VAT News

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National legislation

Law on the Modernisation of the Taxation Procedure

The Law on the Modernisation of the Taxation Procedure (Gesetz zur Modernisierung des Besteuerungsverfahrens) was published in the Federal Law Gazette (Bundesgesetzblatt, or BGBl.) on July 22nd 2016. It includes measures for the technical, organisational and legal improvement of the taxation procedure. The intention of the legislator is to further develop the electronic communication with (and within) the tax authorities. There have been some minor amendments to the German VAT Act (Umsatzsteuergesetz, or UStG). However, even for the VAT practitioner, by far the most relevant amendments are those of the General Tax Act (Abgabenordnung, or AO). In the following, some of the most important amendments to the AO are summarised. Please note that, although most parts of the law will come into force from January 1st 2017 (except where otherwise stated), this does not mean that all technical measures will be ready for use at that date, since many of them are still to be developed and implemented by 2022 at the latest. Therefore, it is recommended to watch further developments even after the enactment.

The law exhaustively creates and, in some cases, updates the legal environment for electronic submission of tax returns and the electronic transmission of tax assessment notes by the tax authorities. Also, the deadlines for the submission of annual returns, such as the annual VAT return, will very probably be subject to change. From 2018, the default deadline will be July 31st of the year following the calendar year in question. If tax advisors and certain equated persons, companies, etc, are in charge of the preparation of the tax returns, the deadline will as a general matter be the end of February of the second year following the year in question. Please note that, in the latter case, time prolongations will only be possible in exceptional cases; also, there are some exceptions, such as farmers, or persons who, in or by the end of the year in question, have ceased their taxable activity. Please note that the tax office may nevertheless decide to request the tax returns at an earlier date.

From 2017, applications for binding rulings placed have to be assessed within six months; otherwise, the responsible tax office has to provide reasons for the delay. Binding rulings, which concern several persons, may under certain conditions be issued consistently for all persons. In such cases, only a single fee will be assessed. The details are not yet known since the tax authorities still need to make use of the granted authorisation; however, the amendment concerning the fee will already be in place for applications for binding rulings placed after July 22nd 2016.

Source: Gesetz zur Modernisierung des Besteuerungsverfahrens of July 18th 2016, published in the BGBl. on July 22nd 2016 (BGBl. I 2016, p. 1679)

National case law

VAT treatment of sale and lease back transactions in exceptional cases

Depending on the setup details of the agreement and its practice, the tax authorities generally consider sale and lease back arrangements either as a supply of goods from the lessee
to the lessor followed by a letting supply of services back from the lessor to the lessee, or as a financial service performed by the lessor with securities provided by the lessee, respectively. The Federal Fiscal Court (Bundesfinanzhof, or BFH), in a recent decision, has shown that the VAT treatment may vary in extraordinary cases. In the present case, the BFH assumed a service consisting of support with the lessee’s accounting treatment of certain assets.

The future lessee had developed an electronic information system but could not account for the self-developed know-how, software and patents in his balance sheet. Therefore, he sold the system to the lessor. Consequently, the lessee could show a corresponding asset of the sale receivables in his balance sheet. This measure improved the lessee’s financial reliability and allowed for the distribution of more profit. The lessor in return leased the system back to the lessee against monthly leasing rates. In addition, the lessor was granted a loan by the lessee. The BFH argued that the procurement of tax and financing advantages could be subject to a service in the scope of VAT. In the BFH’s opinion, the scenario was to be interpreted as a single transaction – as mentioned above, a taxable support with the lessee’s accounting treatment of certain assets, rather than a VAT-free financial service. In this respect, the BFH argued that the fact that the lessee had largely financed the lessor’s purchase of said assets with the loan in the first place would contribute to the result that the whole transaction was not intended as financial service performed by the lessor.

Source: BFH, V R 12/15, judgment of April 6th 2016, available at www.bundesfinanzhof.de (in German only)

**Provision of an online dating site as electronically supplied service**

Electronically supplied services include services which are delivered over the internet or an electronic network and whose nature renders their supply essentially automated, involving minimal human intervention and impossible to ensure in the absence of information technology. In its decision, the BFH has commented on how to interpret “minimal human intervention”. The case at hand was about dating sites (communities) on the internet run by a US-resident company without a fixed establishment in the EU. As the BFH mentioned, the supplier granted the access to that site against payment, which enabled the users to check other members’ information by means of a search engine, to filter the available information according to certain criteria and to contact other members for dating. Apart from that, the users were granted news magazines and chatrooms. The claimant operated a hotline for complaints; in addition, employees checked the profiles for inappropriate content and deactivated them if necessary.

The claimant opined that his services were not in the scope of German VAT. However, the BFH did not share that opinion, as the human intervention was considered as minimal with regard to the grant of access to the online community. In terms of the definition for electronically supplied services, “human intervention” would need to be understood as intervention in the actual performance of the supply. In contrast, the activities carried out by the employees served for the preparation and maintenance of the main supply. Activities carried out by the members who filtered the information were not to be considered as “human intervention” as well, since these activities were not considered as part of the supply performed by the claimant. The news magazines and the chatrooms were considered as ancillary to the main supply. Also, the BFH opined that the collection and provision of member profiles would qualify as a database; it was, further to the BFH, not necessary that the content was provided by web crawlers.

Source: BFH XI R 29/14, judgment of June 1st 2016, available at www.bundesfinanzhof.de (in German only)
Expiry of the VAT ID number after contracting but prior to supply

The claimant was an automobile trader. Among other matters, the tax office objected to an intra-Community supply of cars to Spain where the VAT ID number was no longer valid at the time the supply was made. At the time of conclusion of the contract, the claimant had successfully checked the number, which however became invalid when the car was picked up by the customer some week and a half later. The claimant held that he would not have been obliged to check the number again at the time of supply.

The Tax Court of Berlin-Brandenburg agreed with the claimant’s opinion. While it did not globally deny that the time of supply was decisive in this respect, it agreed that the claimant was not obliged to check the number again in the case at hand. Things would however have been different if either the claimant would have had reasonable ground for suspicion that the number had become invalid in the meantime, or if a longer period of time would have elapsed between the conclusion of the purchase agreement and the supply. In addition, the tax court refers to European Court of Justice (ECJ) and BFH case law according to which the lack of a VAT ID number, under certain conditions, will not impede the zero rating of an intra-Community supply of goods. The court also held that, even if the validity of the number would be ultimately decisive at the time of supply, the claimant might rely on protection of good faith.

Please note that, although the tax court has allowed an appeal of points of law, the decision has in the meantime become final. Therefore, the BFH will not decide on this case in the foreseeable future, such that the principles of this decision must be applied with great prudence. This applies even more as the tax court mentioned that the customer might have been a missing trader but did not comment on the obvious matter of possible denial of input VAT deduction due to possible knowledge, etc, of the claimant regarding the participation in VAT fraud.

Source: FG Berlin-Brandenburg 7 K 7283/13, judgment of November 4th 2015

News from the tax authorities

VAT grouping in Germany

The Regional Tax Office of Frankfurt am Main (Oberfinanzdirektion, or OFD) has dealt with a number of VAT grouping technical matters and with the latest case law of the ECJ and the BFH.

Among other things, the OFD states that matters concerning a VAT group may only be dealt with consistently for all VAT group members. In this respect, it is the opinion of the tax office responsible for the head of the group that prevails. In case an existing VAT group has not been identified as such, or if – to the contrary – a VAT group was considered as existing while the conditions for VAT grouping were not actually met, the VAT consequences must, as a general matter, also be extended to the past. However, under certain conditions, the concerned parties may consentaneously waive the obligation of reversal of the matter. This is quite interesting, as the subsequent clearing of wrongly applied VAT grouping may in certain cases lead to high interest amounts. However, the conditions require, inter alia, that “no substantial reasons” impede the reversal. It is currently not fully clear what is meant by that; in particular, it remains to be seen whether the possession of a valid VAT invoice is “substantial” in terms of the decree. If so, the
reversal would continue triggering interest, such that this rule would be inapplicable to
the cases where it would be most important.

The most recent case law provides that at least certain partnerships may qualify as VAT
group affiliates. This concerns, under certain conditions mainly in terms of financial
integration, affiliated limited partnerships with a limited liability company as general
partner (GmbH & Co. KG). The OFD decrees that this case law should, for the time being,
not be applied to other cases, except where such taxable persons expressly refer to said
case law under the conditions stipulated by both Senates. Again, such referral may only be
made consistently to the head of the VAT group and the GmbH & Co. KG affiliate. Please
note that the OFD decrees that, in such cases, VAT grouping needs to be assumed for all
years still subject to revision, meaning that the new jurisdiction cannot be applied to the
future only. In addition, the financial, organisational and economic integration in the VAT
group head’s business would need to be in place at the time the above mentioned referral
is made, which further restricts retroactive applicability.

Please note that the above opinion only concerns the tax offices supervised by the OFD
Frankfurt am Main, ie, it would normally be restricted to certain tax offices of the Federal
State of Hesse. Other tax authorities might share the OFD’s opinion but will not neces-
arily do so. The only exception appears to be the technical provision mentioned at the
beginning of this article on consistent decision-making regarding VAT group matters with
the VAT group head’s tax office as decider, in which case a consent throughout Germany
becomes compulsory.

Source: OFD Frankfurt am Main, decree of May 24th 2016

**Amendment of the reverse charge procedure by the Tax Amendment Act of 2015**

The Tax Amendment Act of 2015 (Steueränderungsgesetz 2015), which came into force on
November 6th 2015, arranged for a couple of amendments to the German VAT Act with
regard to the reverse charge procedure for domestic construction work. In addition,
certain supplies were removed from the scope of the reverse charge procedure if
purchased for the non-economic activities of public bodies. The Federal Ministry of
Finance (Bundesfinanzministerium, or BMF) has commented on these amendments in a
decree. Apart from a couple of transition rules, the decree is applicable to all supplies
carried out after November 5th 2015.

The BMF clarifies that the reverse charge procedure is, as a general matter, applicable to
all supplies performed to the economic as well as the non-economic sphere of the
recipient, except for certain supplies carried out exclusively to the non-economic sphere of
public bodies (including but not restricted to their activities or transactions in which they
engage as public authorities). The decree amends the VAT Application Guidelines
(Umsatzsteuer-Anwendungserlass, or UStAE) in this respect and provides for transitional
rules for supplies carried out after November 5th 2015 and instalments collected before
November 6th 2015.

The definition of construction supplies has been substantiated by a more exact definition
of real estate in VAT terms, which will also be of importance for the definition of services
relating to real estate. The amendment provides that goods, equipment and machines are
also to be considered as “real estate” if they are permanently installed in a building or
artificial structure and cannot be moved without destroying or modifying that building or
artificial structure. In order for the reverse charge mechanism to become applicable, the
modification must be significant, which is – further to the decree – never the case if said
goods simply hang on the wall or if they are fixed to the wall or to the floor with nails or
screws in a way that their removal will merely cause marks, such as dowel drills, which
may easily be covered or repaired. In addition, the decree provides that (inter alia) the installation supply of goods of open-land photovoltaic plants firmly fixed to the ground may be considered as construction work.

Source: BMF decree of August 10th 2016, available at www.bundesfinanzministerium.de (in German only)


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