October 2015

NEWS FROM THE LEGISLATION

VAT changes due to the Tax Amendment Act 2015

Federal Council Journal 418/15 of 25 September 2015

On 24 September 2015, the German Federal Parliament (Bundestag) adopted the VAT Amendment Act 2015. The former title was "Legislation to implement the declaration regarding the German Customs Code Amendment Act" (See VAT Newsletter March 2015). The approval of the German Federal Council (Bundesrat) followed on 16 October 2015. As a general principle, the VAT changes enter into force the day after their promulgation in the Federal Gazette, except for the new regulation of the VAT treatment of public authorities. Please find as follows an overview of the most important VAT changes we prepared for you.

VAT treatment of public authorities
There will be new regulations on the entrepreneurial status of legal entities under public law (juristische Personen des öffentlichen Rechts, hereinafter "jPöR"). Regardless of the income tax terms, in future, jPöRs (§ 2 (3) of the German VAT Law (UStG)) will not be deemed entrepreneurs insofar as they conduct their activities as a public authority and the competition is not significantly distorted. There are no significant distortions of competition, in particular, if the comparable sales of the jPöR are below EUR 17,500 or equivalent supplies are VAT exempt under private law (§ 2b (2) UStG). Furthermore, there are no significant distortions of competition in particular cases of inter-municipal cooperations between jPöR (§ 2b (3) UStG). There is a catalog of supplies according to which, if exercised, jPöR is deemed to be an entrepreneur (§ 2b (4) UStG). The catalog complements the list already included in the currently applicable § 2 (3) UStG by the activities stated in Appendix I of the VAT Directive. The supplies performed by jPöR under private law are not covered by § 2b UStG and they are always subject to VAT according to the explanatory memorandum of the new law.

The new regulation applies to sales attained as of 1 January 2017. With regard to the sales attained before 1 January 2021, there will be a transitional arrangement. Up until 31 December 2016, the jPöR may declare to the tax authority once that it will continue to apply the previous regulation according to § 2 (3) UStG.

Reverse charge mechanism for construction work
The tax liability of the recipient of the supplies (reverse charge mechanism – § 13b UStG) for construction work is expanded to the supply of goods and services to operating facilities (§13b (2) no. 4 sent. 1 UStG). The legal clarification is given in response to the reaction to the German Federal Tax Court's (BFH) ruling of 28 August 2014, V R 7/14 according to which operating facilities are not covered by the reverse charge mechanism. The tax authorities had already reacted to the ruling by issuing a non-application order on 28 July 2015 (see VAT Newsletter August/September 2015). In addition, the definition of property to be applied as of 1 January 2017 in accordance with the VAT Implementing Rules has already been implemented into national law (§ 13b (2) no. 4 sent. 2 UStG).

Content

Reverse charge mechanism for the purchase of supplies of public authorities
The reverse charge mechanism also applies if the supply of goods and services is purchased by the recipient for non-business activities (§ 13b (5) sent. 6 UStG). However, the tax authorities exclude particular supplies of goods and services that the jPöR obtains to a substantial extent for its non-business activities. This affects construction work and power and gas supplies. These exceptions now will be covered by § 13b UStG and expanded, in particular, with supplies of cell phones and tablets or building cleaning services (§ 13b (5) sent. 6 and 10 UStG).

Reverse charge mechanism for metal supplies
The scope of application of the reverse charge mechanism for supplies of metal is stipulated by Appendix 4 of the UStG. According to the explanatory memorandum of the law, no. 3 of the Appendix referring to iron and steel was editorially modified due to the inaccurate description of the objects. The change is said to have no effect on those involved (see VAT Newsletter March 2015).

Taxes arising in the case of an incorrect VAT statement (§ 14c (1) UStG).
If an entrepreneur states in an invoice excess VAT, the entrepreneur is liable for the excess VAT amount (incorrect VAT statement, § 14c (1) UStG). Pursuant to § 13 (1) no. 3 UStG, the VAT arises as soon as the VAT arises for the supply, however, at the latest at the time the invoice is issued. This regulation is changed by defining the date on which the invoice is issued as the date on which the VAT arises in accordance with the VAT Directive. The previous regulation was already interpreted in accordance with the VAT Directive in the BMF guidance of 2 May 2015 (see VAT Newsletter May 2015).

Please note:
The new legal provision planned for the allocation of the supply involving the movement of goods in a chain transaction (see VAT Newsletter May 2015) was not implemented in the VAT Amendment Act 2015. Insofar, the law's further development remains to be seen. Perhaps, a BMF guidance will be published on this topic in anticipation of a new legal provision. The Lower Tax Court of Rhineland-Palatinate has commented in its ruling of 11 August 2015, 3 K 1637/13, on the allocation of export supplies in a chain transaction to a non-Member State (see article in this Newsletter).

NEWS FROM THE BFH

CMR waybills as documentary evidence for intra-Community supplies of goods

BFH, ruling of 22 July 2015, V R 38/14

The ruling concerns the evidence to be provided for the zero-rated status of intra-Community supplies of goods (VAT exemption with entitlement of input VAT deduction). The BFH addresses the requirements for CMR waybills as proper documentary evidence, as well as the need for documentary evidence to indicate the place of destination.

The case
A vehicle dealer handled twelve vehicle deliveries as zero-rated intra-Community supplies of goods. The tax authorities, however, viewed seven of the deliveries as liable for taxation. Two deliveries were made to Spanish companies through an independent transport company. In field 1 of the CMR waybill, the vehicle dealer was entered as the party ordering the dispatch, although the recipients had in fact engaged the transport company. Five deliveries to Hungarian, Portuguese and Spanish companies were made by collection. Upon collection it was confirmed that the vehicles were exported "properly out of Germany", "from the Federal Republic of Germany to EU member states" or "to the aforementioned destination country".

Ruling
The BFH concluded that a CMR waybill must in particular specify the contractual parties of the transport contract in order to be recognized as a proper form of evidence. These are the carrier (the transport company), and its contractual partner, listed as the sender in field 1. The contractual partner of the carrier, i.e. the sender, need not be the supplier. The sender may in particular also be the customer, as recipient of the delivery, if the customer has contracted the carrier. If the CMR waybill fails to indicate the appropriate sender, the supply must as a rule be regarded as liable for taxation. The BFH maintained that zero-rating for the protection of good faith in accordance with § 6a (4) UStG was not applicable in the present case. The vehicle dealer had experience in the vehicle export business. The dealer should at least have known that the sender specified on the CMR waybill should be the party contracting the carrier, which was not the case in this instance.

Nor was documentary evidence produced when deliveries were collected. According to § 17a (2) no. 2 of the German VAT Operating Regulation (UStDV) old version, the contractor should provide evidence that goods have been delivered elsewhere in the Community using – among other things – a standard commercial document, which indicates the place of destination. It is not sufficient to provide general information, such as a confirmation that the goods have been properly transported out of Germany or to a specified destination country. Zero-rating for the protection of good faith in

accordance with § 6a (4) UStG was also ruled out for these deliveries. It was clear that these documents did not indicate a specific destination for the goods, and this ought to have been recognized when exercising due commercial care.

Ultimately, it was not objectively established beyond a doubt that the material requirements for zero-rating were satisfied. The missing formal elements in the documentary evidence therefore could not be disregarded.

Please note:
A CMR waybill can be considered proper documentary evidence for zero-rated intra-Community supplies. In order for it to be recognized as such, it must particularly be ensured that field 16 specifies the correct carrier and field 1 specifies the correct sender. The sender does not need to be the supplier. The customer may also be the sender if the customer has contracted the transport company (the carrier). The carrier is the party assigned by the sender to transport the goods under its own responsibility, i.e., also for its own account. This can be carried out using the carrier's own vehicles or the vehicles of a subcontractor (subcarrier) in part or in full.

Input tax deduction in the event of insolvency of the issuer of the invoice and incorrect VAT statement

BFH, ruling of 30 June 2015 – VII R 30/14

The BFH reached the conclusion that in the event of incorrect VAT statement (§ 14c (1) UStG) and insolvency of the issuer of the invoice the recipient of the supplies may obtain a refund of the input tax on the grounds of fairness insofar as the issuer of the invoice is not able to make a compensation.

The case
The trader U commissioned the company E to execute trade fairs. In return for the supply of these services, E issued invoices that stated a VAT amounting to over EUR 4,8 million. This amount was paid to its competent tax authority by E. U claimed the amount from its competent tax authority as input tax. Within the scope of an audit performed at U, it was found out that the supply of services were provided abroad by E and thus were out of scope of German VAT. As a result, U refunded a large part of the input tax to the tax authority. At the same time, U demanded from E to repay the unduly paid VAT or to assign its right to refund against the tax authority. In the meanwhile, insolvency proceedings were commenced over the assets of E. The insolvency administrator issued corrected invoices to U excluding VAT. In addition, the competent tax authority for E refunded the VAT due pursuant to § 14c (1) UStG, which was added to insolvency assets. The insolvency administrator advised U to register its refund claims in the insolvency table. Consequently, U applied for a refund of the unduly paid VAT pursuant to § 37 (2) AO in conjunction with § 14c (1), § 17 UStG to the competent tax authority of E. This application was rejected by the tax authority.

Ruling
Since E had issued an invoice stating the VAT for a non taxable supply, E owed the incorrectly stated VAT pursuant to § 14c (1) UStG in conjunction with § 17 (1) UStG until the invoice was corrected. U as the recipient of the supply was principally and as of the beginning not entitled to input tax deduction. The BFH reaches the conclusion that only the issuer of the invoice may have a claim to refund against the tax authority competent for itself. U may only assert its refund claim against E for the unduly paid VAT by way of civil proceedings. U does not have any compensation claims against the tax authority competent for E, even if the full or partial refund is excluded due to insolvency proceedings.

However, taking into account the CJEU ruling of 15 March 2007 – case C-35/05 – Reemtsma Cigarettenfabriken GmbH – U might have input tax deduction claims against the tax authority competent for U on the grounds of fairness pursuant to §§ 163, 227 of the German Tax Code (AO). The principles of the CJEU case-law may also be translated to entirely domestic cases. The BFH could not decide on whether a claim is justified in the present case. It is U's responsibility to make such a claim to the tax authority competent for U. A claim should require at least the issuer of the invoices to have paid the VAT pursuant to § 14c (1) VAT. It is doubtful whether a claim is also justified if the tax authority makes a refund that was added to the insolvency assets as in the present case. This might depend on whether the tax authority was obliged to make a refund that is added to the insolvency asset or whether the refund has led to an unjustified enrichment of the insolvency asset. It seems not unlikely that the BFH will direct a preliminary ruling to the CJEU in a suitable case. This preliminary ruling could also deal with the principle of giving all creditors equal treatment emphasized in the insolvency law.

Please note:
In its present ruling of 30 June 2015, VII R 30/14, the BFH has made it clear that the principles of the CJEU ruling of 15 March 2007 - case C 35/05 – Reemtsma Cigarettenfabriken GmbH – on the refund of incorrectly stated VAT are also applicable to entirely domestic cases. On the other hand, the ruling also shows the difficulty of interpreting the national law (VAT Law, Law of Procedure, Insolvency Law) while taking into account these principles in order to do justice to the recipient of the invoice. Within this context, it needs to be pointed out that further appeal proceedings are pending before the BFH (Lower Tax Court of Munster, ruling of 3 September 2014, 6 K 939/11 AO, ref. no. of the BFH: VII R 42/14; Lower Tax Court of Berlin-Brandenburg, ruling of 26 June 2014, 5 K 5148/12, ref. no. of the BFH: XI R 36/14). In addition, when processing incorrectly

stated VAT pursuant to § 14c (1) UStG, it needs to be considered that according to the BMF guidance of 7 October 2015 – III C 2 – S 7282/13/10001 – a correction of the invoice is only to be accepted in cases where the invoice amount was received if the refund to the invoice recipient was made (see following article in this Newsletter). If such refund is missing, the invoice issuer is not entitled to receive any refund from the tax authority. This could mean that the position of the invoice recipient, who does not receive a (complete) refund from the insolvent invoice issuer, is strengthened, and that the recipient therefore will assert the claim to input tax deduction on the grounds of fairness. Insofar as the claim does only require that the issuer of the invoice did not receive a refund from the tax authority, the claim would be justified.

NEWS FROM THE BMF

Requirements for the correction of an incorrect VAT statement pursuant to § 14c UStG

BMF, guidance of 7 October 2015 – III C 2 – S 7282/13/10001

In its present guidance, the German Ministry of Finance (BMF) has commented on the requirements of an incorrect VAT statement pursuant to § 14c (1) UStG and an unauthorized VAT statement pursuant to § 14c (2) UStG.

Correction of an incorrect VAT statement (§ 14c (1) UStG)
An incorrect VAT statement is given, for example, if an invoice for a VAT exempt supply is issued with VAT or 19 % VAT is stated where a VAT reduction (7%) applies. The BMF takes the view that a correction of the invoice does not need to be accepted in cases where the invoice amount has already been received and the issuer of the invoice has not yet fulfilled his refund obligation towards the recipient of the supply. If the gross amount of the invoice remains unchanged in the invoice, the correction of the invoice must be accepted even without refund of the amount. The VAT Application Decree (UStAE) will be reworded accordingly. The principles must be applied to all open cases. The BMF justifies this with the corresponding application of § 17 (1) UStG and the previous BFH rulings (cf. rulings of 18 September 2008, V R 56/06 and 2 September 2010, V R 34/09).

Correction of an unauthorized VAT statement (§ 14c (2) UStG)
An unauthorized VAT statement is given, for example, in cases of damages or if a small entrepreneur (§ 19 UStG) issues invoices including VAT. As hitherto, the correction needs to be in accordance with § 14c (2) sent. 3 to 5 UStG. Instead of a refund of an excess VAT amount, the elimination of the risk of yield of tax is relevant in these cases. This is made clear in the UStAE.

Please note:
The change of the administrative opinion probably requires the business processes and the ERP systems to be adjusted, because if an incorrect VAT is stated (§ 14c (1) UStG) a corrected invoice does not automatically mean that the VAT will be reduced in the preliminary VAT return. In this context, attention needs to be drawn to the fact that there are pending appeal proceedings XI R 43/13 before the BFH that particularly deal with the question whether a refund of the VAT incorrectly stated in the invoice is required pursuant to § 14c (1) UStG. The Lower Tax Court of Lower Saxony answered this question in the affirmative at first instance in its ruling of 25 September 2014, 5 K 99/13. Anyone affected should check individually whether there are consequences for businesses arising from this administrative opinion and, if so, what these consequences would be. Due to the pending appeal proceedings, it could be reasonable to protect the legal position procedurally (e.g. through objection or application for change pursuant to § 164 AO).

IN BRIEF

Legal consequences in the event of expiration of the input tax adjustment period

Preliminary ruling (Poland) case C-229/15 – Mateusiak

The preliminary ruling referred to the CJEU and relates to the interpretation of Art. 18 (c) of the VAT Directive. According to this, the Member States may treat in case of termination of the business activity the possession of goods as a transaction in return for payment, in particular, if an entitlement to the full or partial input tax deduction was granted with regard to these goods at the time they were acquired. In contrast to Germany, Poland has made use of this regulation. The Polish court asked the CJEU whether these taxation options also exist if the input tax adjustment period has already expired for fixed assets pursuant to Art. 187 of the VAT Directive (cf. § 15a UStG). Accordingly, the preliminary ruling could have an effect on the withdrawals within the meaning of Art. 16 of the VAT Directive (cf. § 3 (1b) UStG) if the business is continued. Insofar the preliminary ruling could have an effect on all Member States, including Germany.

Place of delivery for small consignments of up to EUR 22 from Switzerland

BFH, ruling of 16 June 2015, XI R 17/13

A GmbH sold books, DVDs and CDs to customers in Germany. These were dispatched via an AG domiciled in Switzerland. The goods were delivered to the AG's warehouse located in Switzerland and stored there for the GmbH. When a customer order was received, the goods were handed over to a transport company to be sent to Germany, on the instructions of the GmbH. Deliveries to a customer with a value exceeding EUR 22 were subject to customs clearance in Germany in the name of and for the account of the GmbH. However, if the value of the delivery in question was EUR 22 or less (a small consignment), low value clearance (tax exemption) of the consignment was requested in the name of and on behalf of the recipient, in accordance with Art. 27 of Council Regulation (EEC) No. 918/83 of 28 March 1983.

The question under dispute is whether deliveries of up to EUR 22 are subject to German VAT. The BFH affirmed that this was the case in the dispute in question. The place of delivery is determined in accordance with § 3 (8) UStG if the goods are transported from outside EU to Germany and the supplier or the supplier's agent is liable to pay import VAT. The BFH maintains that § 3 (8) UStG is also applicable if the import is tax-exempt, as in the case of small consignments. In the present case, the customers were not liable to pay import VAT as, according to the applicable terms and conditions, neither the AG nor the GmbH acted for the account of the customers (see BFH ruling of 29 January 2015, V R 5/14; VAT Newsletter June 2015). In the event that a domestic place of delivery was specified instead in this instance, and § 3 (8) UStG were not to apply, the BFH maintains that a presumption of abusive practice within the meaning of Art. 42 AO is also suggested in the present case.

Sales via Internet trade platforms

BFH, ruling of 12 August 2015, XI R 43/13

In the present case, a self-employed financial service provider sold at least 140 fur coats via eBay between 2004 and 2005. She generated proceeds in the amount of approx. EUR 90,000. She stated that she sold the fur coats when she cleared the household of her deceased mother-in-law. She further stated that the sale of the private fur coats was no economic activity. The BFH affirmed that the sales are liable to VAT. The present activity has nothing to do with a private collector. However, in this case not the own fur coats but those of another person were sold. In addition, the sold goods were commodities and no collector's items such as stamps, coins or historical vehicles. Due to the different types of fur coats, it was not apparent to the BFH which collector topics were pursued. The decisive criterion for answering the question as to whether an economic activity was conducted is the fact that the seller, such as for example a trader, has taken active marketing measures or utilized similar resources. The BFH assumed that this is true for the present case even if the activity was executed for a limited period of time. Therefore, the BFH could leave it open what the consequences resulting from the CJEU ruling of 13 June 2013 – case C-62/12 – Kostov – would be for the German law. The ruling relates to natural persons, who act in a business capacity in addition to their main activity. The CJEU considers that each further economic activity within the meaning of VAT Directive is also conducted in a business capacity even if the activity is conducted occasionally. In accordance with the previous BFH rulings, the sale of used private items is principally a non-business act if no business scope is reached (BFH, ruling of 21 May 1987, V R 109/77).

Allocation of an export of goods in a chain transaction

Lower Tax Court of Rhineland-Palatinate, ruling of 11 August 2015, 3 K 1637/13; final

With its rulings of 25 February 2015, XI R 15/14 and XI R 30/13, the BFH recently stated its position on the allocation of an intra-Community supply of goods in a chain transaction between A, B and C where the goods are sent by A located in Germany directly to C located in another Member State (see VAT Newsletter May 2015). Allocation requires an overall assessment of all objective circumstances in the specific case. In particular, it is necessary to establish whether the right of disposal (transfer of substance, value and profit) was already transferred from B to C domestically. Only in this case the intra-Community supply should be allocated to the second supply (B to C). The question of when the right of disposal over an object is provided is determined based on the specific contractual agreements involved and their actual implementation, taking into account the interests of the parties. If it is not possible to dispel doubts that the first purchaser (B) already transferred the right of disposal to the second purchaser (C) domestically, the movement of goods is allocated to the first supply (A to B). The Lower Tax Court of Rhineland-Palatinate maintains that the principles set out by the BFH apply also to exports to a third country. In the present case, vehicles were transported overland to Trieste (Italy), and from there were shipped to Turkey by sea. C assigned a transport company to transport the goods out of Germany. In the present case, the tax office assumes that C already obtained the right of disposal over the vehicles at the moment of handover to the driver of the transport company, which means that B made a potentially zero-rated export to C, while the supply from A to B was liable to tax.

Sales promotion with loyalty points

Lower Tax Court of Rhineland-Palatinate , ruling of 15 September 2015, 6 K 1844/13; ref. no. of the BFH: V R 34/15

In the year in question, a brewery carried out two sales promotion campaigns, each lasting four weeks. Collection booklets were available in the participating shops, and could also be obtained online or by mail. Beer bottles in the shops featured loyalty points that could be saved in the collection booklets. A total of 240 points could be saved in each collection booklet. From among the rewards on offer, a participant could select five different articles (T-shirts, cooler pouches, wristwatches, long-sleeved shirts and sauna towels). This required 40 to 240 points on a graduated basis. The net wholesale price of a reward without additional costs was between EUR 3.79 and EUR 9.66. All items were printed with the name of the brewery. The loyalty points campaign was planned, carried out and financed by the brewery. There was no change to the sales price of the beer bottles for the business. In return for its higher expenses, the brewery expected the potential benefit of higher sales. The tax office maintained that this represented a taxable supply rendered without consideration (§ 3 (1b) no. 3 UStG) to the end consumer. The Tax Court did not share this view, arguing that taxation was ruled out because the gifts were of low value. Gifts worth over EUR 35 for which no input tax can be deducted in accordance with § 15 (1a) UStG in conjunction with § 4 (5) sentence 1 no. 1 EStG are exempt from tax under § 3 (1b) sent. 2 UStG. It follows that the term "low-value gifts" refers to the disposal of goods for which the individual net value without sales tax does not exceed EUR 35. This value threshold, with reference to one year, is consistent with EU law. In the present case, the net value of the rewards is significantly below this threshold. The transfer of the goods in this case also qualifies as a gift. The Tax Court does not share the view of the tax authorities, who do not, on the basis of R 4.10 (2) (4) sent. 5 no. 3 of the Income Tax Guidelines (EStR), accept prizes (loyalty rewards) in the event of reward offers or prize competitions as being gifts. It is argued that the purpose under VAT law must also be taken into account. The collection, storage and mailing of loyalty points are simple, everyday activities that do not rule out the status of a gift. An appeal was filed against the ruling.

Invoice details for intra-Community triangular transactions

Lower Tax Court of Munich, ruling of 16 July 2015, 14 K 1813/13

The ruling of the Lower Tax Court of Munich relates to an intra-Community triangular transaction between three companies (A - B - C) within the meaning of § 25b UStG. In this case, the A – B supply is essentially a zero-rated supply in the member state of origin and the B – C supply is a taxable supply in the destination member state. With regard to the B – C supply, a proper invoice within the meaning of § 14a (7) UStG is, in particular, a material-legal requirement for the transfer of tax liability to C. In this case, the intra-Community acquisition of B is also considered to be taxed. The Lower Tax Court of Munich concluded that § 14a (7) UStG exceeds the provisions under EU law, and the company may therefore refer to the EU law lying more in its favor. § 14a (7) UStG cumulatively requires indication of the existence of an intra-Community triangular transaction and indication of the tax liability of the final recipient on the invoice. Until 31 December 2012, EU law alternatively required a reference to the relevant provision of the Directive, the relevant national regulation, or application of the reverse charge procedure. Since 1 January 2013, though, EU law has required only an indication of the "tax liability of the recipient of the supply" (see Art. 226 no. 11a of the VAT Directive). The Tax Court did not allow an appeal to the BFH. It appears that no complaint of non-admission has as yet been lodged.

EVENTS

We would also like to point out to the following events with regard to these topics that are organized by publishing house Dr. Otto Schmidt in cooperation with KPMG.

Cologne VAT Congress 2015

3 and 4 December 2015 in Cologne

Topics

- Tax Compliance
- Input tax deduction for contributions in kind and private use of business property as well as shareholding
- Current developments in the Austrian and Swiss VAT
- News from the administration, case-law and practice
- Cross-border chain transactions
- VAT group
- VAT treatment of sales competition

Further information and the registration form for the event are available here.

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