

VAT Newsletter

Hot topics and issues in indirect taxation

January/February 2020

LEGISLATION

Brexit – VAT consequences of withdrawal from the EU

BMF, guidance of 16 January 2020 – III C 1 - S 7050/19/10001 :002

The Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU (“Brexit”) came into effect on 1 February 2020. This means that the United Kingdom has thus formally exited the EU.

The withdrawal agreement allows for an immediate transition period up to 31 December 2020, during which Union law will fundamentally continue to apply for the United Kingdom, however without any British right to codetermination in the EU institutions. The United Kingdom shall also remain part of the EU internal market and the EU customs union during this time.

Therefore, both the provisions on the levying of VAT for intra-Community movements of goods and services and also the administrative cooperation in this area in relation to cases in respect of the United Kingdom

must continue to be used (see also German Ministry of Finance (BMF) guidance of 16 January 2020).

The negotiations regarding the future relationship between the EU and the United Kingdom should begin as soon as possible. A free trade agreement is planned.

Please note:

The withdrawal agreement stipulates an option for extending the transition period by up to two years by July 2020. Prime Minister Boris Johnson has, however, categorically ruled out availing of this.

In relation to VAT this means that the United Kingdom will most likely stand in a third-country relationship to the EU from 2021 on. Despite the existence of transitional arrangements, companies affected, with business relationships to the United Kingdom, should therefore examine the coming changes on the input and output sides for both supplies of goods and provision of services.

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In doing so, it must be ensured, from a compliance point of view, that before 1 January 2021 end-to-end inspections of all relevant areas of a company take place that will provide information on the legal changes, amend processes, and, from 1 January 2021, record transactions correctly in the ERP system on both input and output sides.

Expansion of margin taxation of travel services on B2B transactions – relevance for all companies

Federal Law Gazette (BGBl.) I 2019, p. 2451

Through the Law on further fiscal support for electromobility and the amendment of other tax provisions, the scope of application for margin taxation of travel services on B2B transactions (§ 25 German VAT Law (UStG)) has been expanded. Up to now, this provision did not apply if the travel service was intended for the company of the recipient of the supply (so-called “B2B transactions”). This constraint has been eliminated with effect from 18 December 2019.

Companies affected

As the regulations up to now were only valid in the B2C area, previously primarily travel agents were liable for margin taxation. The expansion of the scope of application means in practice that every company should review whether B2B outgoing transactions include travel services and are thus necessarily liable for margin taxation. Margin taxation could also apply to the associated input supplies. Taking on the organization of travel expenses, organizing events – with cost recharging – within a group, or

providing incentive trips are typical scenarios in which this might apply.

Margin taxation requires that travel services are provided in one’s own name, and are not merely arranged. Furthermore, the regulation only applies to the extent the company makes use of the travel services of third parties which directly benefit the traveler, for example the purchase of hotel overnight stays.

Example of legal consequences

If a trader provides a travel service, the place of all third-party advance travel services passed on is uniformly determined in accordance with § 3a (1) UStG, that is, a uniform travel service exists which is generally subject to VAT in the country from which the supplying trader operates their company. If, for example, a company resident in Germany organizes an event for its distribution subsidiaries in Europe, the recharging of centrally procured advance travel services can be subject to taxation in the state in which the head office is located, Germany.

While the trader generally remains entitled to deduct input VAT, they are not, however, entitled to deduct as input VAT the VAT which they receive separate invoices for in relation to third-party advance travel services. Similarly, an input VAT deduction is not permitted if the trader owes VAT for advance travel services in accordance with § 13b UStG (Reverse Charge Procedure). Invoices for travel services may not, in accordance with § 14a (6) UStG show any VAT in relation to the margin. Accordingly, the recipient of the supply is not

entitled to deduct input VAT for VAT which is invoiced separately.

Please note:

On 18 December 2019, the eight industry umbrella organizations demanded a safe harbor provision from the BMF – to run to the end of 2020 – in relation to the application of margin taxation in B2B business. Furthermore, in their submission the umbrella organizations requested opinions on areas of doubt as to what instances in B2B business must be qualified as travel services.

A longer safe harbor provision, as requested by the umbrella organizations, is currently considered unlikely. Companies should therefore analyze without delay, what constellations being practiced in their operations are affected. In individual cases it may be of benefit to design future scenarios, including, if applicable, the associated contractual amendments, so as to avoid margin taxation.

In doing so, from a compliance point of view, it must be ensured that by means of an end-to-end examination of all the relevant areas of a company, information on the legal changes is shared, processes are adjusted, and the transactions are appropriately recorded in the ERP system on both the input and output sides.

More attractive cash accounting and tax reduction for all train journeys *BGBl. I 2019, p. 2875; BGBl. I 2019, p. 2886*

On 30 December 2019, tax law saw the publication of the Law on the Introduction of an Obligation to provide Notification of Cross-Border Tax Structures,

and the Law on the Implementation of the Climate Protection Program 2030. Both laws contain the following VAT changes, which came into force on 1 January 2020:

Increase of turnover limit for cash accounting to EUR 600,000

In the case of cash accounting (§ 20 UStG), upon application by the trader, VAT will not be calculated on the basis of their agreed fees but rather on the basis of fees actually received. From a cash flow point of view this can be an attractive proposition for a trader. Cash accounting is granted, inter alia, if the trader's revenue (§ 19 Abs. 3 UStG) in the previous year did not amount to more than EUR 500,000. This amount has been increased to EUR 600,000.

As the provision rests on the revenue from the previous year, companies that had a revenue in 2019 of not more than EUR 600,000 could also benefit now from cash accounting.

Reduction of VAT rate for the transportation of people in long-distance railway traffic

To promote mobility, the VAT rate for the transportation of people on German railways has also been lowered to 7 per cent for long-distance railway travel (§ 12 (2) no. UStG). Accordingly, the (input VAT) provisions on tickets as invoices (§§ 34, 35 German VAT Operating Regulation (UStDV)) have been amended.

Please note:

In its guidance of 21 January 2020 – III C 2 – S 7244/19/10002:009, the BMF made a statement on the new regulations in long-distance railway travel. The reduced VAT rate fundamentally applies for transportation services effected after 31

December 2019 and corresponding prepayments and advance payments already made (see § 27 UStG). In the case of train journeys, the time that the transportation ends should be referred to. The BMF goes into, among other things, the practice for creating tickets and invoices up to now. The BMF does not appear to object if, as a result of this practice, tickets purchased in 2019 and invoices show a VAT rate of 19 per cent, although the transportation first took place in 2020. This applies, for example, in the case of season tickets that are valid beyond the key date. Accordingly, an input VAT deduction in the amount of 19 per cent will be granted, if there has been no invoice correction.

NEWS FROM THE CJEU

CJEU submission on partnerships as subordinate companies (VAT grouping)

Lower Tax Court Berlin-Brandenburg, ruling of 21 November 2019, 5 K 5044/19; CJEU ref. no.: C-868/19

The Lower Tax Court Berlin-Brandenburg has asked the Court of Justice of the European Union (CJEU) whether the current practice in relation to partnerships as subordinate companies in VAT groups is compatible with Union law.

The case

A-GmbH is the general partner in a GmbH & Co. KG and there are five limited partners, that is, a GbR (a partnership as defined in the German Civil Code), three natural persons, and M-GmbH.

According to the partnership contract, each partner has one vote, except for M-GmbH (six votes). Apart from certain

exceptions, all resolutions for the company are adopted by a simple majority.

The GmbH & Co. KG holds the view that it and M-GmbH have a VAT group status in line with § 2 (2) no. 2 UStG. Besides the economic and organizational integration – which indisputably exists between the parties – it must also be affirmed that a financial integration exists.

In contrast, with reference to Section 2.8 (5a) sent. 1 VAT Application Decree (UStAE) and the German Federal Tax Court (BFH) ruling of 2 December 2015, V R 25/13, the tax authorities deny the financial integration of the GmbH & Co. KG with M-GmbH. The financial integration of a partnership requires that partners in the company, apart from the controlling enterprise, are only entities who are themselves financially integrated into the controlling enterprise.

This ensures the required powers of intervention of the controlling enterprise even in the case where it is possible that the principle of unanimity is always used. Thus, no natural persons may participate in the partnership if it is to be financially integrated. As in the case at hand, as well as M-GmbH, natural persons are also limited partners of the GmbH & Co. KG, financial integration is not possible.

Ruling

The Lower Tax Court has doubts as to whether the BFH case law mentioned above is compatible with Union law.

According to Art. 11 (1) of the VAT Directive, following consultation with the VAT Committee each Member State can treat entities domiciled in its

territory as one taxpayer, even if they are legally separate but closely connected through mutual financial, economic and organizational relationships.

According to Art. 11 (2) of the VAT Directive, a Member State that makes use of the possibility stipulated in paragraph 1, can take the necessary measures to prevent tax evasion or avoidance through the use of this provision.

The Lower Tax Court interprets the CJEU ruling of 16 July 2015 – cases C-108/14 and C-109/14 – Larentia+Minerva to mean that a restriction of the common scope of application of Art. 11 (1) of the VAT Directive, except in the case of Art. 11 (2) of the VAT Directive, is simply not possible. The BFH's Senate XI commented similarly (ruling of 1 June 2016, XI R 17/11) – in contrast to the BFH's Senate V.

It is questionable if the case law of the BFH's Senate V is covered by Art. 11 (2) of the VAT Directive. The requirements established by the BFH could contravene the Union law principles of proportionality and neutrality.

The Lower Tax Court refers to the fact that the legislator has not, up to now, stipulated the prevention of tax evasion and avoidance as a purpose for the limitation of legal structures for subordinate companies and therefore has not previously consulted the VAT Committee on this aspect.

NEWS FROM THE BFH

Invoice details for input VAT deduction and for documentary proof – standard terms

BFH, ruling of 10 July 2019, XI R 2/18, 27/18 and 28/18

In three substantially similar rulings, the BFH has taken a position on what invoice requirements apply in the case of domestic trading in the low-cost segment, namely in the case of trading in textiles and jewelry and accessories, in each case with consequences for input VAT deductions. Furthermore, the principles established by the BFH also apply for the invoice duplicate for the purposes of documentary proof of an intra-Community supply of goods.

The cases

The disputed purchase invoices contain, for example, the details “t-shirt”, “blouse”, “tops”, “dress”, “trousers”, “chain”, “earring”, “belt”, “cell phone accessory” and similar descriptions, (high) numbers of items, and the unit prices. To some extent, the same description of the items supplied is contained, and they are only completed with details of a different quantity and a different price per item. There are no other documents such as order documents, delivery dockets, correspondence with the supplier.

The disputed sales invoices for intra-Community supplies to Spanish companies name the goods using terms like “blouse”, “t-shirt”, “skirt”, “coat”, “trousers” and similar. In addition, the item price and total prices are given. Furthermore, all invoices contain, inter alia, a stamp, the empty spaces of which are filled in by hand giving the destination, the collector, a signature, and

details of the respective transportation vehicle.

In each case, the tax authorities denied the deduction of input VAT in particular due to insufficient descriptions on the purchase invoices, and to some extent also because of the lack of an actual exchange of services. In addition, they denied the zero-rating of the intra-Community supplies. The law suit filed against this was not successful.

Rulings

The BFH dismissed the rulings and referred them back to the Lower Tax Court for further determinations. While the invoice details required by Union law also serve, for purposes of monitoring and control, to rule out multiple billings for the same supply, in accordance with § 14 (4) sent. 1 no. 5 UStG it is sufficient to give the type of the items supplied using the “description customary in the trade”, which the trader can invoke.

The customary usability of a description always depends on the circumstances of the individual case, such as the particular level of trade, the type and contents of the transaction, and in particular the value of the individual goods. The Lower Tax Court must therefore investigate in the cases under dispute – if necessary with the assistance of a technical expert – which details are the customary in the trade for the items supplied.

To the extent that there are questions as to whether the invoices under dispute were actually issued on the basis of a supply or if it is fraud, additional determinations must be made.

These principles also apply for the required details on a

duplicate invoice as documentary proof of an intra-Community supply. At the same time, it should be taken into consideration that the required details on the item being supplied could also be revealed in the trader's accounting records.

Please note:

It remains to be seen what the legal developments will be. In particular, it will be exciting to follow the findings of the technical expert now likely to be engaged by the Lower Tax Court with regard to descriptions customary in the trade, whether or not these findings will be practicable, and whether they will be generally accepted by the tax authorities.

In another ruling of 15 October 2019, V R 29/19 (V R 44/16), the BFH concluded that the description "dry construction works" can satisfy the requirements for the description of services, if it refers to a specific construction project in a certain place. In addition, the time of supply can be taken from the date of issue of the invoice, if, based on the circumstances of the individual case, it can be assumed that the provision or supply of work was carried out in the month in which the invoice was issued. The BFH also issued a similar opinion in its ruling of 1 March 2018, V R 18/17 (see [VAT Newsletter June 2018](#)).

Retroactive correction of incoming invoices in the input VAT refund procedure too
BFH, ruling of 15 October 2019, V R 19/18

The BFH has concluded that a retroactive correction of incoming invoices, taking the

CJEU ruling of 15 September 2016 – case C-518/14 – Senatex – (see [VAT Newsletter August/September 2016](#)) into consideration, is also possible in the input VAT refund procedure.

The case

A company resident in the Netherlands submitted an electronic claim for the refund of input VAT in May 2013 using the portal provided for this purpose by the Dutch tax authorities. The claim related to an input VAT refund in Germany for the period from January to December 2012. Two incoming invoices submitted, showing tax in the amount of EUR 10,600 and EUR 13,000, respectively, did not contain all of the necessary invoice details but during the input VAT refund process, additional documents with the missing details were provided.

While the Federal Central Tax Office (BZSt) refused a refund in this respect, the Lower Tax Court upheld the suit.

Ruling

The BFH dismissed the BZSt's appeal as unfounded. According to § 18 (9) sent. 2 UStG in conjunction with § 61 (2) sent. 3 UStDV, the application for a refund by electronic means must be accompanied by copies of the invoices and import documents if the fee for the transaction or the import is at least EUR 1,000, or in the case of invoices for the purchase of fuel at least EUR 250. In the case under dispute, the Dutch company submitted the required invoices relating to the two items being claimed before the relevant application deadline and then supplemented these with additional documents during the process.

As the BFH, taking into consideration the CJEU Senatex ruling of 15 September 2016,

has already explicitly ruled, an invoice capable of being corrected certainly exists if it contains details on the issuer of the invoice, the recipient of the invoice, the description of the supply, the fee, and separately listed VAT. That means it can be retroactively corrected up to the end of the final oral hearings before the Lower Tax Court, (BFH ruling of 20 October 2016 - V R 26/15).

With regard to the purely procedural peculiarities of the refund process, it therefore follows that the applicant has satisfied their obligation to present a copy of an invoice which meets the minimum requirements needed for an invoice to be capable of being corrected.

In the case under dispute, taking the company descriptions of the supplier into account, the invoice copies provided to the BZSt contained the required minimum details on the issuer of the invoice, the recipient of the invoice, the description of the supply, the fee and the separately listed VAT. Accordingly, the Dutch company was able to submit the full invoice documentation with retroactive effect at a later stage.

Please note:

In the case of an input VAT refund being denied due to a lack of invoices capable of being corrected, companies affected should lodge an appeal and carry out an invoice correction. At the moment, in these types of cases, all too often the company accepts the rejection of the refund and submits the corrected "new" invoice declaration anew in the refund period of the correction. In general, in order to avoid a forfeiture of rights, this method should no longer be pursued.

IN BRIEF

CJEU submission on the point in time of an input VAT deduction in the case of a supply on the basis of cash accounting

Lower Tax Court Hamburg, ruling of 10 December 2019, 1 K 337/17; CJEU ref. no.: 9/20

In a reference for a preliminary ruling, the Lower Tax Court Hamburg has submitted questions to the CJEU on the interpretation of the VAT Directive.

According to Art. 167 of the VAT Directive, the right of a recipient of a supply to the deduction of input VAT arises only when deductible VAT becomes chargeable. According to Art. 66 (b) of the VAT Directive, Member States can stipulate that the chargeability of the VAT to certain taxpayers only arises following receipt of payment (cash-accounting). Germany avails of this possibility in § 13 (1) no. 1 (b) UStG in conjunction with § 20 UStG.

The Lower Tax Court would like the CJEU to tell them whether Art. 167 of the VAT Directive contradicts § 15 (1) sent. 1 no. 1 UStG, in accordance with which the right to deduct input VAT is already created at the time of the execution of the input supply, if the chargeability to the supplier first arises upon the payment by the recipient of the supply as a result of cash accounting.

To the extent Germany may deviate from the provisions of Art. 167 of the VAT Directive, the question arises of whether the underlying importance of the right to deduct input VAT makes it necessary to nevertheless give the trader the opportunity to claim the input VAT under certain circumstances, such as

those in the initial case, for the time period of the payment of the input supply. In the case at issue the payment for the input supplies was deferred and, for the taxation period of the execution of the input supplies, the statute of limitations for an assessment had passed. Because in this constellation the deviation – in itself beneficial for the recipient of the supply – from Art. 167 of the VAT Directive has a detrimental effect for the recipient.

Instructions for the notification of transports into a consignment stock
BZSt, instructions of 18 December 2019

On 18 December 2019, the BZSt published a new form for the notification of transports as part of the consignment stock regulations in effect since 1 January 2020 (see § 6b UStG) along with instructions on its website (see also BMF guidance of 28 January 2020 – III C 5 - S 7427-b/19/10001 :002).

The notification contains the details of the transportations or dispatches to the consignment stock carried out, and the returns in line § 6b (1) UStG, which must be shown giving the VAT ID number of the intended purchaser and the respective statement of facts.

As in the EC sales list (recapitulative statement), this notification in line with § 6b (1) UStG must be transmitted to the BZSt by the 25th day following the expiration of the notification period (§ 18a UStG). The notification period of the transmission, depending on the particular requirements, could be a calendar month, a calendar quarter, or in exceptional cases,

a calendar year (§ 18a (1-3) UStG).

The transmission of the notification can only be carried out via the online form on the forms server of the federal tax authorities (<https://www.formulare-bfinv.de>) or by means of an authenticated transmission as an attachment from a registered De-Mail address to the De-Mail inbox of the Federal Central Tax Office (Konsignationslager@bzst.de-mail.de).

Zero-rated supplies of goods for export in non-commercial travel

BMF, guidance of 10 January 2020 – III C 3 - S 7133/19/10002 :004

In this guidance, the BMF has taken a position on the introduction of a value threshold of EUR 50 for export supplies in non-commercial travel.

The value threshold was introduced through the Law of 12 December 2019 (BGBl. I p. 2451) on further fiscal support for electromobility and the amendment of other tax provisions (see [VAT Newsletter August/September 2019 concerning the government draft bill](#)).

According to this, with effect from 1 January 2020, supplies of goods for export in non-commercial travel are only zero-rated if the total value of the supply including VAT is EUR 50 or more. The value threshold applies to the end of the year in which the IT process for the automatic issuance of export and purchaser certificates – already in the pipeline – will actually go live in Germany.

The value threshold is initially to be used for supplies which are effected after 31 December 2019. The BMF makes clear that the point in time of the purchaser's actual export operation is not important. No objections will be raised if the supplying trader did not apply the provisions on the value threshold in accordance with the specifications of the BMF guidance for supplies which they carried out between 1 January 2020 and the date of the publication of the BMF guidance in the Federal Tax Gazette.

According to Section 6.11 (1) UStAE, new paragraphs 2 to 6 will be inserted, containing further details on when the value threshold is exceeded in the opinion of the tax authorities.

In an additional BMF guidance of 10 January 2020, the information leaflet on zero-rating for supplies of goods for export in non-commercial travel of 12 August 2014 has been updated. Similarly, the model form "Export and purchaser certificates for VAT purposes in the case of exports in non-commercial travel" of 12 August 2014 has been amended.

MISCELLANEOUS

Non-binding explanatory notes at the EU level on the Quick Fixes from 1 January 2020

Guidelines from the VAT Committee (status 12 December 2019); "Explanatory Notes" of the European Commission Directorate General for Taxation and Customs Union (GD TAXUD) of 20 December 2019

The current list of the non-binding guidelines agreed by the VAT Committee was

supplemented in December 2019 (status: 12 December 2019). This includes guidelines from the 113th meeting of 3 June 2019 on the Quick Fixes from 1 January 2020, which have now been published.

Issues covered by the non-binding guidelines are:

- Consignment stock regulation: Procedure in the case of small losses (p. 244); When should a consignment stock be considered to be a fixed subsidiary of the supplier? (p. 245); Consequences in the case of non-applicability – registration as a result of intra-Community acquisition in Member State of destination, even if this is supposed to be zero-rated in accordance with Art. 140 (c) of the VAT Directive (p. 249)
- Chain transactions: Prerequisites for the simplification rules for triangular transactions (p. 246)
- Intra-Community supplies: Consequences of not providing the VAT identification number of the customer (p. 247); Consequences arising from the subsequent EC sales list to be submitted (p. 248)
- Documentary proof in accordance with Art. 45a German Operating Regulation: Meaning of the term "independent" in relation to transport tickets (p. 250)

In addition, on 20 December 2019 comprehensive non-binding Explanatory Notes from the European Commission Directorate General for Taxation and Customs Union (GD

TAXUD) on the Quick Fixes were published.

Please note:

It remains to be seen when the tax authorities will take a position with a BMF guidance on the Quick Fix regulations which have been applicable since 1 January 2020. Transposition into national law took place by means of the Law on further fiscal support for electromobility and the amendment of other tax provisions (the so-called German Annual VAT Act 2019). It is to be expected that there will not be a comprehensive BMF guidance but rather that over the course of 2020, separate BMF guidances will be published on the individual provisions.

EVENTS

VAT 2020 – current developments and hot topics

VAT is complex and subject to constant change. On 1 January 2020 the so-called Quick Fixes were implemented and other important changes to the law made. Added to that are administrative directives and legislation that must also be observed in operational practice. This event offers a compact overview of all current topics and possible approaches to solutions in order to satisfy the compliance requirements for companies affected.

You can find further information on the events [here](#).

4 March 2020 – Stuttgart

10 March 2020 – Berlin

12 March 2020 – Munich

17 March 2020 – Dortmund

18 March 2020 – Offenburg

19 March 2020 – Nuremberg

24 March 2020 – Düsseldorf

25 March 2020 – Dresden

25 March 2020 – Kiel

26 March 2020 – Bielefeld

26 March 2020 – Hamburg

26 March 2020 – Ulm

30 March 2020 – Cologne

31 March 2020 – Frankfurt

1 April 2020 – Mannheim

21 April 2020 – Bremen

21 April 2020 – Hannover

* Please note that the language of this event is German.

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