KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

May 2020

LEGISLATION

Postponement of E-Commerce rules until 1 July 2021 recommended

Website of the European Commission

On 5 December 2017, the Council agreed on various legal acts concerning the taxation of distance sales. In particular these dealt with changes to the VAT Directive and the revocation of VAT zero rating on imports of small-value consignments and changes to the Regulation on Administrative Cooperation. These regulations will enter into force on 1 January 2021.

On 21 November 2019, additional changes and inclusions to the VAT Directive and the VAT Implementing Regulation were implemented, which serve to correct or clarify the new provisions. Finally, on 18 February 2020, with effect from 1 January 2024, additional changes to the VAT Directive and the Regulation on Administrative Cooperation were implemented.

European Commission proposal

On 8 May 2020, as a result of the practical difficulties brought about by the measures to contain the Coronavirus pandemic, the European Commission proposed postponing the introduction of new VAT provisions for electronic trading for six months. Following adoption by the Council, the rules will apply from 1 July 2021 instead of 1 January 2021, so that Member States and companies will have enough time to prepare.

VAT changes due to the Corona Tax Relief Law

Government draft of 6 May 2020

This law is intended to take steps in tax law to support those actors particularly affected by the Corona pandemic. Liquidity should be improved and tax reliefs granted. The draft law contains two VAT-related measures:

First, the VAT rate for restaurant and catering services provided after 30 June 2020 and before 1 July 2021, with the exception of drinks, shall be lowered from 19 per cent to 7 per cent (§ 12 (2) no. 15 German VAT Law – Draft (UStG-E)). We already

Content

informed you of this in our VAT Newsletter April 2020.

Second, the current transitional regulations on § 2b German VAT Law (UStG) (legal entities under public law) to handle the COVID-19 pandemic should be extended until 31 December 2022 (§ 27 (22a) UStG-E).

In addition, a new § 27 (22a) UStG should make it possible to be flexible with the timing of the application, as the small number of legal entities under public law who submitted a declaration before 2016 and have already carried out the necessary adjustment for 1 January 2021, can begin with the application of § 2b UStG by means of a corresponding retraction in 2020. In contrast, other legal entities under public law will be granted up to two more years for the adjustment period.

NEWS FROM THE CJEU

Subsidiary as a fixed establishment

CJEU, ruling of 7 May 2020 – case C-547/18 – Dong Yang Electronics

This Court of Justice of the European Union (CJEU) ruling of 7 May 2020 – case C-547/18 – Dong Yang Electronics – concerns the question of whether, for the determination of the place of supply in Art. 44 of the VAT Directive in the B2B area (see § 3a (2) UStG), a subsidiary can be a fixed establishment of the recipient of the supply.

The case

In the case under dispute, the Polish company, Dong Yang assembled circuit boards for the South Korean company, LG Korea using materials and components from LG Korea. Dong Yang received the materials and components from LG Poland, a Polish subsidiary of LG Korea. LG Poland used the finished circuit boards pursuant to a contract concluded with LG Korea for the production of TFT-LCD modules. These modules, which were owned by LG Korea, were supplied to LG Display Germany GmbH. LG Korea assured Dong Yang that LG Korea does not maintain a fixed establishment in Poland, nor employ any staff, nor own any real estate or technical equipment in the territory of Poland. Accordingly, Dong Yang invoiced LG Korea for the assembly of the circuit boards without showing Polish VAT.

The tax authorities, on the contrary, took the view that LG Korea, by means of the contractual relationship it created, uses LG Poland as its own subsidiary. Dong Yang was not allowed to simply rely on LG Korea's declaration – according to which it did not have a fixed establishment in Poland – but rather, in accordance with Art. 22 of the Implementing Regulation (EU) No. 282/2011, should have checked who the actual beneficiary of the services they supplied was; such a review would have made it possible for them to reach the conclusion that this beneficiary was in fact LG Poland. Accordingly, Dong Yang provided the assembly services in Poland, as LG Poland was a fixed establishment of LG Korea. Therefore, the tax authorities demanded the payment of VAT from Dang Yong for the assembly services provided in 2012. Dong Yang filed a legal suit against this decision.

Ruling

In this case, the place of the assembly services – for lack of a special provision in the B2B area – is determined based on Art. 44 of the VAT Directive, according to the CJEU. On the basis of Art. 44 sent. 1 of the VAT Directive, this means the provision of supply was Korea. However, if these services were provided to a fixed establishment of LG Korea in Poland, then, according to Art. 44 sent. 2 of the VAT Directive, the place of supply would be in Poland.

The CJEU holds the view that it is possible that a subsidiary can constitute a fixed establishment of its parent company. In this respect, the CJEU also refers to its ruling of 20 February 1997 – case C-260/95 – DFDS. Taking the economic and commercial reality into account, the classification of a subsidiary as a permanent establishment may not depend solely on the legal form the establishment in question.

Art. 44 of the VAT Directive, as well as Art. 11 (1) and Art. 22 (1) of the Implementing Regulation (EU) No. 282/2011 must, however, be interpreted so that the service provider cannot reach the conclusion that a company which is resident in a non-EU country has a fixed establishment in the territory of a Member State, solely due to the mere circumstance that this company owns a subsidiary there. Furthermore, the service provider is not obliged, for the purposes of such an assessment, to examine the contractual relationships between both companies, which the CJEU expanded on.

Please note:

The CJEU ruling is also important for the German legal situation. According to the VAT Application Decree (UStAE), a permanent establishment can also be a subordinate company

in line with § 2 (2) no. 2 UStG. A subordinate company only exists in the case of financial, organizational, and economic integration into the parent company or a company at a higher level. To this extent, the provision in the UStAE is essentially covered by the CJEU case law, however, in light of the requirement for financial and organizational integration may still be too narrow. It will be very interesting to see whether and to what extent the tax authorities will amend the UStAE on the basis of this CJEU ruling regarding Dong Yang Electronics.

NEWS FROM THE BFH

Change to the basis of assessment in the case of discounts in points systems

BFH, ruling of 16 January 2020, V R 42/17

If a trader participates in a discount system operated by a third party which gives points, depending on spend, to the customers of the trader, the trader's basis of assessment is only reduced at the time when the customer actually redeems the points, according to the German Federal Tax Court (BFH).

The case
The BFH had to decide on the issue of whether the basis of assessment is reduced retroactively to the time of the supply that takes place as the "first transaction" of the trader's customer using a customer card if, in doing so, a system is used whereby the points are credited to the customer's account by the system carrier, leading to a corresponding charge to the trader for the equivalent value of the points acquired.

Ruling
The BFH ruled that the claimant is entitled to a reduction of the basis of assessment in accordance with § 17 (1) UStG. The Lower Tax Court ruled incorrectly that this correction must be carried out for the point in time of the "points clearing", as the basis of assessment only changed due to the customer availing of the repayment in the "second transaction". If a trader is participating in a discount system operated by a third party that issues points, depending on spend, to the trader's customer, the basis of assessment is first reduced when the customer actually redeems the points.

In its justification, the BFH relies primarily on CJEU case law in the case of Freemans (ruling of 29 May 2001, case C-86/99), and on the wording of the German VAT Law. Payment, and thus the basis of assessment, is, according to § 10 (1) sent. 2 UStG (in the version valid up to 31 December 2018), what the recipient of the supply uses in order to receive the supply, however minus the VAT. Consequently, the basis of assessment is reduced by definition due to the expense to the customer being reduced.

According to the BFH this is commensurate with Union law. In accordance with Art. 73 of the VAT Directive, which § 10 (1) sent. 2 UStG (in the version valid since 1 January) is based on, the basis of tax assessment includes everything that forms the value of the reward which the supplier or service provider receives or should receive for these transactions from the purchaser or the recipient of the service or a third party, including the subsidies directly linked to the price of these transactions. This also means that the basis of assessment changes only when the value of the reward received by the customer changes; in other words, when the customer makes use of the discount.

Please note:
It remains to be seen if the financial authorities will pick up on the ruling and publish it in the Federal Tax Gazette, so that the tax authorities will (have to) make use of it. It is possible that initially the decision of the Lower Tax Court in the second instance will be awaited, as the BFH lifted the ruling of the previous instance, and referred it back to the Munich Lower Tax Court for further hearing and a new ruling.

NEWS FROM THE BMF

Changes to the input VAT refund procedure from 1 January 2020

BMF, guidance of 7 May 2020 - III C 3 - S-7359 / 19 / 10010 :001

This German Ministry of Finance (BMF) guidance provides understanding on the VAT changes in the input VAT refund procedure from 1 January 2020 as a result of the law on further fiscal support for electromobility and the amendment of other tax provisions of 12 December 2019 in the VAT Application Decree (see VAT Newsletter August/September 2019 on the government draft).

Change to § 15 (4b) UStG – limits to input VAT deduction

The scope of application of § 15 (4b) UStG was expanded to prevent instances of abuse. This could happen if the limits of the input VAT deduction procedure in relation to the required reciprocity and the exclusion of the right to deduct input VAT in the case of fuels is supposed to be gotten around using an

incorrect or unjustified showing of VAT according to § 14c (1) and (2) UStG, and the reference to a supply that falls under § 13b UStG.

Change to § 18 (9) sent. 3 UStG – input VAT refund procedure despite tax debt in accordance with § 14c UStG

According to the administrative opinion in Section 18.15 (1) sent. 2 UStAE, traders resident abroad who fulfill the requirements of the input VAT refund procedure and owe VAT as part of the general tax process (for example in accordance with § 14c (1) UStG), can only claim the refund of the input VAT amounts, by way of derogation from § 16 (2) sent. 1 UStG, in the input VAT refund procedure. This administrative provision has now been substantively included in § 18 (9) sent. 3 UStG.

Change to § 59 sent. 2 German VAT Operating Regulation (UStDV) – traders resident abroad

The definition of a trader resident abroad, for whom the input VAT refund procedure comes into consideration, was amended in line with the CJEU ruling of 25 October – cases C-318/11 and 319/11 – Daimler and Widex. Thus, a domestic branch office will only lead to exclusion from the input VAT refund procedure, if the domestic branch executes transactions liable to VAT in Germany.

Change of § 61 (5) UStDV – interest term in the input VAT refund procedure

§ 61 (5) UStDV regulates, for the EU input VAT refund procedure, that interest must be applied to the amount to be refunded after a certain period has elapsed. The exact beginning shall be amended to be consistent with the wording of the Directive 2008/9/EC.

Please note:
In addition, the BMF guidance contains two changes that are only indirectly prompted by the law on further fiscal support for electromobility and the amendment of other tax provisions of 12 December 2019. According to the previous administrative provision in Section 18.11 (4) sent. 4 no. 1 and 2 UStAE, in the case of a lack of reciprocity, the input VAT refund procedure was to be carried out if the trader who is not resident in the Community territory only executes transactions for which the recipient of the supply owes the VAT (§ 13b (5) sent. 1 and 6 UStG), or which were subject to the individual taxation on transport (§ 16 (5) and § 18 (5) UStG). The same applies in the case of a lack of reciprocity, if the trader is active as the middle link in an intra-Community triangular transactions (§ 25b (2) UStG). Both of these regulations were dropped without explanation.

IN BRIEF

VAT on the operation of a gaming machine

BFH, ruling of 11 December 2019 – XI R 13/18

The BFH has confirmed its earlier case law, according to which the revenue of a slot machine operator since 6 May 2006 is absolutely subject to VAT. Union Law, too, does not stand in the way of this.

According to CJEU case law, the supply of the person setting up the machine consists of providing the chance to win (accepting the risk of having to pay out the prize), while the fee for which the supply is rendered, as a result of statutory requirements, exists in the (net) cash takings from the games of all players. This must also be adhered to if taking into consideration the CJEU ruling of 10 November 2016 – case C-432/15 – Bastova – on the non-taxability of prize-winnings in the case of horse races (see VAT Newsletter December 2016).

Since 6 May 2006, according to § 4 no. 9 (b) sent. 1 UStG only those transactions which fall under the Law on Horse Betting and Lotteries are still free of VAT. For time periods before this, machine operators can invoke a VAT exemption under Union law. Furthermore the BFH, following the CJEU ruling of 24 October 2013 – case C-440/12 – Metropol Spielstätten – reached the conclusion that the VAT and a special domestic levy on games of chance may be cumulatively levied, to the extent that the special levy does not have the character of a value-added tax. Whether the fact that, in the case of public casinos, the VAT is charged against the casino levy breaches the Union prohibition on State aid is not material to the issue relating to VAT in the legal proceedings. A suspension of the appeal proceedings until the conclusion of the state aid proceeding SA.44944 is therefore not necessary.

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

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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

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