2025


On 18 February 2020, the Council adopted simplified VAT provisions for small enterprises (see press release from the same day). The new measures are intended to help lower the administrative burden and compliance costs for small enterprises, and to ensure VAT conditions that will help small enterprises to expand and to carry out cross-border business more efficiently. The new rules will apply from 1 January 2025.

Companies have VAT obligations and function as VAT collectors for tax authorities. This involves incurring compliance costs, which are proportionately higher for small enterprises than for larger companies. In accordance with the current provisions in the VAT Directive, only domestic companies may avail of the small enterprise rules (for the corresponding legal position in Germany see § 19 German VAT Law (USTG)). According to the new provision, in future small enterprises located in other Member States will be granted a similar VAT exemption.

The change to the VAT Directive stipulates in particular that Member States can introduce simplified VAT compliance rules for small enterprises located in their Member State, if the annual turnover does not exceed a threshold of EUR 85,000 at the most. Under certain circumstances, small enterprises from other Member States that do not exceed this threshold could also enjoy the simplified provisions, to the extent that their total EU-wide annual turnover is no higher than EUR 100,000 at the most.

NEWS FROM THE CJEU

CJEU submission on the interest applied to electricity tax refund claims according to Union law

BFH, resolution of 19 November 2019, VII R 17/18; CJEU ref. no.: C-100/20

The German Federal Tax Court (BFH) submission to the Court of Justice of the European Union (CJEU) concerns the question of whether or not to introduce those reductions, there is – according to the current electricity from the supply grid and stored it in accumulators. In its electricity tax return for 2010, it declared that it had used this amount of electricity itself and chose the reduced tax rate. The main customs office, however, taxed this electricity at the standard tax rate, contrary to § 9 (3) Energy Taxation Act. This meant that the company was entitled to a refund of the excess electricity tax paid.

In December 2014, the company applied for the assessment of interest with regard to the refunded electricity tax, which the main customs office denied. The Lower Tax Court held that the company has no claim to the requested interest under either national law or Union law. The company appealed this ruling.

Resolution

The BFH notes that the use of the reduced tax rate in accordance with § 9 (3) Energy Taxation Act also refers to Art. 17 (1) (a) Council Directive 2003/96. The BFH draws the conclusion, from the CJEU case law (e.g. rulings of 19 July 2012 – case C-591/10 – Littlewoods Retail inter alia), that Member States are required to refund taxes levied in contravention of Union law, plus interest. This also applies if, as in the case of Council Directive 2003/96, it is a legal act of the Union which first needs to be implemented in national law.

However, Art. 17 (1) (a) Council Directive 2003/96 deals with an optional tax reduction, which Member States can grant to taxpayers. Accordingly, there is no obligation to provide tax benefits to enterprises that use a lot of energy. For the BFH this leads to the question of whether in this case, there is still an entitlement to interest. Ultimately the BFH tends towards the view that interest be denied.

Please note:

Interest must generally be applied to taxes levied contrary to Union law from the day of the incorrectly paid tax until it is refunded (see CJEU ruling of 18 April 2013 – case C-565/11 – Mariana Irimie; VAT Newsletter July 2013). In this respect, the German rules on a grace period of 15 months in accordance with § 233a German Tax Code could contravene Union law, if the underlying tax assessment also contravenes Union law.

In the case of VAT the fact that in relation to all VAT rate reductions, there is – according to Union law – a right to choose whether or not to introduce those reduced rates, must be taken into consideration. Thus, in
Denmark – permissibly – there are no VAT rate reductions, but rather just one VAT rate. Union law VAT exemptions, on the other hand, are partially mandatory, with no leeway for the Member States (example: substantive requirements for intra-Community supplies). In this respect, it remains to be seen how the CJEU case law on the application of interest to taxes levied in contravention of Union law develops.

NEW FROM THE BFH

Business activities of supervisory board members – unwarranted showing of VAT in cases of self-billing

BFH, ruling of 27 November 2019, V R 23/19 (V R 62/17)

The BFH ruling concerns the business activities of supervisory board members and the unwarranted showing of VAT (§ 14c (2) of the German VAT Law (UStG)) in cases of self-billing ( invoicing by the customer).

The case

The plaintiff was the top executive of S-AG and at the same time, a supervisory board member of E-AG. S-AG was the sole shareholders of E-AG. According to E-AG’s statutes, each supervisory board member received a fixed annual payment for their task, or a pro rata amount thereof. Among other things, E-AG issued the plaintiff for the supervisory board payment for 2013 a self-billing invoice which showed VAT. The plaintiff objected to this invoice in 2014. The plaintiff opposed the assumption that as a member of the supervisory board he was a trader and in this capacity was providing service liable to VAT. An appeal and a legal suit before the Lower Tax Court were unsuccessful.

Ruling

In contrast, the BFH allowed the legal action. As the reason for this, it gave the CJEU case law which must be taken into consideration when interpreting national law. According to the CJEU ruling of 13 June 2019 – case C-420/18 – IO (see VAT Newsletter July 2019), under certain circumstances, a member of a supervisory board does not carry out an independent activity. What is relevant is that the supervisory board member is acting for the account and on the responsibility of the supervisory board and in doing so, also bears no economic risk. The latter arose in the individual case decided by the CJEU – as in the case at hand – from the fact that the supervisory board member received a fixed payment, which depended neither on participation in meetings nor on the hours he actually worked.

The issue is also ripe for decision vis-à-vis the year under dispute, 2013. While in this case there is a self-billing invoice showing VAT, which the plaintiff first objected to the following year, a self-billing invoice which is not issued for a service performed by a trader, cannot – according to the law – be considered equivalent to an invoice issued by the trader. Therefore it cannot form the basis for a tax liability in accordance with § 14c (2) UStG. In its ruling of 16 March 2017, V R 27/16, the BFH had left this issue open.

Please note:

Following the BFH’s previous case law (see most recently the ruling of 20 August 2009, V R 32/08), the tax authorities have, up to now, classified the activities of a supervisory board member as a business activity (Section 2.2 (2) sent. 7 VAT Application Decree). It must therefore be invoiced with VAT, unless the supervisory board member can, and wants to, invoke the status of a small enterprise (§ 19 UStG). Conversely, only civil servants (Beamte) and other public service employees, who take on the supervisory board activity at the request, suggestion or instigation of their employer, and who are bound, by virtue of civil service or other employee laws to transfer the remuneration in whole or in part to their employer, are not carrying out a business activity (Regional Tax Office Frankfurt, order of 4 October 2013 – S 7100 A-287-St 110).

As far as can be seen, there has not yet been any public reaction to the recent BFH case law from the financial authorities. From a practice point of view, such a statement from the authorities, in combination with a transitional regulation to provide legal certainty in dealing with the companies affected and their supervisory board members, would be welcome. This applies especially in light of the multitude of open issues on different remuneration models, such as variable and mixed
payments, which the case law has not explicitly decided.

Sale and leaseback: time at which VAT is incurred
BFH, ruling of 27 November 2019, V R 25/18

The ruling relates to a sale and leaseback transaction in which, for VAT purposes, the performance consists of participating in structuring the balance sheet. According to the BFH, this time-limited ongoing service will only be rendered when the legal relationships underlying this service have ended.

The case
The purpose of a certain GbR (German civil law partnership) is to acquire electronic information systems of company I and to lease them back to I immediately. In 2006 the GbR bought the information systems. At the same time, I granted the GbR an interest-bearing loan for a period of 48 months. Also in 2006, the GbR leased the electronic information systems back to I for a period of 48 months, for which monthly leasing instalments were agreed. In March 2007, the GbR invoiced I for all leasing fees in a single invoice. In this invoice, VAT from one monthly instalment was openly shown and recorded as transfer December 2006. I paid a leasing instalment in March 2007 only. At the beginning of 2008, the GbR terminated the leasing contract without notice due to payment irregularities. The point at issue is whether the GbR has to pay VAT in 2007.

Ruling
The BFH rules that it does not. In the present case, the service of the GbR is to be qualified as participation in the structuring of the balance sheet of I. The GbR carried out its participation on the contractual basis of several connected legal relationships, a purchase agreement, a loan agreement and a leasing agreement. Accordingly, the remuneration does not consist of the sum of the leasing instalments, but of the balance of leasing instalments, purchase price and loan interest.

This time-limited ongoing service is only rendered upon termination of the legal relationships underlying this service. This also includes the leasing contract. Thus, the participation service could be rendered at the earliest, due to the termination of the leasing contract, at the beginning of 2008 and thus only after the year of dispute.

The acceptance of a partial performance already fails in the present case due to the lack of economic divisibility of the participation service rendered by the GbR. Nor did the GbR receive any advance payments. According to the BFH, this would only have been the case in the dispute if the GbR had received payments that exceeded the payments it had made. Since the GbR only collected one leasing instalment, this can be excluded. A tax liability according to § 14c UStG can be ruled out because the one-off tax statement made here did not exceed the total tax due for the participation service.

Please note:
The tax authorities have commented on the VAT qualification of sale and leaseback transactions in section 3.5 (7) UStAE: Depending on the specific terms of the contract and its actual implementation, there may be (a) two separate transactions, namely a delivery and a return delivery, (b) a single transaction by the lessor in the form of a VAT exempt loan, or (c) a taxable other service provided by the lessor. The latter requires that the sale and leaseback transaction is aimed primarily at providing the lessee with an advantageous balance sheet structure. In addition, the lessee must have provided a loan for the predominant share of the financing of the acquisition by the lessor.

NEWS FROM THE BMF
Zero-rated international transport of goods relating to import and export
BMF, guidance of 6 February 2020 - III C 3 - S 7156/19/10002 :001

Under § 4 no. 3 (a) UStG, cross-border transport of goods relating to imported and exported goods is zero-rated (VAT exemption with entitlement of input VAT deduction) under the conditions set out therein. The provision is based on Article 146 (1) (e) of the VAT Directive.

Allowing for the CJEU ruling of 29 June 2017 – case C-288/16 - L.C. - zero-rating may be granted only if the carrier provides the transport service directly to the consignor or the consignee of the goods. This is not in line with the current practice of the tax authorities (see VAT Newsletter July 2017).

The following restriction is therefore included in section 4.3.2 (4) UStAE by the BMF guidance of 6 February 2020: In principle, only the services of the principal carrier are eligible for zero-rating, but not those of the sub-carriers, since they do not provide transport services directly to the consignor or
consignee of the goods, but to
the principal carrier. Section
4.3.4 (8) UStAE is also amended
in this respect.

The principles of the BMF
guidance shall be applied to all
open cases. However, no
objections will be raised for
transactions carried out before 1
July 2020 (§ 4 no. 3 (a) UStG) if
the previously applicable legal
position on section 4.3.2 (4)
UStAE is applied.

Please note:
The BMF guidance concerns
goods transport services
provided by subcontractors
which were previously zero-rated
under the tax administration
pursuant to § 4 no. 3 (a) UStG
and which are to be treated as
taxable from 1 July 2020. Unless
the reverse charge procedure is
applicable to other services
provided by a contractor
domiciled abroad, VAT is now to
be charged for subcontracted
transport services.
The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation. Our services are provided subject to our verification whether a provision of the specific services is permissible in the individual case.

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