KPMG

VAT Newsletter

Hot topics and issues in indirect taxation

January / February 2021

NEW LEGISLATION

Extension of the deadline for submitting 2019 VAT returns

Law dated 15 February 2021, Federal Law Gazette I 2021 p. 237

According to § 149 (2) German Tax Code (AO), the deadline for submitting VAT returns normally ends 7 months following the taxation period (i.e. for VAT returns 2019 on 31 July 2020). To the extent that those working in tax advisory professions generate the returns, this deadline normally extends to the end of February of the year after that (i.e. for VAT returns 2019 until 28 February 2021). For returns for the assessment period 2019, a further extension of the deadline to the end of August 2021 (31 August 2021) has been decided if tax advisory professions according to German Tax Advisory Law are involved.

Regardless of the VAT return deadline, however, the interest term for potential additional interest payments in accordance with § 233a AO generally ends 15 months after the end of the calendar year 2019, i.e. on 1 April 2021. This grace period has also been extended for an additional six months periodby the law, i.e. to 1 October 2021.

Draft of a Third Corona Tax Relief Law

Bundestag journal 19/26544

The CDU/CSU and SPD parliamentary parties have introduced the draft of a “Third Law to Implement Tax Relief Measures to Overcome the Corona Crisis” (Third Corona Tax Relief Law). In this law, tax measures aimed at further fighting the consequences of Corona and strengthening domestic consumption are adopted. Actors particularly affected by the Corona pandemic shall be supported.

The draft law contains in particular an extension of the reduced VAT rate of 7 per cent for restaurant and catering services supplied, with the exception of the sale of drinks, beyond 30 June 2021, with a deadline of 31 December 2022 (§ 12 (2) no. 15 Draft German VAT Law (UStG-E)).

Content

Reduction of the VAT special advance payment to zero

DATEV Document no. 1019615

The German Ministry of Finance (BMF) and the highest tax authorities in the states have agreed on various tax simplifications in order to provide relief to those taxpayers directly and not insignificantly affected by the Corona crisis.

Some federal states are offering the possibility for a reduction of the VAT special advance payment for 2021. Most of these states require that the ongoing Corona crisis is having a direct and not insignificant impact on the company. There are not currently any uniform nationally prescribed procedures.

NEWS FROM THE CJEU

Provision of company vehicles to staff

CJEU, ruling of 20 January 2021 – case C- 288/19 – QM

This Court of Justice of the European Union (CJEU) ruling deals with the question of whether the cross-border provision of company vehicles to commuters for business and private purposes is subject to VAT in the employee's place of residence.

The case

QM is an investment fund management company and is located in Luxembourg. Among other things, it made available company cars to two employers that live in Germany. They could use these vehicles for both business and private purposes. For one of the employees, the vehicle was provided free of charge, while the other had to pay costs in the amount of EUR 5,688 per year – this amount was deducted from his salary.

QM primarily carries out transactions that are exempt from VAT and pays tax in line with a simplified tax scheme in Luxembourg. This scheme does not allow the deduction of input VAT on the purchase of items and services incurred at an earlier transaction stage. In particular QM did not avail of the right to deduct input VAT for the two vehicles that form the core of the dispute in the main proceedings. It is disputed if QM's act of making the vehicles available to the employees living in Germany is subject to VAT.

According to Art. 56 (2) of the VAT Directive, the place of rental of a means of transport to a non-taxable person for a period longer than 30 days is the place at which the recipient is resident or has their place of residence or usually resides. In this respect the Saarland Lower Tax Court asked the CJEU whether the provision applies to the transfer of a car to an employee, if that employee makes no payment nor uses part of their remuneration, and the right to use the vehicle is not connected to forgoing other benefits.

Ruling

In the case of the provision of a car without any payment by the employer, the taxation of a benefit in kind in accordance with Art. 26 (1) (a) of the VAT Directive (see § 3 (9a) no. 1 German VAT Law (UStG)) is ruled out if the car has not created a right to deduct input VAT. In Luxembourg, QM could not claim an input VAT deduction in relation to the car that was made available, in Germany this still has to be judged by the Saarland Lower Tax Court. If, therefore, VAT in accordance with Art. 26 (1) (a) VAT Directive (§ 3 (9a) no. 1 UStG) is possible, the transaction nonetheless does not fall under the provision relating to location of Art. 56 (2) (1) of the VAT Directive (see § 3a (3) no. 2 UStG) and, as a result, in the case at hand is not subject to VAT in Germany, as the place of supply is located where QM operates its business.

In the case where the car was made available and the employee made a payment, the place of supply of the paid service is determined in line with Art. 56 (2) (1) of the VAT Directive (see § 3a (3) no. 2 UStG), if the service in question is a service for a consideration and the employee, having paid a rental fee, has a permanent right to use the vehicle for private purposes for an agreed period of more than 30 days and to exclude other people from using it. This means that the place of the transfer of the vehicle in this case is the employee's place of residence in Germany.

Please note:

In the present ruling, the CJEU has clarified that the transfer of a company vehicle by an entrepreneur to his staff for private use is generally subject to VAT at the employee's place of residence. On the other hand, in the case of a provision for free, taxation generally takes place where the employer operates his business.

It is therefore particularly important in commuter cases to check whether there are opportunities (e.g. reimbursement of VAT paid at the place of residence in the case of making the car available free of charge provision) or also risks (e.g. registration obligations at the employee's place of residence in the case of making the car available against

payment) for the past. The CJEU is not conclusively clear on the question of whether the exchange-like turnover assumed by the tax authorities in many cases is obsolete and can be qualified as free of charge. This would be a major change in previous practice, which in many respects could also result in adjustments to purely domestic car provisions.

Affected companies should now examine the corresponding constellations of facts (short-term / long-term provision; rented / leased or own vehicle of the employer; input tax deduction at employer level or not, etc.) and contractual regulations (paid / free leasing) of private vehicle use, especially in the area of cross-border commuters and analyze it against the background of the CJEU ruling.

VAT exemption for golf clubs

CJEU, ruling of 10 December 2020 – case C-488/18 – Golfclub Schloss Igling

The ruling concerns the question of whether the services of a golf club can be exempt from VAT.

The case

In the case at hand the resources of a golf club are only used for the purposes set out in its statutes, which stipulate that its assets, in the case of a dissolution or liquidation, are turned over to a person or institution determined by a general meeting of members. Whether the revenue from the use of the golf course, the rental of golf balls, the hiring of caddies, the sale of golf clubs, and the holding of golf tournaments and events for which the golf club receives entry fees for participation, is subject to VAT is disputed.

The tax authorities hold the view that a VAT exemption only applies to the participation fees for golf events. These are only exempt in line with § 4 no. 22 UStG if the club is a charitable organization within the meaning of § 51 et seq. AO. This is not the case for the golf club, as its statutes do not contain specific enough provisions for the commitment of assets in the case that it is dissolved.

Ruling

Regarding the referral of the German Federal Tax Court (BFH), the CJEU interprets Art. 132 (1) (m) of the VAT Directive such that it does not have a direct effect. If this provision, on the basis of the legal provisions implemented by a Member State to satisfy it, only exempts a limited number of services closely related to sport or physical education services from VAT, a non-profit-making organization can indirectly invoke it before the national courts in order to effect a VAT exemption for other services closely related to sport or physical education that this organization provides to those taking part in those activities and that are not exempt according to the legal provisions mentioned.

Furthermore, the term non-profit organization within the meaning of Art. 132 (1) (m) of the VAT Directive is an autonomous concept of Union law that demands that such an organization must stipulate in its statutes that in the case of a dissolution the profits achieved by it, beyond the capital share paid in by its member and the fair market value of their contributions in kind, may not be distributed to its members.

Audit obligations in the input VAT refund process

CJEU, ruling of 17 December 2020 – case C-346/19 – Y-GmbH

In an referral to the CJEU of 13 February 2019 (XI R 13/17; VAT Newsletter May 2019), the BFH had asked which details are necessary in an input VAT refund application for a taxable person located in another Member State for the term “number of the invoice”.

The CJEU decided that the German tax authorities’ practice of denying applications for input VAT refunds, if the annex to the application did not contain the invoice number but rather a different number, violates Union law.

The Federal Central Tax Office may not consider the application in such a case to be not effective and must rather, if necessary, access the invoices presented as part of an audit or request the applicant to subsequently provide the missing details, according to the CJEU.

NEWS FROM THE BMF

Taxation of travel services from companies resident in non-EU countries

BMF, guidance of 29 January 2021 – III C 2 – S 7419/19/10002 :004

In its guidance of 29 January 2021, the BMF wishes to amend the scope of application for travel services in accordance with § 25 UStG (so-called margin taxation) such that it will no longer apply for traders resident in a non-EU country without a fixed establishment within the EU.

According to § 25 UStG all services provided in carrying out a journey count as single supplies provided by the travel organizer to the recipient of the supply to the extent that the travel organizer deals with the recipient of the supply in its own name and makes use of third-party supplies of goods and services (pre-travel services) to carry out the journey. According to § 3a (1) UStG, services are deemed to be carried out in the place in which the travel organizer operates its company. If the service is provided by a branch office of the travel organizer, the location of the branch office applies as the place of supply. For travel organizers resident in non-EU countries with fixed establishments in Germany see Section 25.1 (6) UStAE.

The BMF now explains that it no longer wishes to apply § 25 UStG for travel services from companies resident in non-EU countries and with no fixed establishment in the EU. Section 25.1 (1) UStAE will be amended accordingly. As a consequence a single supply of service will not longer be assumed automatically and in principle every individual supply of service has to be evaluated separately from a VAT point of view.

Please note:
The provisions of the BMF guidance must be applied to all ongoing cases. For reasons of the protection of legitimate expectations, no objection will be raised if the special provision of § 25 UStG is applied for travel services carried out up to 31 December 2020 by companies located in non-EU countries and with no fixed establishment in the EU.

Suspension of the duty to submit monthly preliminary VAT returns in the case of start-ups

BMF, guidance of 16 December 2020 – III C 3 - S 7346/20/10001 :002

The Third Bureaucracy Reduction Act of 22 November 2019 was amended from 1 January 2021 at § 18 (2) UStG sent. 5, and a new sent. 6 was inserted.

The new provision stipulates that for the taxation periods 2021 to 2026, deviating from § 18 (2) sent. 4 UStG, for the determination of the relevant preliminary returns period in cases in which the trader has carried out their commercial or professional activity for only part of the previous calendar year, the actual VAT must be converted to an annual tax, and in cases in which the trader has carried out their commercial or professional activity in the current calendar year, the predicted VAT is relevant for the current calendar year.

For the tax periods 2021 to 2026, this provision suspends the general obligation to submit monthly preliminary VAT returns in the case of start-ups.

The UStAE was amended in line with the new legal provision in the BMF guidance of 16 December 2020. Accordingly, the provisions must be applied for taxation and preliminary reporting periods that begin after 31 December 2020 and end before 1 January 2027.

Unjustified VAT shown in an invoice

BMF, guidance of 11 January 2021 – III C 2 - S 7283/19/10001 :001

Here, the BMF has issued its opinion on the unjustified showing of VAT in accordance with § 14c (2) UStG and amended the UStAE accordingly. The background to this action lies in two BFH rulings from 17 February 2011, V R 39/09, and from 21 September 2016, XI R 4/15. The changes must be applied to all ongoing cases:

An invoice has already satisfied the requirements for showing unjustified VAT in line with § 14c (2) UStG if it shows the invoice issuer, the (alleged) recipient of the supply, a description of the supply, and the fee and separately listed VAT.

VAT is already considered to be listed separately if the tax is mentioned as an amount of money and labelled as a tax amount. The explicit, clear and unconditional statement of VAT suffices. Apart from that, showing VAT in line with § 14c (2) UStG does not demand any particular optical requirements. The VAT can also be listed separately as part of an explanatory note.

The legal consequences of § 14c (2) UStG arise regardless of whether the invoice contains all of the details listed in § 14 (4) and § 14a UStG, the abstract risk of input VAT being availed of is sufficient.

Changes to preliminary VAT returns 2021

BMF, guidance of 14 December 2020 and of 25 February 2021 – III C3 – S 7344/19/10001 :002

The BMF has added two new reference numbers in particular to the form for preliminary VAT returns (UStVA):

- If the basis of assessment for a transaction subject to VAT has changed, the trader must, as previously, correct the VAT amount owed in accordance with § 17 (1) sent. 1 in conjunction with § 17 (2) no. 1 sent. 1 UStG. The changes must be recorded with the basis of assessment for the individual transactions. If this change is carried out because the agreed fee subject to VAT has become uncollectible (for example in the case of insolvency), the reduction of the basis of assessment must also be recorded. If a claim that has been treated as uncollectible for VAT purposes is later paid in full or in part, no entry should be made
- As a result of a change in accordance with § 17 (1) sent. 2 in conjunctions with (2) no. 1 sent. 1 UStG a reduction in the deductible input VAT amounts must also be recorded.

Noticeable administrative burden for companies

For companies the new form means a not insignificant need for change:

First of all, the new form for the preliminary VAT returns must be set up in the system. In this respect, attention must be paid to guidelines and regular updates from the individual ERP (Enterprise Resource Planning) system supplier in order to always keep up to date. Some suppliers have already provided provisional manual solutions to set up the form.

It is also important to clarify how the particular cases of uncollectibility can be separately recorded in the ERP system in order to allow the new form to be filled out correctly. This can, among other things, be dealt with using a new tax reference number and entry in separate accounts or a combination of the two.

Above all, however, the practical challenge will lie in maintaining the different types of uncollectibility in the system on the basis of the facts (to analyze this kind of uncollectible cases falling under the respective VAT provision from a pure VAT law perspective, to implement this procedurally accordingly, to record these transactions in the system and ultimately to implement them in the system when making accounting entries.

Please note:

Overall, the changes to the preliminary VAT returns require companies to make system-based adjustments. As part of these adjustments it is recommended that not only systems but also existing processes are examined and optimized (for example quality assurance measures to classify different cases or additional controlling). As changes to the declaration requirements are likely in future – especially taking EU-wide development (real-time reporting obligations, e-invoicing, SAF-T, etc.) into consideration – companies should generally make sure that systems and processes are designed to be as flexible and forward-looking as possible.

IN BRIEF

New in relation to the Digital Package from 1 July 2021

European Commission website

The second phase of the so-called VAT Digital Package, applicable from 1 July 2021, was implemented by the German Annual Tax Act 2020. The draft BMF guidance of 2 February 2021 deals with these developments and was sent to organizations for comment by 26 February 2021. Presumably the final guidance will therefore be published in March/April 2021.

At the end of September 2020 detailed, non-binding explanatory notes on the digital package from 1 July 2021 were published by the Directorate General for Taxation and Customs Union of the European Commission (DG TAXUD). The guidelines were initially only published in English.

The publication of the guidelines in the other EU languages took place at the end of 2020. In addition, a Chinese and a Japanese version were published.

Expansion of tax liability of the recipient of a supply to include telecommunications services

BMF, guidance of 23 December 2020 – III C 3 - S 7279/19/10006 :002

From 1 January 2021, the existing provision on the tax liability of the recipient of a supply in accordance with § 13b UStG was expanded by the German Annual Tax Act 2020 to include services in the area of telecommunications. As a result

of this change in the case of services provided by 31 December 2020 in the area of telecommunications to so-called resellers, the recipient of the supply is the one liable for VAT in accordance with § 13b(2) no. 12 in conjunction with (5) sent. 6 UStG. The BMF guidance clarifies the change to the law in detail.

For supplies carried out after 31 December 2020 and before 1 April 2021, no objection will be raised at the supplying trader and the recipient of the supply, if the parties to the contract mutually assume that the supplying trader is the one liable for VAT in line with § 13a (1) no. 1 UStG. The prerequisite for this is that the transaction is taxed by the supplying trader in the appropriate amount.

This also applies in cases in which the fee or a portion of the fee is received after 31 December 2020 and before 1 April 2021 and the supply is only carried out after the fee or a portion of the fee is received.

Brexit – deadline for applications for input VAT refunds 31 March 2021

BMF, guidance of 10 December 2020

Input VAT amount arising before and after 1 January 2021 must be differentiated.

Applications for the refund of VAT "paid" before 1 January 2021 in Germany by a trader resident in Great Britain, or in Great Britain by a trader resident in Germany, must be made in accordance with the process for traders resident in the EU by 31 March 2021. German taxpayers must thus apply in Germany, British taxpayers in Great Britain.

For input VAT amounts that arise after 31 December 2020 the procedure for traders resident in non-EU countries applies. In this respect reciprocity still needs to be established. The deadline is 30 June of the following year and therefore June 30, 2022 for input tax amounts incurred in 2021, if reciprocity with Great Britain should be established.

With regard to the refund of input VAT arising on goods purchased by German traders in Northern Ireland or by Northern Irish traders in Germany, the provisions of Directive 2008/9/EC continue to apply; this means, the previous procedure and in particular the nine-month deadline continue to apply. Accordingly, corresponding applications from traders resident in Germany must be transmitted to the Federal Central Tax Office pursuant to § 18g UStG.

PREVIEW

CJEU submission on the input VAT deduction of a managing holding company

BFH, resolution of 23 September 2020, XI R 22/18

The BFH has submitted a question to the CJEU concerning whether a managing holding company can deduct the input VAT on purchases that are passed on as a shareholder contribution to a subsidiary that is not entitled to deduct input VAT.

EVENTS

What mail order and online companies need to know: VAT changes as of 1 July 2021 as a result of the digital package & update on digital tax

Webcast on 16 March 2021

You will find additional information here.

Virtual VAT annual conference 2021

Event on 12 April 2021

You will shortly find additional information here.

.

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

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

Mario Urso*
T +49 89 9282-1998
murso@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

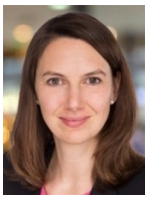
Issuer

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

Editor

Kathrin Feil (V.i.S.d.P.)
T +49 89 9282-1555
kfeil@kpmg.com

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



VAT Newsletter and Trade & Customs News – Free Subscription

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

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

www.kpmg.de

www.kpmg.de/socialmedia