



KMLZ VAT NEWSLETTER

German VAT Act amended at the turn of the year 2014 / 2015

1. Quick Reaction Mechanism (QRM)

With effect from 1 January 2015, the Federal Ministry of Finance is authorized to extend the scope of the reverse charge mechanism by statutory instrument. This extension requires the existence of sudden and massive fraud liable to lead to considerable and irreparable financial losses. The statutory instrument requires the consent of the *Bundesrat*. In turn, the *Bundesrat* is competent to initiate a statutory instrument (sec. 80 para. 3 of the German Basic Law).

To become effective, the extension of the reverse charge mechanism requires the approval of the Commission. The Commission appraises whether the alleged fraud exists, considerable tax losses are imminent and whether the extension is an indispensable countermeasure.

A further condition is that the Federal Government applies to the EU Council for authorization to introduce special measures for derogation from the provisions of the VAT Directive. Pursuant to the VAT Directive, the reverse charge mechanism is only permitted for supplies laid down in art. 194 *et seq.* The application procedure may not exceed the

Reverse Charge Mechanism: Quick Reaction Mechanism and First Amendments

The law on amendment of the German Fiscal Code to match the Customs Code of the European Union and the amendment of further tax provisions (ZollkodexAnpG) dated 30 December 2014 also serves to amend the German VAT Act. In addition to minor changes, the Federal Ministry of Finance is authorized to extend the scope of the reverse charge mechanism by statutory instrument within the scope of the Quick Reaction Mechanism. The law also restricts the reverse charge mechanism as regards metals. The German legislature has amended the recent extension which came into effect on 1 October 2014 (so-called Croatia Act).

duration of six months (art. 395 para 5 of the VAT Directive). The EU Council should only grant temporary authorization. The statutory instrument issued by the Federal Ministry of Finance bridges the period until the Council has authorized the QRM special measure.

Whether, and if so, to what extent the Federal Ministry of Finance makes use of the authorization is not yet foreseeable. To date, the *Bundestag* and *Bundesrat* have been competent for QRM special measures. If the EU fails to make a successive regulation, the QRM will cease to be in force by 31 December 2018, at the latest. Any statutory instruments not yet authorized by the EU Council would thus also lose their legal base.

2. Reverse charge mechanism

a) Consideration threshold for supplies of metals according to schedule 4 German VAT Act

With respect to supplies of goods, in accordance with schedule 4, (see below b) to taxable persons, the reverse charge mechanism is only applicable if the consideration for



all supplies within a single economic process exceeds the amount of EUR 5,000 (sec.13b para 2 No. 11 of the German VAT Act). The regulation intends to relieve dealers supplying both taxable and non-taxable persons (building materials and hardware trade). These said dealers were facing difficulties in determining whether their customers were taxable persons. In addition, the cash desk systems in use were not compatible with the reverse charge system.

b) Restriction of the reverse charge mechanism

In addition to the implementation of the consideration threshold, numerous tariff item numbers in schedule 4 to sec. 13b para 2 No. 11 of the German VAT Act have been omitted. Selenium, wires, strips, foils, sheets, profiles and bars made of different metals have been removed from the schedule. Gold has also been removed although it is still subject to the reverse charge mechanism according to sec. 13b para 2 No. 9 of the German VAT Act.

c) Gas supply dealers

As regards the supply of natural gas, the reverse charge mechanism is only applicable if the customer is a gas dealer in accordance with sec. 3g of the German VAT Act (sec. 13b para 5 sentence 3 of the German VAT Act, new version). The amendment corresponds to the requirements of art. 199a para 1 lit. e of the VAT Directive. In the past, the fiscal authorities have interpreted the previous wording “taxable person ..., supplying natural gas” as provided in the VAT Directive (see sec. 13b.3a para 2 German VAT Circular).

d) Impact in practice

Supplies of goods in accordance with schedule 4 of the German VAT Act which do not exceed the consideration threshold are again outside the scope of the reverse charge mechanism. In these cases, it is not crucial, in terms of VAT liability, whether the customer is a taxable person or not.

Instead, companies have to determine if a supply is part of a “single economic process” (e.g. framework agreement). Making such a distinction and the implementation within an ERP automatic tax determination, are often demanding.

By means of its Circular dated 22 January 2015, the German Federal Ministry of Finance extended the interim regulation to the new legal position as already granted as regards the Croatia Act (cf. Circulars dd. 26 September 2014 and 5 December 2014 as well as VAT newsletters 22/2014 and 29/2014). With respect to supplies of goods made in accordance with schedule 4 (old version) to be rendered by 30 June 2015, the parties to the supplies may mutually agree that the supplier is liable for VAT. In turn, supplies of goods, which have been omitted from schedule 4, may be mutually treated as being within the scope of the reverse charge mechanism if rendered by 30 June 2015. The same applies for supplies of goods made in accordance with schedule 4 (new version) if the consideration threshold is not exceeded.

Companies, which have already implemented the extended reverse charge mechanism according to the Croatia Act, are facing new adjustments. If possible, the adjustments should be used to create the conditions for further amendments to the scope of the reverse charge mechanism at low cost. In the medium-term perspective, further amendments are to be expected. Art. 199a of the VAT Directive authorizing the Member States to apply the reverse charge mechanism will cease to be effective by 31 December 2018. If the EU fails to make a successive regulation, many supplies will again fall outside the scope of the reverse charge mechanism. This not only applies to metals according to sec. 13b para 2 No. 11 of the German VAT Act but also, e.g., to mobile telephones, game consoles, tablets PC's and greenhouse gas emission allowances.



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3. Further amendments to the German VAT Act

a) Banking and financial services (B2C)

The regulation regarding the place of supply of banking and financial services to non-taxable persons established outside the Community (sec. 3a para 5 No. 6 lit. a of the German VAT Act) is no longer restricted to supplies of services, in terms of sec. 4 No. 8 lit. a to h of the German VAT Act. Also banking and financial services, which are not tax-exempt, are within the scope of the regulation. The amendment adopts ECJ ruling C-44/11 – *Deutsche Bank*. The fiscal authorities have already adopted the ruling (see sec. 3a.10 para 17 sentence 2 and 3 German VAT Circular).

b) Non-physician dialysis services outside the German health care reimbursement scheme

The supply of non-physician dialysis services has been tax-exempt if provided within the German health care reimbursement scheme (sec. 4 No. 14 lit. b (bb) of the German VAT Act; sec. 95 para 1a sentence 1 of the Social Security Statute Book V – SGB V). According to clause hh (new version) the tax-exemption also applies to services outside the German health care reimbursement scheme. This requires, however, that the taxable person has entered into an agreement in accordance with sec. 126 para 3 and 127 of the SGB V with a health insurance provider, its association or one of its working groups.

c) Confirmation that cultural tasks are performed – expiry of the period for assessment

Supplies by a similar institution, in terms of sec. 4 No. 20 lit. a sentence 2 of the German VAT Act, are VAT exempt if the competent agency confirms that it performs the same tasks

as public theaters etc. According to sec. 4 No. 20 lit. a sentence 4 of the German VAT Act (old version), the confirmation was subject to the provisions regarding the period of limitation for the tax assessment (sec. 181 of the German Fiscal Code). The object of this provision was to avoid VAT refunds for distant past periods in circumstances where the confirmation had been issued retroactively. Sec. 171 para 10 sentence 2 of the German Fiscal Code (new version) generalizes the provision to all basic assessment notifications (*Grundlagenbescheide*) which have not been subject to the period of assessment scheme as stipulated by sec. 181 of the German Fiscal Code. Sec. 4 No. 20 lit. a sentence 4 of the German VAT Act (old version) was therefore no longer necessary. Future basic assessment notifications will only be binding with respect to subsequent notifications – like VAT assessment notifications – if the taxable person applied for the basic assessment notification before the assessment period expired.

d) Shelf and shell companies – obligation to file monthly VAT returns

Shelf companies have to file monthly VAT returns upon launching taxable activities. In order to avoid tax fraud, this applies to acquired shelf companies at the moment of acquisition (sec 18 para 2 sentence 5 of the German VAT Act, new version). For the first two calendar years, it is not permitted to file quarterly or only annual VAT returns even if the respective tax thresholds are not exceeded.