

“Act on Prevention of VAT Losses from Internet Trade of Goods and on the Amendment of Other Tax Provisions“ has come into force

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In Brief

The “Act on Prevention of VAT Losses from Internet Trade of Goods and on the Amendment of Other Tax Provisions“ (“Act”) has come into force on 1 January 2019. While the Act contains amendments for numerous tax acts, this newsflash deals with VAT amendments only. The most important VAT amendments concern the introduction of joint liability for operators of online marketplaces. Also, the EU voucher Directive as well as certain provisions of the so-called Digital Package were transposed into national law.

General information

The Act (formerly drafted as the “2018 Annual Tax Act”) has been published in the Federal Gazette on 14 December 2018 and thus has come into force on 1 January 2019.

It should be noted that, apart from the Digital Package provisions transposed into the German VAT Act, the supplementing Council Implementing Regulation (EU) 2017/2459 of 5 December 2017 amending the Council Implementing Regulation (EU) 282/2011 has come into force as well. These amendments of the German VAT Act and the Implementing Regulation (EU) 282/2011 only concern the (minor) first stage of the Digital Package. The far more important second stage of the Digital Package designed to extensively alter the EU VAT system with respect to cross-border supply of goods and services to private persons and similar non-taxable persons is expected to come into force in 2021.

Joint liability of electronic marketplaces operators

The joint liability for the operator of electronic marketplaces is introduced in several stages. An electronic marketplace operator

(“operator”) is a person maintaining an electronic marketplace and enabling third parties (“sellers”) to carry out transactions on that marketplace. An electronic marketplace is defined as meaning a website or any other tool by which information may be made available over the internet, allowing a seller to carry out supplies. The joint liability of the operator concerns the outstanding VAT for a supply of goods carried out by a seller that has been legally constituted on their electronic marketplace.

Operators can remove themselves from joint liability by implementing certain measures. Which measures are applicable depends on whether the seller is a taxable person or if he is acting as a private person within the marketplace.

Sellers acting as taxable persons

Where the seller acts as a taxable person (which, in the first instance, means that he is not registered as a private seller with the marketplace), the joint liability is normally not applied if the operator holds a certain certificate or a certain electronic confirmation valid at the time the supply is carried out. Such a certificate (the form of which has already been published by the BMF) is issued by the German tax office responsible

for the seller upon the seller's application and is meant to certify the seller's VAT registration. The certificate shows the seller's complete name and complete address as well as his German tax number and, as the case may be, his German VAT ID number. The certificate is valid for up to three years and shows the start date and the end date of validity. Please note that the certificate is not yet available electronically, although the provision of the necessary technical resources is currently being prepared and will be launched at a later point in time.

There are two exceptions to the non-application of joint liability mentioned above. The certificate does not exclude the operator from joint VAT liability if the operator knew, or ought to have known in terms of the diligence applied by a prudent businessman, that the seller did not (or not completely) comply with his VAT obligations. Therefore, the possession of the certificate does not mean that suspicious facts should not be investigated further, nor (probably) remove the need for additional precautionary measures. Hopefully, the BMF will comment about this matter in more detail.

The other exception: If the responsible tax office notifies the operator that the seller has not complied with his VAT obligations (either not at all, or not to a substantial degree), the operator becomes jointly liable for VAT with respect to all transactions carried out from the time of receipt of the respective notification. In such a case, the operator may remove himself from joint liability by demonstrably disabling the seller from offering goods on the operator's electronic marketplace within a fixed deadline included in the notification.

In addition to the information shown on the certificate, the operator, for all supplies of the seller starting or ending in Germany (which includes German domestic supplies), has to record the place of the start of the transport or dispatch of the goods as well as their place of destination. In addition, the time and the value of the transaction must be recorded. Please note that the corresponding records must be provided electronically to the German tax authorities upon request – however, as electronic submission will only be possible at a later point in time still

to be specified by the German tax authorities, the records will presumably need to be provided to the authorities under the usual conditions for the time being.

Non-business sellers

If the seller is not registered with the operator's marketplace as a taxable person, the operator may, generally remove himself from joint liability by recording certain required information for all transactions starting or ending in Germany (this information is: full name and address of the seller, the place of the start of the transport or dispatch of the goods as well as their place of destination, time and the value of the transaction and the seller's date of birth). No certificate is required for such cases. As above, the records are to be submitted upon the tax office's request, with electronic submission to be introduced at a later point in time. Nevertheless, a liability for the seller's VAT will arise if the operator knew, or ought to have known in terms of the diligence applied by a prudent businessman, that the seller qualified as a taxable person acting as such from the nature, the quantities or the amount of the transactions made by the seller. Apparently, this means that the operator has to monitor the sellers trading on his electronic marketplace at least with respect to these criteria and to follow up any suspicious facts. In addition, a liability may arise also upon receiving a notification under the same conditions as outlined above.

Other matters

Please note that, while the new recording obligations are already in place from 1 January 2019, joint liability will be applied from 1 March 2019 for VAT on supplies by sellers not established (with their permanent address, their usual residence, their seat or place of management) in Germany, the EU or in EEA (European Economic Area). These sellers are in addition obliged to appoint a receiving agent. For all other taxable persons, joint liability will be applied from 1 October 2019. Hopefully, the Federal Ministry of Finance (Bundesministerium der Finanzen, or BMF) will issue further guidance about details of the new provisions soon.

Transposition of the Voucher Directive

The Voucher Directive has been transposed into the German VAT Act now with effect to vouchers issued as of 1 January 2019, thus contributing to a uniform VAT treatment of vouchers in the EU Common Market. A voucher as defined by the amendment is an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services. In addition, it is stipulated that the goods or services to be supplied or the identity of the potential supplier (please note that the German VAT Act applies the singular) are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument. Please note that, particularly, coupons etc. only qualifying for a price reduction are not considered as “vouchers” in terms of the new provisions.

There are two kind of vouchers in above terms: “single-purpose voucher” (SPV) means vouchers where both the place of supply of the goods or services to which the voucher relates, and the VAT due on those goods or services, are known at the time of issue of the voucher (which of course comprises e. g. the tax rate). Otherwise, a multi-purpose voucher (MPV) is on hand.

In brief, each transfer of a SPV made by a taxable person acting in his own name shall be regarded as a supply of the goods or services to which the SPV relates, whereas the actual supply of services or of goods shall not be regarded as an independent transaction. Where a transfer of a SPV is made by a taxable person acting in the name of another taxable person, that transfer shall be regarded as a supply of the goods or services to which the SPV relates made by that other taxable person. Where the supplier of goods or services is not the taxable person who, acting in his own name, issued the SPV, that supplier shall however be deemed to have made the supply of the goods or services related to that SPV to the issuer of the voucher.

MPVs are subject to general rules, which means that, inter alia, the transfer of a MPV

is outside the scope of VAT, the actual supply of services or of goods remaining decisive; there is, however, a special provision about the taxable amount for certain MPV cases.

Digital Package

The Digital Package provides for a number of new provisions mainly for the benefit of small and medium enterprises. For instance, if telecommunications services, radio and television broadcasting services and electronically supplied services (in the following referred to as “communication services”) are performed by a micro enterprise to non-taxable persons established, resident or with their seat in other EU Member States, the general place of supply (Art 45 of the Main VAT Directive) is applicable if some additional conditions are met. For instance, in simplified terms, the supplier must be established or resident only in a single Member State, and the total value, exclusive of VAT, of the communication services to non-taxable persons in other EU Member States has not exceeded EUR 10,000 either in the current or in the preceding year. This means that e.g. a German taxable person meeting these requirements may invoice his customers in other EU Member States with German VAT and thus does not even take part in the “mini one stop shop” (MOSS) mechanism. Please note that it is possible for the supplier to waive this privilege.

Also, taxable persons applying the MOSS are allowed to apply the invoice rules of the Member State where they are identified for MOSS purposes for their services declared in the MOSS. Lastly, the admissibility of MOSS has been allowed also for certain third country suppliers which could not take part previously, e. g. because of being obliged to register in some EU Member State for another reason.

It should be noted that the Digital Package also provides certain presumptions for the place of supply according to Art 24b of the Council Implementation Regulation No 282/2011. The respective amendment mainly concerns small and medium companies performing communication services to non-taxable persons and is subject to a number of conditions outlined in the said provision. As an Implementation Regulation, it has

immediate effect without a need to be transposed into the German VAT Act.

Other

There have been some minor VAT amendments. For instance, following the ECJ “SWAP” decision (C-37/16, from 18 January 2017), a provision was cancelled that made certain copyright fees subject to VAT. Also, the definition of the term “consideration” in the German VAT Act is now more in line with the Union legislation – however, in practice, this amendment does not have a major impact.

Sources

Bundesgesetzblatt (Federal Gazette) Part I 2018, p. 2338, available at www.bgbl.de (in German only); Council Directive (EU) [2016/1065](#) of 27 June 2016 (“Voucher Directive”); Council Directive (EU) [2017/2455](#) and Council Implementing Regulation (EU) [2017/2459](#) of 5 December 2017 (“Digital Package”)

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