

VAT Newsletter

Hot topics and issues
in indirect taxation

November 2023

LEGISLATION

Postponement of ViDA

*EU VAT Expert Group, meeting of
26 October 2023*

In its 2020 action plan for a fair and simple taxation supporting the recovery strategy, the EU Commission announced the legislative package “VAT in the Digital Age (ViDA), which was also included in the 2022 Commission Work Program.

ViDA consists of three pillars:

- From January 2028: Digital reporting requirement (e-Reporting) and electronic invoicing (e-Invoicing)
- From January 2025: Digital platform economy
- From January 2025: Single VAT registration

“EU Council discussions on the VAT in the Digital Age (ViDA) package are set to continue into 2024 with a likely delay in the implementation of certain measures beyond the initially proposed timelines. There continues to be discussion on the e-invoicing and digital reporting aspects of the proposals in particular. The three pillars of ViDA require agreement before formal adoption of the package.” (explained David Duffy, Partner

Indirect Tax, KPMG Ireland, EU VAT Expert Group Member).

Bundesrat calls for a Growth Opportunities Law conciliation committee

*Bundesrat, resolution of 24
November 2023*

On 17 November 2023, the Bundestag (German Parliament) passed the “Law to Strengthen Chances for Growth, Investment and Innovation and Tax Simplification and Tax Fairness” (Growth Opportunities Law (WtChancenG). On 24 November 2023, the Bundesrat (German Federal Council) did not approve the law and demanded the convening of the conciliation committee. In particular, the law contains the following VAT changes:

Mandatory use of electronic invoicing

In anticipation of the planned reporting system (EU Commission proposal for a directive “VAT in the Digital Age” from December 2022), mandatory electronic invoicing will be introduced (§ 14 (1) to (3) German VAT Law (UStG)).

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The requirement is confined to supplies between domestic companies and in these cases applies without the approval of the recipient of the invoice. Invoices for small amounts and travel tickets are excluded from the requirement.

In addition, e-invoicing shall be newly legally defined as an invoice that is issued, transmitted and received in a structured electronic format that allows it to be processed electronically, and which in general complies with the provisions of the Directive 2014/55/EU of 16 April 2014. The Bundestag incorporated an alternative to this. The structured electronic format of an electronic invoice can also be agreed between the issuer and the recipient of an invoice. This assumes that the format enables the correct and complete extraction of the details required by this law from the electronic invoice in a format that corresponds to the previously mentioned European norm, or is interoperable with that norm. According to the details of the legislative intent, this shall ensure, in particular, that invoices issued using EDI processes also comply with the format requirements. At the same time, the wording is open to other technologies and also allows for other (including new) electronic invoicing formats.

The changes will in general enter into effect on 1 January 2025 with transitional arrangements for the period from 2025 to 2027, contrary to the extended ones in the government draft: In 2025 and 2026 other invoices on paper or in another electronic format are permissible; by the end of 2027 invoices on paper or in another electronic format are possible if the revenue of the issuing trader in the previous year was less than EUR 800,000; in 2026 and 2027 invoices in a different electronic format are permissible if they are

issued using an electronic data interchange (EDI process). The issuing of invoices in a different electronic format requires the agreement of the recipient.

VAT on supplies of gas and heat

The period of validity of the reduced VAT rate for supplies of gas and heat was reduced by the Bundestag. It shall now only apply until 29 February 2024 (instead of as previously until 31 March 2024) (§ 28 (5), (6) UStG).

Simplifications in taxation processes

The simplification provision, according to which the **recipient of the supply is deemed to be the taxpayer**, if the supplying trader and recipient of the supply have used the reverse charge process although this is not objectively applicable, can also be used for transactions arising from the transfer of emissions certificates in accordance with § 3 no. 2 Fossil Fuel Emissions Trading Law (§ 13b (5) sent. 8 UStG); entry into effect on 1 January 2024.

Expansion of cash accounting:

The threshold for cash accounting, in which VAT can be calculated according to the collected rather than the agreed payments will be increased from the current EUR 600,000 to EUR 800,000 (§ 20 sent. 1 no. 1 UStG); entry into effect on 1 January 2024.

Small business provision:

Fundamentally no transfer of advance VAT notifications and an annual VAT return. The waiving of the small business provision can in future be declared up to the end of the second calendar year following the taxation period in question (previously: until the period in which the VAT assessment can no longer be

appealed) (§ 18 (1) sent. 1, (3) sent. 1, § 19 (1) sent. 4, (2) UStG); first applicable for the 2023 tax period.

Increase of **threshold** for the exemption from the obligation to submit quarterly advance VAT notifications and payments from the current EUR 1,000 to EUR 2,000 (§ 18 (2) sent. 3 UStG).

Please note:

On 24 November 2023, the Bundesrat referred the Growth Opportunities Law passed by the Bundestag to the Conciliation Committee. In their decision to refer the matter, the federal states are calling for a fundamental revision of the law. A date for the discussion of the law in the Conciliation Committee has not yet been set (as of 28 November 2023).

Bundesrat approves Financing for the Future Act

Bundesrat, resolution of 24 November 2023

On 17 November 2023, the Bundestag passed the “Law for the Financing of Forward-Looking Investments” (Financing for the Future Act (ZuFinG)). On 24 November, the Bundesrat approved the law. This was followed by the announcement in the Federal Law Gazette. In relation to VAT, the law contains the following changes in particular:

The new exemptions to the VAT law stipulated in the government draft – **administration of loans and loan collateral by the lender** (§ 4 no. 8 (a) and (g) Draft German VAT Law (UStG-E)) – were not included in the law passed. According to the reasons given, this was due to the

potential financial impacts and the tight budgetary situation.

The expansion of the VAT exemption – also earmarked in the government draft – for venture capital funds within the scope of those permitted by Union law to **administrative services of alternative investment funds** in line with § 1 (3) of the Capital Investment Code – investment funds that are not UCITS – was adopted unchanged into the law passed (§ 4 no. 8 (h) UStG). According to the reasons given for the law, the exemption in line with the previous law, will extend to investment funds within the meaning of the UCITS Directive and the administration of such alternative investment funds as well as the administration of venture capital funds. The new provisions enter into effect on 1 January 2024.

NEWS FROM THE BFH

Time of collection in the case of transfers

BFH, ruling of 17 August 2023, V R 12/22

This German Federal Tax Court (BFH) ruling concerns the issue of whether the collection of a payment exists only on the day that the amount transferred is credited or already exists on the day of the retroactive value date.

The case

A special VAT audit was carried out at the plaintiff – who had been granted a calculation of VAT on the basis of payments collected (§ 20 UStG) – in July 2020 for the second half of 2019. In the audit report analysis, for the annual VAT assessment notice for 2019, the tax authorities took into consideration payments from an amount transferred in 2020. Although this amount was not booked to the plaintiff's checking

account until 2 January 2020, it had already been collected on 31 December 2019 due to the retroactive value date.

From the reasons for the decision

The BFH reached the following decision: In the case of transfers the collection of the payment within the meaning of § 13 (1) no. 1 (b) UStG also exists at the point in time of the crediting to the recipient of the payment's checking account, even if the value date is already effective at an earlier point in time.

The VAT for supplies of goods and other services arises, in this case's calculation of VAT on the basis of collected payments in line with § 13 (1) no. 1 (b) UStG, after the end of the advance notification period in which the payments are collected. In terms of Union law, this provision is based on the authorization in Art. 66 (1) (b) of the VAT Directive, according to which Member States can stipulate that the tax chargeable for certain transactions arises at the latest at the time of collection of the price.

Collection within the meaning of § 13 UStG requires that the trader can economically dispose of the consideration for their supply. In the case of transfers, therefore, collection takes place at the point at which the amount is credited to the checking account of the recipient of the payment. For the credit to exist, it is immaterial if the value date is already effective at an earlier point in time.

In the case of transfers to a checking account, as in the case under dispute, a difference must be made between the claim upon crediting, the claim to the value date and the claim from the value date. In this regard, the value date gives the point in time at which interest can be calculated on the

amount booked. It is a booking independent of the credit.

If, as in the case at hand, the value date takes place before the day on which the credit is booked, the amount nevertheless only becomes available to the account holder upon the credit being booked, as they are only able to dispose of the amount from this point in time. The value date applied retroactively is irrelevant for the collection within the meaning of § 13 UStG. What is relevant is that the consideration (as the amount to be collected) can be disposed of economically. This requires the possibility of disposing of the credited amount and not just a value date relating to the calculation of interest.

Please note:

A value date with retroactive effect (value date) for the bank transfer is irrelevant for the receipt under Section 13 UStG because the value date only indicates the time at which the amount becomes interest-bearing. At this point in time, the account holder cannot yet dispose of the amount. Accordingly, in the case in dispute, the contractor correctly took into account the receipt of the remuneration, which was only credited on 2.1.2020 but had already been valued on 31.12.2019, only in 2020.

Rental of operating equipment as an ancillary service of a property rental; legitimate expectation in the case of administrative instructions

BFH, ruling of 24 August 2023, V R 49/20 (Follow-up judgment to CJEU judgment of 4 May 2023–Case C-516/21–Y)

The BFH ruling implements the above-mentioned CJEU ruling and also makes statements on

confidentiality protection in accordance with Section 176 AO.

1. letting and leasing of land with operating equipment:

The specific case concerned the leasing of a stable building for turkey rearing with specially adapted equipment elements.

Following a referral from the BFH, the ECJ came to the conclusion in its ruling of 4 May 2023 that the leasing of a operating equipment is not taxable under Art. 135 para. 2 sentence 1 lit. c of the VAT Directive if this letting is an ancillary service to a VAT exempt letting or leasing of real estate (see Newsletter May 2023 for details of the facts). The BFH has now followed this ruling.

According to the BFH, Art. 135 para. 2 sentence 1 lit. c of the VAT Directive does not apply to the rental of permanently installed equipment and machinery if this rental is an ancillary supply to a main supply of the lease of a building, which is provided under a lease agreement concluded between the same parties and exempt under Article 135(1)(l) of this Directive, and these supplies form a single economic supply.

In implementation of the BFH ruling, the tax court will now have to deal with the following instructions of the BFH: A decision must be made as to whether a uniform supply exists in which the leasing of inventory or operating equipment is to be regarded as an ancillary supply to an overall tax-exempt supply, taking into account the above case law. According to the BFH, the lease agreement could be cited in this regard insofar as the monthly rent of € 3,750 is divided into an amount of € 2,500 for "box stables, buildings" and € 1,250 for "facilities" in connection with the issuing of the invoice. The investment sums for the hall and

for the other items, which may be inventory or operating equipment, could also speak in favor of the VAT exemption of a total service.

Please note:

[It remains to be seen whether and to what extent the tax authorities will adapt their explanations in the VAT Application Degree \(see section 4.12.10 of the VAT Application Degree\) to these more recent rulings.](#)

2. protection of legitimate expectations:

The ruling also addresses the question of the extent to which legitimate expectations are protected in the event of unlawful administrative instructions.

According to § 176 (2) German Tax Code (AO) in the case of the cancellation or amendment of a tax assessment notice that is not to the benefit of the taxpayer, it may be taken into consideration that a general administrative regulation of the federal government, an upper federal or state authority from a federal supreme court has been designated as not in compliance with the applicable law.

The BFH has already explicitly ruled in relation to § 176 (1) sent. 1 no. 3 AO, that the wording of the provision ("In the case of the cancellation or amendment ...") implies that the provision only applies if the legislation is changed in the period before the amended notice is issued, but that it does not encompass the case in which an amendment notice is initially issued and a legislative change only subsequently takes place through which the amended notice becomes materially legally legitimized and that ultimately the same applies with regard to § 176 (2) AO as the description set out therein also must take place

before the amended notice is issued.

According to the BFH, protection of legitimate expectations pursuant to Section 176 AO only exists if the case law leading to the invalidity was issued before the (contested) amendment decision was issued.

The date of publication of the judgment on the BFH website is decisive.

Accordingly, contrary to the judgment of the tax court, Section 176 (2) AO does not grant protection against amendment for the 2014 year in dispute. This is because the contested amendment notice of 28 March 2018 was issued before the BFH ruling of 1 March 2018 (V R 35/17), as the publication of this ruling on the BFH website on 16 May 2018 is to be taken into account.

Please note:

[The BFH's decision on the granting of protection of legitimate expectations in accordance with Section 176 \(2\) AO is of considerable importance in practice. In future, it will not be the date of the decision that is decisive, but the time of publication on the Internet. It is therefore important that the case law has changed before the amendment notice is issued. This is similar to Section 176 para. 1 no. 3 AO and the protection against amendment. Both provisions do not apply if an amendment notice is initially issued and a change in case law only occurs subsequently.](#)

NEWS FROM THE BMF

VAT exemption for laboratory services

BMF, guidance of 10 October 2023 - III C 3 - S 7170/20/10002 :001

In its ruling of 24 August 2017 – V R 25/16, the BFH ruled that medical analyses carried out by a privately organized laboratory outside of the surgery of the practicing doctor who has ordered those analyses, could be exempt from VAT in line with § 4 no. 14 (b) UStG, but not also exempt from VAT in line with letter (a) of this provision.

As the BMF stated in its guidance dated 10 October 2023, the BFH had abandoned its opinion in its ruling of 18 December 2019 - XI R 23/19 (XI R 23/15) because it was outdated following the CJEU ruling of 18 September 2019, C-700/17 (Peters).

Now, also according to the BMF, medical analyses of a doctor for clinical chemistry and laboratory diagnostics can not only be exempt from VAT in line with § 4 no. 14 (b) UStG, but also in line with § 4 no. 14 (a) sent. 1 UStG. The existence of a mutual trust between the treating physician and the patient is not a requirement for an exemption from VAT for an activity in the course of a medical treatment within the meaning of § 4 no. 14 (a) sent. 1 UStG.

The German Ministry of Finance (BMF) has amended the VAT Application Decree to take account of the new jurisprudence.

The principles of the BFH ruling of 18 December 2019 – XI R 23/19 (XI R 23/15) must be applied to transactions in all open cases. For transactions carried out up to 31 December 2023, no objection shall be raised if a trader treats or has treated their supplies,

contrary to the details given above, as subject to VAT as long as the requirements for an exemption from VAT in line with § 4 no. 14 (b) sent. 2 (bb) or (cc) UStG were not or are not present.

The principles of the BFH ruling of 28 August 2017 – V R 25/16 are, to the extent the legal position taken therein was amended by the BFH ruling of 18 December 2019 – XI R 23/19 (XI R 23/15), must not be applied according to the BMF.

MISCELLANEOUS

Income tax related permanent establishment

BFH, ruling of 27 June 2023, I R 47/20

The BFH indicates that based on settled case law, the assumption of an (income tax related) permanent establishment in line with § 12 sent. 1 AO requires a place of business or installation with a fixed connection to the surface of the earth, which has a degree of permanence, serves the activity of the company and for which the taxpayer has the power to dispose on more than a temporary basis. It is a question of a company's own commercial activity being exercised with a permanent local connection (the company "putting down roots" in the place the commercial activity is carried out).

These requirements, which also characterize the term of a permanent/fixed establishment under treaty law (here: DTA-UK 1964/1970 und 2010), are met if the supplying company (in this case aircraft mechanics/engineers), in connection with the provision of services (in this case maintenance work on airplanes) provides structures for individual use by people at location-based business

premises (here: lockers in common rooms on the grounds of the airport).

Please note:

The BFH holds the view that in this case it was decisive that the mechanic from the subcontractor's contract had a derived power to dispose of the hangar, the computer room and the administrative offices. The individual use of lockers led to the mechanic having the necessary roots. This is therefore an artificial service establishment and the mechanic must therefore pay tax on income arising from self-employed activities in Germany.

In the case of VAT, it could happen that the responsible tax office assumes without further examination that a permanent establishment (fixed place of business) can also be assumed for VAT purposes. However, it would then have failed to check whether there is a permanent establishment with a permanent structure and staff, which would be a prerequisite for a permanent establishment for VAT purposes in Germany. If you would like to learn more about VAT-related permanent or fixed establishments, listen to the newest episode of our VAT podcast, "VAT to go".



Listen in: VAT podcast "VAT to go"

Our tax expert Kathrin Feil and Rainer Weymüller, former presiding judge at the Munich Tax Court, talk about fixed establishments for VAT purposes in the new episode of our VAT podcast "VAT to go" - listen in on [Spotify](#) and [SoundCloud](#).

Investment subsidy

Saarland Lower Tax Court, ruling of 14 June 2023 – 1 K 1264/19

In this case the VAT treatment of investment subsidies is disputed.

The case

The plaintiff is a company with limited liability under Luxembourg law. The business consists of the leasing of developed real estate. It leases a property, under a waiver of exemption from VAT, to A-GmbH.

The plaintiff undertook to pay an "investment subsidy not for a specific purpose" in a certain amount plus VAT. In line with the agreement A-GmbH issued an invoice for this with an open VAT statement, which the plaintiff subsequently paid. The tax authorities did not allow an input VAT deduction for the invoice. An objection was not successful.

From the reasons for the decision

The Lower Tax Court rejected the

case as unfounded. According to § 15 (1) sent. 1 no. 1 sent. 1 UStG, traders can deduct legally owed VAT for supplies carried out by another trader for their company, as input VAT. The interpretation in line with the Directive allows input VAT to only be deducted for the VAT owed by the supplier for the transaction charged. Consequently, the right to deduct input VAT does not extend to VAT that was solely owed as it was given in an invoice. This applies in particular to VAT shown within the meaning of § 14c (1) and (2) UStG. From a Union law perspective, these provisions are based on Art. 203 of the VAT Directive.

According to § 14c (2) sent. 2 alt. 2 UStG, VAT is unjustifiably shown if someone bills as a supplying trader and shows a VAT amount separately although they do not carry out a supply of goods or other services.

However, a tenant who carries out building expansions, conversions or installations at their own cost or erects a building on a rented property, is essentially carrying out a supply of works. This applies in any case if the tenant transfers not only the civil law ownership but also provides an economic advantage that the landlord actually directly makes use of.

That being said, a taxpayer who only pays a consideration for the provision of a service in cash, or undertakes to do so, does not themselves provide a supply of services (CJEU from 9 October 2001 C-409/98 "Mirror Group"). This is not about an act, sufferance or omission which is assigned an economic value and can therefore be the subject of an exchange of services, but rather a consideration for the supply of another. Therefore, the tenant, who only undertakes to become a tenant and to pay rent, does not provide a supply of services to the

landlord even if they are paid to do so by the landlord (CJEU of 9 October 2001 C-409/98 "Mirror Group").

It is a different situation if the (future) tenant, in addition to entering to the rental contract also provides a service of some other kind to the landlord and it constitutes something other as a usable benefit for the landlord within the meaning of VAT laws. Because then, the (future) tenant provides a distinct supply beyond the consideration, that is an act, sufferance or omission with an economic value. In this case, a payment by the landlord can be evaluated as a consideration for other supplies provided by the tenant (CJEU of 9 October 2001 C-409/98 "Mirror Group"). This type of distinct supply should, in the view of the CJEU, exist if the landlord assumes that by virtue of the presence of the tenant as a "prestige tenant", other tenants will move into the building and therefore pays the tenant something in return for the undertaking to move into the building. The undertaking of such a tenant can then be viewed as a commercial supply of services subject to VAT (CJEU of 9 October 2001 C-409/98 "Mirror Group"). Whether and which supply of services the tenant provides to the landlord for a consideration and what this may have been, must be decided by the court.

Furthermore, a supply can also exist if a taxpayer waives a right – to which they are entitled on a legal or contractual basis – to a legal position for a consideration. Thus, for example, the waiver of a commercial or professional activity for a consideration, in whole or in part, is a miscellaneous supply. The contractual termination of a rental agreement in return for compensation will also be deemed to be a taxable transaction.

In line with these legal principles, the Lower Tax Court could not form the conviction that the investment subsidy for a supply of A-GmbH was paid, to which the Lower Tax Court gave further details. In the Lower Tax Court's view, the investment subsidy lowered the basis of assessment for the rental supply to be provided by the plaintiff. Ultimately, this does not however lead to a reduction of the VAT burden as the plaintiff had issued invoices for the rental payments showing too much VAT and therefore owed the VAT in accordance with § 14c (1) UStG. No appeal was against the judgment was permitted.

Please note:

It must be checked in each individual case whether a cash payment actually constitutes an exchange of services. This also applies if the landlord grants the tenant a so-called investment cost subsidy. The tax court held that there was a direct connection between the investment cost subsidy and the rent in this case, so that this had an effect on the amount of the payment, i.e. it resulted in a reduction in the rent and there was no further exchange of services.

EU: statistics on VAT gap for 2021

EU Commission, press release of 24 October 2023

The European Commission has published a press release with the statistics on the VAT gap for 2021.

According to the Commission's announcement an approximate EUR 61 billion of VAT revenue was lost by EU Member States in 2021 due to VAT fraud, evasion and avoidance, non-fraudulent bankruptcies, miscalculations and

financial insolvencies. The "VAT gap" – an estimate of the total difference between the theoretically expected VAT revenue and the amount actually collected – decreased by around EUR 38 billion in comparison to the figures for 2020.

The most recent report shows that targeted policy measures, particularly those related to the digitalization of tax systems, real-time reporting of transactions and e-invoicing appear to have made a difference. Temporary factors such as government support measures implemented during the pandemic (COVID-19), which were often contingent on paying taxes, may also have played a role.

FROM AROUND THE WORLD

TaxNewsFlash Indirect Tax

KPMG articles on indirect tax from around the world

You can find the following articles [here](#).

13 Nov - Italy: New reporting obligations for payment service providers

10 Nov - Czech Republic: Pharmaceutical marketing services are separate supply of services not subject to VAT (Supreme Administrative Court decision)

10 Nov - Serbia: Amendments to electronic invoicing law

9 Nov - Ireland: Purchase and resale of second-hand cars does not meet conditions under VAT margin scheme

6 Nov - Switzerland: Blockchain services partially taxable and partially non-taxable for VAT purposes (Federal Administrative Court decision)

1 Nov - France: VAT digital economy enforcement included in 2024 Finance Bill

31 Oct - Poland: Striking taxable person from VAT register; exit law compatible with EU law; construction management services subject to VAT (court decisions)

25 Oct - Cyprus: VAT exemption for specific training services

24 Oct - Sweden: VAT apportionment rules violate of EU law (Supreme Administrative Court decision)

19 Oct - France: New deadlines for implementation of e-invoicing

EVENTS

Cologne VAT Congress

on 30 November and 1 December 2023 in Cologne

Topics

- Current developments in relation to VAT groups
- Guarantee commitments – challenges and open questions on practice and applicability to leasing structures
- Current case law and news from the tax authorities
- Invoices and VAT liability in line with § 14c UStG and interest in the case of the shifting of periods
- Challenges in the case of chain and triangular transactions due to current developments
- Obligatory electronic invoicing and transaction-related reporting system following the legislative proposal "VAT in the Digital Age" from the European

Commission and current plans
for national implementation

You can find further information
and the registration form for the
event [here](#).

KPMG Tax year-end events 2023

All dates at a glance:

Berlin, 22 November 2023
Cologne, 27 November 2023
Bremen, 28 November 2023
Dortmund, 28 November 2023
Frankfurt, 28 November 2023
Düsseldorf, 29 November 2023
Bielefeld, 30 November 2023
Kiel, 30 November 2023
Hamburg, 4 December 2023
Mainz, 6 December 2023
Dresden, 7 December 2023
Hanover, 7 December 2023
Munich, 11 December 2023
Leipzig, 12 December 2023

Further information and the
registration forms for the events
can be found [here](#).

VAT 2024: Hybrid annual conference

on March 12, 2024

Further information and the
registration form for the event will
be available [here](#) shortly.

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International Network of KPMG

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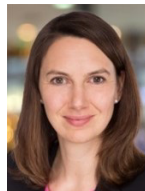
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