



VAT NEWSLETTER

Voluntary self-disclosure: future correction period of up to 15 years

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1 Corrections to VAT returns and voluntary disclosures to avoid penalty

Corrections to VAT returns are not uncommon. Due to the existence of complex facts and issues, combined with relatively short declaration deadlines, it is no surprise that risk of error is ever present. Most incorrect facts are provided to the tax authorities in the absence of any criminal intent to commit a fraudulent act. A correction pursuant to sec. 153 German Fiscal Code will - for reasons of prudence and risk prevention for the employees and management involved - often be structured in such a way that the requirements for a self-disclosure with exemption from punishment, pursuant to sec. 371 German Fiscal Code, are met. If an error becomes "chronic", in the sense that it is allegedly treated incorrectly for several years, matters can become complicated. In order to proceed with a protecting voluntary self-disclosure pursuant to sec. 371 para. 1 of the German Fiscal Code, all VAT offences that have not become time-barred and at least all offences committed within the last ten calendar years, must be corrected.

2 New regulation through the Annual Tax Act

By means of the Annual Tax Act 2020, the legislator has extended the criminal limitation period for prosecution of tax evasion in particularly serious cases from previously 10 years to 15 years (see sec. 376 para. 1, sentence 1 of the German Fiscal Code (new version)). The 15-year limitation period for prosecution will apply to all tax evasions in particularly serious cases that were not yet time-barred when the Annual Tax Act 2020 entered into force on 29 December 2020. The background to the amendment of the law was the fact that the statute of limitations was threatening the prosecution of the so-called cum-ex cases in the criminal courts, which was not to be undermined by a limitation issue. However, a problem now exists, namely that the amendment not only applies to cum-ex cases, but also to VAT cases. This not only means extended



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correction periods in the context of disclosures, but it also has an impact on the statute of limitation, as well as on the duration of the retention of tax-relevant documents, thereby creating uncertainty for businesses. This is because, according to sec. 171 para. 7 of the German Fiscal Code, the statute of limitation is extended until the prosecution of the tax offence becomes time-barred.

3 Particularly serious case of tax evasion in excess of EUR 50,000

The 15-year criminal limitation period only applies to tax evasion in particularly serious cases. However, for facts relevant to VAT, the typical example of tax evasion on a large scale, pursuant to sec. 370 para. 3 sentence 2, No. 1 German Fiscal Code, plays an important role. A finding of tax evasion on a large scale is regularly made where the amount evaded is in excess of EUR 50,000 per offence. This applies uniformly to cases in which the offender does not file a return at all or fails to declare a VAT liability, as well as in cases where the offender obtains an unjustified VAT advantage due to false statements, such as an input VAT refund. This large scale evasion amount must, in principle, result from one offence, i.e. from one VAT return. In the case of similar circumstances, however, it may also be sufficient, for the assumption of a large-scale tax evasion, if the evasion amount of more than EUR 50,000 results from several individual (VAT) returns, provided that these have a serial character due to their temporal and factual overlap. This means that the criminal statute of limitations must be examined in detail, in advance, concerning all amendments that either individually, or as part of an ongoing matter, lead to a VAT adjustment of more than EUR 50,000.

4 Calculation of the limitation period for prosecution

When calculating the limitation period, the date of 29 December 2020 is crucial. The calculation is made even more difficult by the fact that the 15-year limitation period applies to all tax evasions in particularly serious cases that were not yet time-barred on 29 December 2020. Conversely, a self-disclosure therefore no longer has to include any VAT evasion that was already time-barred on 29 December 2020. The calculation of the criminal limitation period is made to the day and is complex. For the limitation period to commence, the termination of the respective offence is crucial. In order to determine the point in time when the tax evasion ceases, a distinction must be made between assessment taxes and self-assessed taxes, as well as between the forms of offences committed by active action and by omission. Furthermore, it must be ensured that the calculation is made separately for each annual (VAT) return. A criminal limitation period, which has expired regarding the evasion of VAT for 2015, can in no way lead to the assumption that the previous years of 2014, 2013 etc. are also time-barred.

Example of the filing of incorrect annual VAT returns: *A taxable person files an incomplete annual VAT return for 2009 with the tax office on 12 April 2010 (**variation:** 12 April 2011). He underreports VAT of EUR 225,000. In the case of self-assessment, the offence is accomplished with the filing of the VAT return. Provided that there is no interruption, the criminal limitation period in our basic example expires on 11 April 2020. Since this offence was already time-barred on 29 December 2020, the 15-year limitation period, pursuant to sec. 376 para. 1 sentence 1 of the German Fiscal Code (new version), therefore, does not apply to the evasion in the annual VAT return for 2009. The amendment therefore does not have to contain the incorrect annual VAT return for 2009 for the protection against criminal charges. As regards the **variation**, the offence was not time-barred on the effective date of 29 December 2020 (not until the end of 11 April 2021) and the 15-year limitation period for the assessment thus applies. In the variation, the amendment must include the annual VAT return for 2009 in order to provide protection from prosecution.*