LEGISLATION

Law on the adaption of the national tax law to Croatia’s accession to the EU and the amendment of further tax provisions

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On 3 July 2014, the German Federal Parliament (Bundestag) adopted the German government’s draft law for the adaption of the national tax law to Croatia’s accession to the EU and the amendment of further tax provisions, taking into account the decision recommendation of the Financial Committee from 2 July 2014. The law was approved by German Federal Council (Bundesrat) on 11 July 2014. In principle, there will be the following VAT changes:

New regulations for telecommunications services, radio and television services and electronically supplied services as of 1 January 2015

For the supply relationships regarding electronically supplied services through a telecommunications net, an interface or a portal such as an Appstore, new regulations will apply as of 1 January 2015. Further, § 45h (4) Telecommunications Act (TKG) will be revoked and § 3 (11a) of the German VAT Law (UStG) will be added. For further details, please see our VAT Newsletter May 2014.

In addition, a new regulation will apply to the place of supply of telecommunications services, radio and television services and electronically supplied services for non-entrepreneurs. The place of supply is always the place where the recipient of the supply is resident (cf. § 3a (5) UStG). Hitherto, the place of the supplier has been decisive. It is, in general, of no importance where the received services are used or evaluated. However, there is an exemption if services are supplied by an entrepreneur not located in the Community area and the services are in fact used and evaluated within Germany. The right to tax will then have Germany (§ 3a (6) sent. 1 UStG).

Please note:
The wording of § 3a (6) sent. 1 UStG probably exceeds the provisions of the VAT Directive. As a result, a literal interpretation would mean that if a business of a non-member country, for example, renders telecommunications services to a French end customer, who in turn uses the services during his holidays in Germany (for example a phone call home), the place of supply would not be where the customer is resident, in this case France, but where the services are consumed, in this case Germany. In accordance with the EU authorization in Art. 59a (b) of the VAT Directive, changing the place of supply may only be permitted if the recipient of the supplies is resident in the non-member country. In such cases, the right to tax is to be transferred to the EU where the services are consumed. However, it is not intended to allocate the taxation within the EU in accordance with the actual place of consumption. As a result, § 3a (6) sent. 1 UStG should therefore be interpreted in a restrictive way. Further clarifying information as to the administration remain to be seen.

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As a consequence of the new regulations set forth with regard to the place of the supplies to non-taxable customers, affected suppliers generally have to comply with VAT registration obligations in various Member States. To avoid this, suppliers may voluntarily participate in the so-called mini-one-stop-shop. Both, suppliers resident within the EU (Art. 369a et seq. of the VAT Directive) and – under certain circumstances – suppliers resident outside the EU (Art. 358a et seq. of the VAT Directive) may use this form of registration. For suppliers resident within the EU, the mini-one-stop-shop established in their Member States is responsible. If a person liable to VAT decides to use the mini-one-stop-shop on a voluntary basis, he is obliged to apply the regulations in all Member States, in which he supplies services without having a fixed establishment there. For these purposes, quarterly statements on a uniform national internet-based application are to be transmitted. The statement – broken down by the individual Member States – must be transmitted by the 20th day upon the end of the quarter. Also, the payment on a one-off basis must be made by this time. The statement refers as output transactions only to telecommunications services, radio and television services and electronically supplied services to customers not liable to VAT within the EU. In this respect, other additional output transactions may therefore result in a registration in the individual Member States. No deductible input tax may be reported by the mini-one-stop-shop, because – depending on the circumstances – it has to be claimed in the VAT return or – if applicable – in the input tax refund procedure (see § 59 sent. 1 No. 4 and 5 of the German VAT Operating Regulation (UStDV)).

Any suppliers resident in Germany may register for the mini-one-stop-shop with the German Federal Central Tax Office already as of 1 October 2014. An entrepreneur is considered to be resident within Germany if his business or management is located there or – in case he resides in a non-member state – if he has a fixed establishment within Germany. Application and cancellation of the participation are done electronically by using the officially prescribed data forms. A supplier may only choose to participate in the mini-one-stop-shop uniformly for all Member States, in which he is not resident and does not have a fixed establishment. Any VAT returns are to be transmitted electronically by the 20th day upon expiry of each taxation period using the officially prescribed data forms. The tax is to be calculated by the suppliers themselves and to be paid to the German Federal Central Tax Office (§ 18h UStG).

Suppliers resident in non-member countries who are not registered for VAT in any other Member State (§ 18 (4c) UStG) will fall within the jurisdiction of the German Federal Central Tax Office also in future. Up to now, such jurisdiction has only applied to electronically supplied services.

New regulation of the tax liability of the recipient of construction work and building cleaning services as of 1 October 2014

Pursuant to § 13b (5) sent. 4 UStG, the recipient of construction work becomes liable to tax for the received supply (so-called reverse charge procedure) if he is a taxable person and sustainably supplies construction work, regardless of the specific use of the received construction work. A reverse charge may be assumed if the recipient of the supply has a relevant certificate issued by the competent tax authority and valid at the time the supplies were procured. This also applies to building cleaning services (§ 13b (5) sent. 5 UStG). For purposes of simplification, the recipient of construction work or building cleaning services is considered to be liable to VAT if he and the supplier have unanimously assumed a reverse charge and no tax losses have arisen as a result (§ 13b (5) sent. 6 UStG). According to the grounds of the law, this is the case when the transaction supplied to the recipient was taxed by him in the applicable amount.

For taxable supplies procured before 15 February 2014, where a reverse charge pursuant to § 13b UStG is incorrect-ly assumed by the supplier and recipient of the supply, the tax assessment for the supplier is to be changed if the recipient of the supply reclams the taxes from the tax authority which he has incorrectly paid. Under certain circumstances, the supplier may settle his tax liability by assigning the payment claims against the recipient of the supply (§ 27 (19) UStG).

Please note:

According to the grounds of the law, the new regulation pursuant to § 13b UStG applicable as of 1 October 2014 addresses criteria for distinction, which the tax authorities applied for the reverse charge before the BFH ruling from 22 August 2013, V R 37/10 (see VAT Newsletter December 2013). This is supposed to help to avoid practical application problems arising from the ruling. However, the certificate for the supply of sustainable construction work is a separate certificate different from the exemption certificate in accordance with § 48b EstG. The validity of the certificate is to be limited to a maximum of three years. A template is supposed to be published together with the changes in the law. According to the grounds of the law, a taxable person is supplying sustainable construction work if at least 10 percent of its global turnover is achieved by construction work. No extension of the tax liability of the recipient of construction work to taxable persons, who sustainably sell own property that they previously developed (so-called developers), was made in contrast to the German Federal Council’s wish. The new regulation of § 27 (19) UStG, which will apply upon publication of the law, addresses such cases in which the recipient of the supply does not make use of the non-objection rule stated in the applicable amount.
Extension of the tax liability for recipients of precious metal and base metal supplies as well as tablets and game consoles as of 1 October 2014

According to the wording of § 13b (2) no. 10 UStG, the recipient of the supply is liable to tax for any taxable supplies of mobile phones and integrated circuits before they are built into an item suitable for the retail level of trade, provided that the recipient is a taxable person. However, it is required that the sum of the fees to be charged for the supply within the framework of an economic transaction amounts to at least EUR 5,000. Any subsequent fee reductions will remain unaffected. These regulations will also be applicable to taxable supplies of tablets and game consoles as of 1 October 2014.

Also, if the recipient of the supply is a taxable person, tax-able precious metal and base metal supplies listed in Annex 4 will also be subject to the reverse charge procedure as of 1 October 2014. As a result, the supplier will issue invoices without stating VAT and the tax liability will then transfer to the recipient of the supply, who will have the right to input tax deduction in accordance with the general input tax rules.

Please note:
According to the grounds of the law, the period until the law enters into force on 1 October 2014 is to give the businesses time so they can prepare themselves for the new legal situation. Significant practical challenges may be faced in particular when questions of legal differentiation arise whether a specific product is subject to the reverse charge procedure. Therefore, Annex 4 refers to the customs tariff for detailed classifications which is to be used for any differentiation.

Introduction of a reduced VAT rate for audio books as of 1 January 2015

The introduction of the reduced VAT rate is a result of the change made to No. 50 of Annex 2 of UStG. One requirement is that the supply is to contain a physical object in the form of a storage device. Another requirement is that only the sound recording of the reading of the book is stored on this device.

Please note:
The scope of application of the reduced VAT rate is very narrow. According to the grounds of the law, the reduction shall not apply to audio books that have more features than the playback of the mere reading of the book. In addition, the reduced rate does not apply to transactions with regard to audio newspapers and audio magazines.

Selection of other VAT changes
Furthermore, we are presenting you the following selected VAT changes – without any claim to completeness.

Changes that come into effect on the day upon publication of the law

- Subsequent changes to the elimination of the recipient’s tax liability pursuant to § 13b (6) No. 2 UStG according to which the supplier is liable to tax for all passenger transports with motorized land vehicles as of 1 October 2013; accordingly the obligation to report pursuant to § 18 (12) sent. 1 UStG for foreign bus companies is not applicable only if their transactions are subject to the individual transport assessment.

- Changes made subsequently to the changes of the VAT law by the Administrative Cooperation Directive and the Amendment of Certain Tax Regulations (AmtshilfeRLUmsG) of 26 June 2013 within the scope of the input tax deduction (import VAT):
  - Adjustment of the obligations to keep records pursuant to § 22 (2) no. 6 UStG: the obligation to keep record of the import VAT paid or to be paid in cases pursuant to § 16 (2) sent. 4 UStG; instead the import VAT incurred is to be recorded. This requirement is fulfilled if the incurred import VAT is noted on an appropriate customs declaration (new version of § 64 UStDV);
  - Adjustment of the input tax restriction for margin schemes according to which in the case of § 25a (2) UStG (stated in the invoice as so-called “Kunstgegenstände”, “Sammlungsstücke” or “Antiquitäten”) the incurred import VAT may not be deducted (§ 25a (6) sent. 3 UStG).

- The transfer of the local jurisdiction to the tax authority Bremen for the VAT of businesses located in Finland, Latvia and Norway (authority of § 1 (1) no. 5, 12, 18 of the Ordinance Regulating Allocation of Responsibilities in the Area of VAT (UStZuStV)).

Changes that take effect as of 1 January 2015

- Introduction of a separate VAT exemption standard for labor market services pursuant to Code of Social Law (SGB) II and III, namely integration services, services of active promotion of work and similar services, which are procured by bodies governed by public law or other facilities that have charitable status. According to the grounds of the law, subcontractors themselves must fulfill the requirements for the VAT exemption (§ 4 no. 15b UStG)

- Expansion of the VAT-exemption for the procurement of personnel pursuant § 4 No. 27a UStG for religious and secular institutions
**Please note:**
The German government has announced a further legislation procedure in the area of tax for the second half of 2014 which is to be completed already this year. This might include the implementation of regulations requiring extensive consultation and technical clarification. In this context, also concerns of the German Federal Council, which may require a more extensive review, could be considered (see German Parliament’s Journal no. 18/1776 of 18 June 2014). A new regulation in § 13b (10) UStG may also be part of this which could serve to establish the requirement according to which the opportunities to fight against fraud may be used on a national level provided by the rapid reaction mechanism (Council Directive 2013/42/EC of 22 July 2013).

**NEWS FROM THE CJEU**

**Sale of discount cards liable to VAT**

*CJEU, ruling of 12 June 2014 – case C-461/12 – Granton Advertising BV*

The preliminary ruling from the Netherlands refers to the question whether the sale of a discount voucher is a transaction within the scope of VAT. If the answer is in the affirmative, the next question arises whether this transaction is subject to tax or tax-exempt.

**The case**

Granton Advertising BV is a company incorporated under Netherlands law. It sold vouchers called “Granton” at a price ranging between EUR 15 and EUR 25. In exchange, these Grantoncards granted a claim to specific supplies on preferential terms at affiliated restaurants, cinemas, hotels or saunas. The preferential terms were part of granting a discount. Granton Advertising BV was responsible for the concept, production, distribution, sales promotion and sale of Grantoncards. The company did not charge the Grantoncards to the affiliated companies and did also not receive any consideration. The Grantoncards were not bound to one person but could be transferred to other persons. However, they could not be exchanged for money or goods. It is in dispute whether Granton Advertising BV is liable to tax for the sale of the Grantoncards.

**Ruling**

The affiliated company refrains from charging a part of the normal price on presentation of the Grantoncard. As a result, the owner of the Grantoncard does not pay the amount of the price discount. This waiver constitutes a discount within the meaning of Art. 11 part A (3b) of the Sixth EU Directive (now Art. 79 of the VAT Directive). The amounts paid for a Grantoncard by the consumers also do not constitute compensation from a third party for the affiliated companies. On one hand, the purchase of a Grantoncard does not constitute a contract between the consumers and the affiliated company. But on the other hand, the affiliated company does not receive a share in the revenues generated through the sale of the cards by Granton Advertising BV. In addition, the amount of the possible discounts is coincidental and may practically not be defined in advance. Furthermore, the discount particularly depends on the use of these vouchers as well as on the availability of the offers from the affiliated companies.

With regard to the consumer, the sale of a Grantoncard generates a transaction subject to VAT. The sale does not constitute a VAT exempt transaction within the meaning of Art 13 part B (d) no. 5 or no. 3 of the Sixth EC Directive (see now Art. 135 (1f) or (1d) of the VAT Directive). The Grantoncards are neither „other securities“ nor „other commercial documents“. According to its nature, the sale does not constitute a finance transaction within the meaning of the case-law of the Court of Justice of the European Union (CJEU) on Art. 13 part B (d) of the Sixth EC Directive (see, to this effect, the rulings of 19 April 2007 (case C-455/05 – Velvet & Steel Immobilien) and of 28 July 2011 (case C-350/10 – Nordea Pankki Suomi). This regulation is to be interpreted narrowly.

**Please note:**
The Commission’s proposal for a Directive (see VAT Newsletter July 2012) includes a uniform treatment of different voucher types as of 1 January 2015. For detailed information on the course of the procedure up to date, please visit the Website of the European Parliament. In order to change the VAT Directive, a decision by the European Council is required. According to the preliminary agenda of ECOFIN Council for the second half of 2014, on 7 November 2014 an agreement may be reached. The proposal for a Directive also contains specific regulations on discount vouchers. If the supplier grants a discount to his customer in exchange for a discount voucher, which the customer received from a third party (issuer) free of charge, and if the supplier receives a compensation for the discount by the issuer, there is a supply called “redemption of the voucher” by the supplier towards the issuer. However, the facts of the present ruling are not included therein, because there is precisely no supply relationship between the supplier and the issuer and the customer does not receive the discount voucher free of charge. With reference to the present case, there are currently also no utterances of the German tax authorities or case-law in the highest courts. Affected companies should at any rate check in similar cases to what extent their current treatment complies with the case law of the CJEU. This particularly applies insofar as the issuance of discount vouchers in return for payment has been qualified as non-taxable transaction.
Change in case law on input tax apportionment for mixed-use buildings

BFH, ruling of 7 May 2014 – V R 1/10

Following its ruling of 22 August 2013, V R 19/09 (see VAT Newsletter January/February 2014), the BFH has restated its position on input tax apportionment for mixed-use buildings.

The case
The ruling relates to an asset management company which constructed a mixed-use building between 2002 and 2004. It rented out the ground floor as planned to businesses (subject to VAT) and the upper floor to private tenants (VAT-exempt). The issue in question was whether the input tax amounts due on the manufacturing costs in 2004 could be apportioned according to the ratio of the output transactions (72.8 % taxable). The tax authorities took the view that the input tax amounts should be partly attributed directly to the ground floor (deductible) and partly to the upper floor (not deductible). The remaining input tax amounts should, they held, be apportioned on the basis of the percentage of the surface area that was let subject to VAT (52.8 %), as a result of which the input tax amounts had to be reduced. The Financial Court ruled in favor of the appeal, stating that the company was entitled to apportion input tax using the transaction formula. The use of this formula may be prohibited under § 15 (4) sent. 3 UStG as amended by the Steueränderungsgesetz (Tax Amendment Act) from 1 January 2004, the Court acknowledged. According to this law, calculating the non-deductible part of the input tax amounts using the transaction formula is permitted only if no other commercial apportionment is possible. However, this standard is not consistent with EU law, the Court stated, with the result that the company was entitled to invoke EU law directly.

The ruling
The BFH stood by its previous judgments according to which input tax apportionment under § 15 (4) UStG must include all expenses related to the construction of the building. It was of the opinion that the partial direct allocation to the building parts applied by the tax authorities was not permitted.

According to § 15 (4) sent. 1 UStG, the portion of the input tax amounts commercially attributed to the transactions leading to the exclusion of the input tax deduction is not deductible. The undefined legal term “commercial apportionment” must be interpreted in accordance with EU law. Although the BFH has hitherto advocated object-related interpretation, basing its decisions on the usage of the object (building) in question, it no longer stands by this position. Instead, input tax apportionment based on a business’s total turnover is to be viewed also as an appropriate commercial apportionment method according to EU law.

Furthermore, the BFH no longer stands by its position stated in the ruling of 22 August 2013 according to which the provisions of § 15 (4) UStG are to be reduced teleologically so that they only cover input tax amounts which are also subject to adjustment under § 15a UStG.

Taking into account the CJEU ruling of 8 November 2012 (case C-511/10 – BLC Baumarkt; see VAT Newsletter January 2013), the BFH remains of the opinion that the surface area method based on the building as per § 15 (4) sent. 3 UStG is generally a more accurate apportionment method than the transaction formulas. This applies to both the transaction formula based on the entire company and the transaction formula based on the building. However, the input tax amounts cannot be apportioned according to the ratio of the areas if there are significant differences in the dimensions and fittings of the rooms that serve different purposes. This could be the case due to the height of the rooms, the thickness of the walls and ceilings or the interior fittings, for example. In this case, the input tax amounts should be apportioned using the building-related transaction formula. Not only is it required that the input tax amounts relate to the building itself, but also, the building-related apportionment must be more accurate than the total turnover-based apportionment because there is a direct link to the output transactions through the use of the building (e.g. through letting). If, however, the case in question relates to the use for transactions of the entire company (e.g. for an office building), the input tax amounts must be apportioned on the basis of the total turnover using the general transaction formula. This case has now been referred back to the Financial Court, which must make further findings on the question of which formula enables more accurate input tax apportionment.

Please note:
According to the BFH, a building-related view of transactions is required for the purposes of input tax apportionment under § 15 (4) UStG only if it produces more accurate results. In this respect, the surface area formula does take priority, but is not applicable in every case. The building-related transaction formula may in many cases result in an ever more accurate input tax calculation in favor of the affected party which has hitherto been impossible due to the extensive use of a surface area formula. Affected businesses should therefore check to what extent the BFH ruling is applicable in their specific case. It must be noted, however, that the principles of input tax apportionment are likely to be the subject of further rulings in the future. The referral to the CJEU from the Eleventh Senate of 5 June 2014 (XI R 31/09) – see the following article in this newsletter – shows that further changes to the current legal position are conceivable.
CJEU referral on input tax apportionment for mixed-use buildings

BFH, ruling of 5 June 2014, XI R 31/09

In its ruling published on 9 July 2014, the BFH referred several questions on input tax apportionment for input transactions for a mixed-use building and on the adjustment of the input tax deduction to the CJEU (see also press release no. 50 of 9 July 2014).

The case
The case in dispute relates to the amount of the input tax deduction in 2004 from construction costs and running costs for a residential and commercial building with which the claimant earned both tax-exempt and taxable income. The question was also raised as to whether, due to the introduction of §15 (4) sent. 3 UStG on 1 January 2004, an input tax adjustment is possible in respect of the input tax amounts recognized since construction work began in 1999 if a surface area formula is now to be used for the input tax apportionment instead of the transaction formula.

The ruling
According to the CJEU ruling of 8 November 2012 (case C 511/10 – BLC Baumarkt), Art. 17 (5) (3) of the Sixth EC Directive allows the Member States to primarily use a different apportionment formula than the transaction formula provided for in Art. 19 (1) of the Sixth EC Directive for the purpose of calculating the pro-rata rate for deducting input tax from a specific transaction, such as the construction of a mixed-use building, provided that the chosen method guarantees a more accurate calculation of this pro-rata rate. The BFH has the following questions on this:

Input tax apportionment in relation to the purchase or construction of a building

The BFH seeks clarification as to whether, in the case of mixed-use buildings, the input tax on input transactions that relate to the purchase or construction of the building must first be attributed to the taxable or tax-exempt output transactions, and only the input tax remaining after that is to be apportioned using a (less accurate) surface area or transaction formula.

Please note:
The BFH notes that, in current legislation and practice, calculations of the input tax deduction for acquisition and construction costs must be based, subject to § 15 (4) UStG, on the usage ratios for the entire building (see Section 15.17 (5) ff. of the German VAT Application Decree (UStAE)). In the BFH’s view, however, a more accurate method is to divide a building into different parts according to its use. If this method were applied, the division of the input tax amounts under § 15 (4) UStG would be limited to those building parts which are actually mixed use (such as the stairwell, boiler room, roof, outdoor areas and district heating connection), while the windows and all development costs could be attributed to the specific rooms (see also Section 208 (2) sent. 12 to 14 of the German VAT Guidelines 2008 (UStR 2008)). Without explicitly stating it, the Eleventh Senate making the referral is apparently not following the ruling of the Fifth Senate of 7 May 2014, V R 1/10 (see article in this newsletter), which sticks to the method of basing calculations on the usage ratios for the entire building.

Input tax apportionment from running costs

The reference for a preliminary ruling that led to the CJEU ruling of 8 November 2012 related only to input tax apportionment on the construction of a building. In the opinion of the BFH, a surface area formula regularly generates a more accurate input tax apportionment than a transaction formula, including for input tax amounts from input transactions relating to the use, maintenance and operation of a mixed-use building. The BFH therefore asks the CJEU whether the principles it has established also apply to such input tax amounts. Furthermore, the Senate’s targeted harmonization of the methods for dividing input tax amounts from construction costs on the one hand and running costs for use, maintenance and operation of a mixed-use building on the other would simplify the situation.

Input tax adjustment on the basis of the new regulation in § 15 (4) sent. 3 UStG – protection of legitimate expectations?
The BFH also has doubts as to whether the position of the Fifth Senate in the ruling of 22 August 2013 (V R 19/09; see VAT Newsletter January/February 2014) – according to which the revision of the input tax apportionment under § 15 (4) sent. 3 UStG constitutes a change in legal circumstances leading to an adjustment of the input tax deduction under § 15a (1) UStG – is consistent with EU law. Even if this were the case, the BFH believes that the principles of legal certainty and protection of legitimate expectations preclude an input tax adjustment under § 15a UStG. It doubts whether § 15 (4) sent. 3 UStG, as a possible basis for an input tax adjustment, is sufficiently clear and unambiguous. In addition, the legislators have not ruled that § 15 (4) sent. 3 UStG should trigger the application of § 15a UStG, nor have they made any transitional arrangements. This would have served the interests of legal certainty.

Time limit for the withdrawal of the waiver of the tax exemption

BFH, ruling of 19 December 2013, V R 7/12

In its ruling, the BFH particularly commented on the deadline by which the waiver to tax exemptions pursuant to § 9 UStG may be withdrawn.
The case
The ruling relates to a limited company (GmbH), which bought a property with a hotel by a company in 1991. The company waived the tax exemption of the supply and stated the VAT separately in the invoice. The GmbH claimed an input tax deduction in a corresponding amount in its VAT return for 1991. Not until after the tax assessment achieved legal force in 1991, did the legal successors agree to withdraw the waiver to the VAT exemption. On the same day a new invoice was issued without stating a separate VAT amount.

Ruling
According to the BFH, the waiver of the VAT exemption pursuant to § 9 UStG may be withdrawn as long as the tax assessment for the year in which the supply was made is not final or may still be changed due to follow-up audits pursuant to § 164 AO (clarification of the case-law). A changeability pursuant to § 173 (1) no. 1 AO is ruled out since the fact (withdrawal) is new. Also, a changeability pursuant to § 175 (1) no. 2 AO is denied by the BFH due to a retroactive effect.

According to the BFH, the same applies to deadlines for the exercise of the waiver. The waiver and its withdrawal are to be treated equally with regard to the deadlines. However, the limitation of the waiver or its withdrawal to the achievement of legal force grants legal certainty and clear relations at an early stage, but unduly restricts the tax payer’s right to choose. In general, such a narrow restriction is only permissible if it is provided by the law. This happened in contrast to the option pursuant to § 9 UStG for example in § 19 (2) sentence 1 UStG for the small business option.

Insofar as the tax authority concludes from the BFH ruling of 10 December 2008 (XI R 1/08) that both the declaration to exercise the option pursuant to § 9 UStG and its withdrawal are only permissible until the respective tax assessment achieves legal status (BFH guidance of 1 October 2010; now section 9.1 (3) sentence 1 UStAE; different until 1 October 2010 section 148 (3) UStR 2008), the BFH does not endorse this.

In addition, the BFH comments on the possibility to make corrections pursuant to 174 AO. According to the BFH, a correction pursuant to § 174 (3) AO is even justified if the tax authority has not issued a tax assessment but this omission is based on the apparent assumption that a specific fact is to be taken into account in another tax assessment. In the ruling of 19 December 2013, V R 6/12, the BFH concludes that a tax group after a merger to the controlling company is not anymore a third party pursuant to § 174 (5) AO.

Please note:
According to the BMF guidance of 23 October 2013 (see VAT Newsletter November 2013), an option is generally ruled out within the scope of a business transfer as a going concern (§ 1 (1a) UStG). However, if the parties within the scope of a notarized sales agreement unanimously assume a transfer of the business as a going concern and if they intend – only in case that their legal assessment later proves to be incorrect – a right to exercise the VAT option, the option will be effective with the conclusion of the agreement and is necessarily to be stated in the notarized sales agreement. In order to ensure that an option has been exercised in time, the wording of the agreement clause will still be of high importance, also in consideration of the BFH ruling of 19 December 2013. However, if the option in the sales agreement is only partially and if the follow-up audit is later waived, there is a risk of expiry when the conditions are later fulfilled.

NEWS FROM THE BMF

Input tax deduction and VAT treatment for vehicles

BMF, guidance of 5 June 2014 – IV D 2 – S 7300/07/10002 :001

The BMF has adjusted, restated and respectively stated in the new section 15.23 UStAE its principles in the BMF guidance of 27 August 2004 with regard to the input tax deduction and VAT treatment of vehicles to the generally applicable BMF guidances of 2 January 2012 and 2 January 2014 (see VAT Newsletter January/February 2014).

Principles of the input tax deduction

In order to allocate a vehicle bought, produced, imported or acquired inside the Community to the business the allocation principles in accordance with 15.2 c UStAE are to be observed. Income tax treatment as business or private asset is generally not decisive. For vehicles used partially for business purposes it has particularly to be distinguished whether its use is for non-business purposes within a non-economic activity in the narrower sense of the term (for example idealistic area of an association) or within a non-business (private) activity.

Only in the last case the company will be granted the right to choose whether it will allocate its vehicle to its business activities, connected with a taxation of the private use. Otherwise, an allocation prohibition applies in general leading to a reduced input tax deduction and the lapse of the taxation of the non-economic activity. The reference to section 15.2c UStAE also means that an allocation to the business is to be observed by 31 May of the following year; at the latest in the VAT return for the relevant year in which the supplies are received or the prepayment occurs. Vehicles which the employees are permitted to use for private purposes continue to be considered generally as a transaction in return for payment so that this is exclusively a use for business purposes.
Electrical vehicles
Due to the Administrative Assistance Implementing Act of 26 June 2013, to § 6 (1) No. 4 sent. 2 and 3 Income Tax Law (EStG) special regulations for electronic vehicles and externally chargeable hybrid electrical vehicles were added (see BMF guidance of 5 June 2014). These special regulations may also be used for simplification reasons for VAT purposes also for the taxation of the unpaid use of a vehicle by the personnel. In contrast, for VAT purposes the national list price is not reduced at a flat rate for the taxation of the paid use by the personnel and other unpaid transactions with regard to the one-percent-regulation. Concerning the logbook regulation, there is also no reduction of the total expenses by the expenses incurred due to the battery system.

In addition, the BMF refers to the fact that if the vehicle is not used for business purposes to more than 50 % (which comes into question with regard to VAT in the case of the unpaid transfer) the one-percent-regulation is explicitly ruled out in accordance with the wording of § 6 (1) No. 4 sent. 2 EStG. The proportion of the use assessed for income tax purposes pursuant to § 6 (1) no. 4 sent. 1 EStG is generally to be taken as a basis for the VAT taxation. For VAT purposes the total cost for electric and hybride electric vehicles are, however, not to be reduced by such cost attributed to the battery system.

First workplace
With the Law on the Change and Modification of the Company Taxation and Travel Expenses of 20 February 2013, the tax regulations for travel expenses that have been valid up to now have been modified as of 1 January 2014. In particular, the “first workplace” (so-called “erste Tätigkeitsstätte”) will in future substitute the regular workplace (so-called “regelmäßige Arbeitsstätte”). Depending on the employment relation, the employee may only have one first workplace, or maybe no first workplace but only external workplaces (see BMF guidance of 30 September 2013). Insofar as for VAT purposes for the taxation of the use of a vehicle the income tax regulations are used, the term “workplace” will be substituted by the term “first workplace”.

Please note:
The principles of the BMF guidance apply to all open cases insofar as nothing to the contrary results from the BMF guidances of 2 January 2012 and 2 January 2014. The regulations of the BMF guidance of 27 August 2004 are not to be applied anymore except for paragraph 6 (vehicles procured between 1 April 1999 and 31 December 2003).

Apportionment of payments for simultaneously issued print and electronic newspaper/book editions

**BMF, guidance of 2 June 2014 – IV D 2 – S 7200/13/10005**

The BMF guidance was issued in response to submissions by various associations. It concerns the apportionment of payments for sales of printed newspapers/books with simultaneous granting of electronic access to the electronic edition of the newspaper/e-book.

Not a single supply
According to the BMF, such transactions cannot be assumed to be a single supply. In particular, the option of using an electronic newspaper/e-book does not constitute a dependent ancillary supply to the printed edition. Instead, providing access to an electronic newspaper/e-book constitutes an independent service for the recipient and not a completion of or addition to the supply of the newspaper/book. It is to be treated as an independent, separate supply in the form of a supply of services, as defined in § 3 (9) sent. 1 UStG, that is made electronically.

Apportionment principles
Sales of printed newspapers/books are, as a general rule, subject to the reduced rate of VAT, while the granting of access to an electronic newspaper/e-book is subject to the normal tax rate.

If the recipient has to make a separate payment for the additional granting of access to the electronic newspaper/e-book, this forms the assessment basis for the supply of services made to the recipient. If the access to the electronic newspaper/e-book is provided without a separately calculated payment, the total selling price must be divided up in accordance with Section 10.1 (11) UStAE. According to this regulation, the key figure is the ratio of the individual selling prices; however, other equally simple methods are permitted provided that they generate appropriate results. According to the BMF, it should be noted that the BMF guidance of 28 November 2013 only instituted a limited no-objection rule lasting until 1 July 2014.

Please note:
The BMF guidance, which is addressed to the associations, is not available on the BMF website. However, the wording is reproduced in the Bavarian State Tax Office’s ruling with identical content of 12 June 2014 (S 7200.1.1-21/4 St33). In contrast to the position of the associations, the BMF rejects treatment of combined sales as a single supply subject to the reduced rate of VAT. Companies should check whether their business models fall under the scope of the BMF guidance and what the consequences of that will be in individual cases.
**IN BRIEF**

**Further extension of the transitional period for the VAT treatment of transport containers**

*BMF, guidance of 12 June 2014 – IV D 2 – S 7200/07/10022 :001*

In its guidance of 5 November 2013 on the VAT treatment of transport containers (see VAT Newsletter December 2013), the BMF has extended the non-objection regulation period by another six months. For transactions undertaken before 1 January 2015, there will be no objection if the delivery of the transport equipment for right of lien (such as in the case of packing material) is treated as an ancillary supply for the supply of goods. In such cases the refunding of the received deposit should correspondingly be regarded as a reduction of the charge for the initial supply. Likewise, there will be no objection in case of delivery of transport equipment within the scope of plain exchange systems if billed defaults are treated by the parties mutually not as real damages but as a supply of pallets in return for payment. The prerequisite for this is that the transaction of the suppliers is taxed in the applicable amount. The place of supply shall be defined pursuant to § 3 (7) sent. 1 UStG. Therefore, it should be checked where the transport equipment is located at the time of the settlement of damages.

**Supervision services may be considered as VAT exempt training services**

*BFH, ruling of 20 March 2014, V R 3/13*

The ruling refers to a graduate social education worker and organizational consultant, who supplied so-called supervision services to welfare organizations, youth welfare, the psychiatry, addiction advice centers and Diakonie social services organisation and Caritas. In doing so, she gave supervision sessions to employees of their customers and also trained them to give supervision sessions (training supervisions). A VAT exemption pursuant to § 4 no. 21 a bb) UStG was ruled out. In fact, the certificate presented did not indicate that the services for training and educational purposes, for which the VAT exemption was claimed, properly prepared for a professional qualification or an examination to be taken before a public sector entity. The claimant may, however, claim that her services are VAT exempt pursuant to Art. 13 Part A (1) of the Sixth EC Directive are teaching units, which are given by private teachers and which refer to the school lessons or university education (now Art. 132 (1) of the VAT Directive). With regard to this, the Financial Court has now to adress further questions. The rules of the European Union law also address the education and training (see CJEU, ruling of 28 January 2010 (case C-483/08 – Eulitz)). Therefore, it is not decisive whether the private teacher gives lessons to pupils or university students or whether the lessons are part of a curriculum. The BFH therefore overturned its earlier rulings (ruling of 17 April 2008, V R 58/05).

**No charge reduction for intermediary actions**

*BFH, ruling of 27 February 2014, V R 8/11*

The BFH does not stick to its earlier ruling (ruling of 12 January 2006, Federal Tax Gazette II 2006 p. 479 and ruling of 13 July 2006 Federal Tax Gazette II 2007 p. 186), according to which the intermediary may reduce its charge for its intermediary services if he grants a price discount to the end customer. The change in the case law is also subsequent decision with regard to the CJEU ruling of 16 January 2014 (case C-300/12 – Ibero Tours; see VAT Newsletter January/February 2014). The legal dispute refers to Ibero Tours GmbH. The business rendered intermediary services to travel companies for which charges were billed to be paid by the travel companies. In doing so, it granted to the travel customers price discounts and the respective costs were borne by it. Hence, the travel companies received the full price despite the discount. The travel companies paid taxes for the travel services pursuant to § 25 UStG. This regulation could not be applied to the intermediary services supplied by Ibero Tours GmbH. The CJEU denied a charge reduction in favour of Ibero Tours GmbH.

**Time of exercising the right of input tax deduction**

*BFH, ruling of 13 February 2014, V R 8/13*

According to the BFH, the right to input tax deduction is to be exercised during the accounting period (taxation period) in which the deduction right has arisen and the requirements are fulfilled. The taxable person has no right to choose to alternatively exercise his right to input tax deduction during a later taxation period.

The ruling refers to the deduction of import VAT as input tax. The Financial Court of Hamburg permitted the appeal, because it deviated from section 15.8 (4) UStAE and the previous BFH rulings. Up to now, the tax authorities and the BFH considered the company’s power of disposition with regard to the imported items and their integration into its business as a necessary requirement for the right to input tax deduction. The BFH did not have to comment on this point, because no import VAT was paid in the case year 2009 (as required pursuant to § 15 (1) no. 2 UStG old version). Also, in accordance with the deviating EU law (see later implementation since 30 June 2013, VAT Newsletter July 2013) the requirements to exercise the right were not fulfilled in the case year. The document needed for the right
to exercise pursuant to Art. 178 (e) of the VAT Directive resulted already from the notifications issued in 2008.

**Additional food on aeroplanes**

*BFH, ruling of 27 February 2014, V R 14/13*

According to the BFH, snacks and sweets and drinks served on an airplane against additional payment during the transportation within the Community territory are supplied at the point of departure of the airplane pursuant to § 3e UStG. It is not considered to be a supplementary service to the air transportation.

In the present case, the supply of the items was to be classified as supplies of goods instead of services. The supplies delivered by the claimant between 1999 and 2001 were not zero-rated (VATexempt with entitlement to input VAT deduction) pursuant to § 4 No. 6 (e) UStG, because the food and the drinks were not delivered in connection with water vessel traffic. According to the BFH, it is not possible to interpret the regulation beyond its wording with regard to its contradiction to the Union law. Furthermore, the BFH refers to § 26 (3) sent. 1 UStG. As a consequence, the BMF may order – without prejudice of §§ 163, 227 AO – to abate in full or in part or reduce the taxes which were to be paid for international air transportation of persons. This may be done insofar as the company has not issued an invoice with separate statement of VAT (§ 14 (1) UStG). Since this is a case of a specially regulated equity decision, further decisions are to be taken within the course of a special equity procedure instead of a taxation procedure.

Please note:

As of 1 January 2010, the place of supply pursuant to § 3e (1) UStG also contains services, which are considered to be supplied at the place where the food and drinks are provided for consumption.
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