



VAT Newsletter

Hot topics and issues in indirect taxation

August / September 2022

NEW LEGISLATION

Reduced VAT rate on supplies of gas

BMF, draft of an aid for formulating the wording of 14 September 2022

The draft law provides for the VAT rate on the supply of gas via the natural gas network to be reduced to 7 per cent from 1 October 2022 to 31 March 2024.

This should balance out gas prices, which have risen dramatically due to the war against Ukraine, as well as the impending price increase as a result of the levy to finance the costs of sourcing replacements for the shortfall in Russian supplies (so-called gas levy).

As the gas levy will only be charged on the supply of gas via the natural gas network, supplies of gas using other distribution channels, for example tankers or cartridges, shall continue to be subject to the standard rate of VAT.

Please note:

The reduction in VAT on gas supplies planned for 1 October 2022 shall now also apply to district heating. The Finance

Committee of the German Bundestag agreed to this in a special session on 28 September 2022.

German Annual Tax Act 2022

Government draft of 14 September 2022

On 14 September 2022, the German Ministry of Finance (BMF) published the government draft for the German Annual Tax Act 2022. This draft law also contains planned changes in VAT law. Particular attention should be paid to the following changes:

(Record keeping) duties for providers of payment services in the case of cross-border payments

§ 22g Draft German VAT Law (UStG-E) shall introduce certain (record keeping) duties for providers of payment services in the case of cross-border payments. This standard implements the EU Directive (EU) 2020/284 of 18 February 2020 and is intended to serve in the fight against VAT fraud in cross-border e-commerce.

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The duty to keep records affects providers of payment services who effect more than 25 cross-border payments in a calendar quarter to the same payment receiver (threshold value). In particular the following must be recorded:

- Information on the person receiving the payment (name, VAT identification number, tax number, address, IBAN of the payment account),
- the BIC or any other commercial identifier, and
- details on all cross-border payments provided (date, time, amount, currency, Member State from which the payment originates).

The reporting period is the calendar quarter. Providers of payment services must transmit the records to the Federal Central Tax Office using the officially prescribed data format by the end of the calendar month following the end of the calendar quarter in question using an officially designated interface. If the providers of payment services identify at a later stage that the payment information transmitted is incorrect or incomplete, they are required to correct or complete the incorrect details within one month of the discovery of those inaccuracies. The provider of payment services must store the records in an electronic format for three calendar years.

Someone who intentionally or negligently does not transmit information on cross-border payments correctly, in full, or on time, or who does not correct or complete the information on time, or who does not store the records for at least three calendar years, can be fined a

penalty of up to EUR 5,000 (§ 26a (2) no. 8, 9, 10 UStG-E).

The provisions are intended to enter into effect on 1 January 2024.

Zero VAT rate on photovoltaic systems

A VAT rate of zero shall be applied to the supply, import, intra-Community purchase, and installation of photovoltaic systems, including storage batteries (§ 12 (3) no. 1-4 UStG-E).

The zero VAT rate shall apply to the supply of solar modules, including essential components for the operation of a photovoltaic system and storage. The prerequisite for the application of the zero VAT rate is that the photovoltaic system is installed on or close to private dwellings, apartments, public building, or other buildings used for purposes of activities in the public interest.

These requirements shall be deemed to be satisfied if the gross output of the photovoltaic system does not amount to more than 30 kW (peak).

According to the explanatory notes of the law, this standard shall serve to allow operators of photovoltaic systems to make use of the small business operator regulations in future without financial disadvantage.

The provision is intended to come into effect on 1 January 2023.

Input VAT refund procedures

An amendment to this provision is intended to implement Union law stipulations. This should ensure in particular that in invoices for intra-Community supplies, tax amounts invoiced separately will not be refunded if

the purchaser has not given the valid VAT identification number – issued to them by another Member State – in line with § 6a (1) sent. 1 no. 4 German VAT Law (UStG), but the remaining requirements for a zero-rating objectively exist. As in these cases the corresponding supplies could be treated as zero-rated if the purchaser were to give their VAT identification number at a later stage, a refund as part of the input VAT refund procedure is not indicated and should therefore be prevented by this provision.

The provision is intended to enter into effect on the day after the announcement of the Annual Tax Act 2022 in the Federal Gazette.

Deletion of § 4 (1) (b) sent. 2 UStG

This deletion is intended to clarify that the requirement for the existence of a zero-rated intra-Community supply applies regardless of the correction deadline contained in § 18a (10) UStG for recapitulative statements (ZM). This deadline should only be relevant for the purposes of carrying out a correct and proper intra-Community control procedure and potential administrative-fine proceedings in line with (§ 26a (1) no. 5 UStG). Conversely, the duty to submit a correct and complete ZM as a requirement for the granting of a VAT exemption for the intra-Community supplies executed shall also be covered by way of the deadline given in § 18a (10) UStG.

If, within the assessment period, the trader submits a corrected ZM or an initial ZM for the reporting period concerned in full and correctly, the VAT exemption, if the other

requirements are satisfied, shall be revived or, in the case of an initial submission of a ZM, if the requirements for the VAT exemption in this time period are satisfied, the VAT exemption shall be available for the first time.

By submitting an appropriate ZM for the reporting period concerned, the previous failings of the trader shall be deemed to be sufficiently excused. This is in harmony with Article 138 (1a) of the VAT Directive.

The provision is intended to enter into effect on 1 January 2023.

Improvements to online access

According to the Laws on Improvements to Online Access to Administrative Services of 14 August 2017 the federal government and the federal states are required to also offer their administrative services electronically using administrative portals by 31 December 2022. This amendment to the law is intended to implement this requirement.

This concerns in particular electronic declarations in the case of vehicle taxation. The change should be applied for the first time to taxation periods ending after 31 December 2022.

Further VAT changes *German Bundestag, Parliament News, hib 466/2022*

The following further changes in the law are to be expected based on resolutions of the Finance Committee of the German Bundestag:

Extension of the reduced tax rate on restaurant and catering services (excluding the sale of beverages) until the end of 2023.

Reduction of the input tax flat rate for farmers from 9.5 to nine percent from 1 January 2023.

Extension of the reverse charge procedure to the transfer of emission certificates that are traded in the national system in accordance with the law on national certificate trading for fuel emissions (Fuel Emissions Trading Act - BEHG) of 12 December 2019. The change is to take place through the eighth law amending consumption tax laws (printed papers 20/2247). The change is to come into force on the first day of the month following the promulgation of the law.

NEWS FROM THE CJEU

Input VAT deduction of a holding company *CJEU, ruling of 8 September 2022 – case C-98/21 – Finanzamt R*

Following a submission by the German Federal Tax Court (BFH), the CJEU has commented on the input VAT deduction of a holding company.

The case

In 2013, W GmbH (W) held shares in X GmbH & Co. KG (X) and Y GmbH & Co. KG (Y), whose activities consist in the construction of buildings and selling residential units. These activities are largely exempt from VAT. It was agreed between W and X, and between W and Y, that W would provide accounting and management services for a fee in relation to their construction of buildings. In

supplementary agreements to the company contracts addition, W also agreed to make a shareholder contribution to X and Y. This contribution consisted in each case of the free-of-charge provision of services. W provided these services partially with its own personnel or equipment, partially by purchasing goods and services from other companies. Whether W is entitled to deduct input VAT on the input services is disputed. The BFH has doubts as to the interpretation of Union law on input VAT deductions and referred the case to the CJEU for a preliminary ruling.

Ruling

In this case W's activity was not limited to the purchase and holding of shares in X and Y. Rather, it provided both of its subsidiaries with accounting and management services in exchange for payment, which constitutes an economic activity within the meaning of the VAT Directive. Consequently, W must be classified, according to the CJEU, as a taxable person.

The right to deduct input VAT moreover requires that the goods and services obtained by the taxable person be used for the purposes of their taxed transactions.

In this case, the objects of the input services are the contributions that W, as a shareholder, made to its subsidiaries X and Y. These are not, therefore, expenses which W must incur for the acquisition of shares, but rather expenses which constitute the very object of the shareholder contribution from W to its subsidiaries. Such a contribution of a holding company in favor of its subsidiaries, whether in cash or in kind, is a part of the holding of shares, which does not

constitute an economic activity and therefore offers no right to deduct input VAT. The sole reason for the transaction in question is a shareholder contribution on the part of W.

In addition, if the actual use of the services obtained by W is taken into consideration, the CJEU noted that W had claimed that these supplies of services constituted a shareholder contribution in kind and that it had needed to pass this on to its subsidiaries for this purpose free-of-charge, so that they could make use of it for their transactions. The fact that these supplies of services were intended to be used by W's subsidiaries gives rise to a direct connection with the transactions of these subsidiaries and confirms the absence of a direct and immediate connection with W's economic activity. The fact that these services are passed on by W to its subsidiaries does not call into question that these services are directly connected to the subsidiaries' activities, as it is the actual use of these services that is relevant.

Please note:

[The judgment of the CJEU is not so surprising in terms of the result, but the reasoning of the CJEU raises some questions that were actually clarified long ago. In this respect, it remains to be hoped that no general principles will be derived from this decision of a very special individual case with regard to the entrepreneurial status and input tax deduction entitlement of holding companies, but in particular also with regard to the VAT assessment of contributions in kind.](#)

NEWS FROM THE BFH

VAT on the supplies of a swimming school

BFH, ruling of 15 March 2022 – V R 35/21 (V R 35/19)

Subsequent to the CJEU ruling of 21 October 2021 – case C-373/19 - Dubrovin & Tröger – Aquatics, the BFH has ruled that revenues from the services of a swimming school are subject to VAT.

The case

Whether the swimming lessons carried out by a sole trader for infants from age 3 to 12 months and toddlers from age 12 to 36 months are exempt from VAT is disputed. The sole trader treated all swimming lessons as supplies exempt from VAT in line with § 4 no. 21 UStG from the beginning. She did not issue invoices showing VAT separately. The sole trader applied unsuccessfully to the Regional Council for a certificate in line with § 4 no. 21 UStG. Therefore, the tax authorities considered the supplies to be subject to VAT.

The action at the Lower Tax Court was partially successful. The Lower Tax Court treated the swimming lessons for toddlers (12 to 36 months) as exempt from VAT. In contrast, it considered the swimming lessons for infants (3 to 12 months) to be subject to VAT. According to national law, the supplies were therefore subject to VAT as a whole. However, the trader could, in relation to the swimming lessons for toddlers (12 to 36 months) rely on Union Law to the extent that she was providing tuition within the meaning of these provisions. The infant lessons (3 to 12 months), on the other hand, are subject to VAT as they do not go beyond recreational activities

and do not impart swimming skills and abilities to the infants in a structured process.

Ruling

The tax authorities' appeal was successful. The BFH dismissed the ruling and also dismissed the action to the extent that the Lower Tax Court had treated the swimming lessons for toddlers (12 to 36 months) as exempt from VAT.

A VAT exemption in line with § 4 no. 21 UStG can be ruled out as the necessary certificates for vocational or examination preparation do not exist for the disputed courses. Nor is there any question of a VAT exemption derived from Union law. While the BFH, in its ruling of 5 June 2014, V R 19/13, ruled that swimming lessons provided as school lessons by private teachers can be exempt from VAT in accordance with Union law, the CJEU – following the submission by the BFH in the case of Dubrovin & Tröger – Aquatics – ruled that school or university teaching required by Union law does not encompass swimming lessons provided by a swimming school. Therefore, the BFH, in its ruling of 16 December 2021, V R 31/21 (V R 32/18), abandoned its previous jurisprudence.

No other reason for a VAT exemption can be given. The Lower Tax Court's determinations provide no evidence that the course participants used the participation in the course for a later job, for example as a swimming instructor, or in the pursuit of such an occupation; moreover the trader presented no information to this effect. Furthermore, in light of the ban on aggravation applying to appeal proceedings, it was not necessary to rule on whether the

VAT exemption must be denied to the extent that the tax authorities affirmed the VAT exemption for swimming lessons for toddlers from age 3 to 6 years and for children from the age of 5 ½.

NEWS FROM THE BMF

Correction of input VAT when giving up one of several activities

BMF, guidance of 1 September 2022 – III C 2 - S 7316/19/10002 :001

This BMF guidance concerns the question of input VAT corrections in the case of only one of several activities being given up.

If, originally, there is a mixed use case in line with § 15 (4) UStG, for which one activity is then given up (e.g. the activity that confers the right to deduct input VAT) and where the asset is now exclusively used for the purposes of the activity that was retained (e.g. one which does not confer a right to deduct input VAT), a change in circumstances in line with § 15a UStG must generally be assumed (cf. CJEU ruling of 9 July 2020 – case C-374/19 - Finanzamt Bad Neuenahr-Ahrweiler).

However, taking all of the circumstances of the individual case into consideration, it must be examined whether, as an exception, there is only a selective use of the asset in question in the course of the retained activity and otherwise there is now no doubt about a non-use (for example a vacancy). To the extent that such a non-use exists, there is no change in the circumstances within the meaning of § 15a

UStG (cf. BFH ruling of 27 October 2020 – V R 20/20 (V R 61/17).

The VAT Application Decree has been amended accordingly. The principle must be applied in all open cases.

IN BRIEF

Place of import in the case of customs law breaches

CJEU, ruling of 8 September 2022 – case C-368/21 – R.T.

This ruling concerns a legal dispute between R.T., resident in Germany, and Hamburg Main Customs Office in relation to the levying of import VAT on a vehicle that was brought to a territory of the European Union in breach of customs law.

In this case, R.T. purchased and registered a vehicle in Georgia. Using the vehicle, he entered the territory of the European Union in Bulgaria. In fact, R.T. drove the vehicle from Georgia via Turkey, Serbia, Hungary and Austria to Germany without registering the vehicle at any import customs office. R.T. used the vehicle, which came to attention on 28 March 2019 in the course of an inspection by a control team from the main customs office, in Germany.

Following the submission by Hamburg Lower Tax Court, the CJEU has ruled that the place of import of such a vehicle lies in the Member State in which the person who has committed the violation of duties is resident and the vehicle is actually used, that is in the case at hand, in Germany.

Right to deduct input VAT

CJEU, ruling of 15 September 2022 – case C-227/21 – HA.EN.

This ruling was issued in the course of a legal dispute between HA.EN and the State Tax Inspector at the Ministry of Finance of the Republic of Lithuania as a result of the denial of an input VAT deduction due to an alleged abuse of the law by HA.EN.

The CJEU has ruled that Union law precludes a national practice which, in the course of the sale of a property between taxpayers, denied the purchaser the right to deduct input VAT solely because he knew or should have known, that the seller was in financial difficulties or even was totally unable to make payments, and that this circumstance could potentially give rise to the seller not paying or not being able to pay the VAT to the tax authorities.

OTHER

“VAT in the digital age” report published

The report “VAT in the digital age” was published on 21 July 2022. This report was produced for the European Commission, Directorate-General for Taxation and Customs Union, as part of a study on VAT in the digital age by a coalition of advisory companies and research institutions.

The report encompasses three different but related areas of VAT policy:

- Digital reporting requirements (DRR),
- the VAT treatment of the platform economy, and

- single EU VAT registration and the import one-stop shop (IOSS).

The objective of the report is twofold: (i) Assessment of the current situation in relation to the areas mentioned above and (ii) evaluation of the impacts of potential political initiatives in these areas. The report is intended to feed into the development of an impact assessment by the European Commission, to accompany potential legislative or non-legislative initiatives.

The three sections of the report in English (only available in this version) – as well as the summary (also available in German) – are available for download on the EU website at the following link: [VAT in the digital age - Publications Office of the EU \(europa.eu\)](https://ec.europa.eu/economy_finance/publications/indirect-taxation).

28 Jul – KPMG report: Global overview of environmental taxes, incentives and grants (table)

26 Jul – Bolivia: Measures regarding persons conducting business but not registered for VAT purposes

22 Jul – EU: Infringement procedures against UK for not complying with parts of Ireland / Northern Ireland Protocol including excise and VAT rules

18 Jul – Czech Republic: Tax priorities of the Czech EU Presidency

14 Jul – Mexico: List of 155 registered foreign providers of digital services (as of 30 June 2022)

You can find these and other articles [here](#).

AROUND THE WORLD

TaxNewsFlash Indirect Tax *KPMG articles on indirect tax from around the world*

6 Sep – Poland: Draft decree proposes changes to national e-invoicing system

2 Sep – South Africa: Proposal to change VAT treatment of cross-border leases of aircraft engines

24 Aug – Bahrain: Guidance on VAT registration certificates, simplified tax invoices

2 Aug – Poland: Draft bill to implement EU single-use plastics directive

2 Aug – Malaysia: Proposed measures for sales tax on low-value goods include new requirements for online sellers

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