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KMLZ VAT NEWSLETTER

Waiver of VAT exemption: German Ministry of Finance implements court case law

1. Previous administrative practice

For certain supplies, which are VAT-exempt according to sec. 4 German VAT Act, a taxable person can opt for VAT liability pursuant to sec. 9 German VAT Act. According to the Ministry of Finance, a taxable person could hitherto opt for VAT liability, as well as make the decision to withdraw this option, up until the formal enforceability of the respective annual tax assessment.

In the case of supplies of immovable property outside of a foreclosure procedure, a taxable person was required to waive the VAT exemption in the notarial sales contract. However, a subsequent option to waive the VAT exemption could still be made in a notarized supplementary certificate.

In the case of supplies of immovable property outside of a foreclosure procedure, the waiver needed to be stated at the time the offer was submitted.

Temporary limits for VAT liability option

The German Ministry of Finance implements Federal Fiscal Court case law with respect to the waiver of VAT exemptions, as well as the withdrawal thereof. Accordingly, in the future, the waiver and its withdrawal are still permissible up to the substantive enforceability. However, this does not apply to the supply of immovable property outside of a foreclosure procedure. In the future, a taxable person can only opt for VAT liability when a notarial sales contract is concluded.

2. Case law of the Federal Fiscal Court

On 19 December 2013 (V R 6/12 and V R 6/13), the Federal Fiscal Court clarified that a taxable person can still withdraw a waiver of VAT exemption pursuant to sec. 9 German VAT Act provided that the VAT assessment is still contestable or subject to subsequent review pursuant to sec. 164 German General Fiscal Code (substantive enforceability). This applies not only to the cancellation, but also to the waiver itself.

However, in the case of supplies of immovable property outside of a foreclosure procedure, the Federal Fiscal Court set out stricter rules than the fiscal authorities in its judgment of 21 October 2015 (XI R 40/13). The Federal Fiscal Court considers that the waiver of a VAT exemption, in the case of supplies of immovable property outside of a foreclosure procedure, may only be declared in the notarized sales contract relating to the supply of immovable property. A waiver as well as its withdrawal at a later time are ineffective, irrespective of whether they are notarized.



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3. Implementation of case law

By letter of 2 August 2017, the German Ministry of Finance adopted the new case law of the Federal Fiscal Court. From now on, a taxable person can waive the VAT exemption and withdraw it up until the substantive enforceability of the underlying annual tax assessment.

For supplies of immovable property outside of a foreclosure procedure, a taxable person may only declare the waiver in the underlying notarized sales contract. A waiver as well as its withdrawal at a later time are ineffective.

In the case of supplies of immovable property outside of a foreclosure procedure, a taxable person still needs to declare the waiver at the time when the offer is submitted.

4. Transitional arrangement

The Ministry of Finance's letter is to be applied to all pending cases. If a taxable person refers to the administrative orders in the Ministry of Finance's letter of 31 March 2004 that had previously been more favorable for him, the German tax authorities will not object to notarial amendments being made to the sales contract for supplies of immovable property for declarations after 30 March 2004 and before 31 October 2010. Due to the Ministry of Finance's letter of 1 October 2010, the notarial sales contract amendments are subject to the protection of legitimate expectations up to the

formal enforceability of the relevant tax assessment. However, this is only valid for periods as of 1 November 2010 and only if the declarations are submitted before 1 January 2018.

5. Conclusion

On the one hand, the Ministry of Finance has extended the timeframe for the option for VAT liability and its withdrawal with the implementation of the case law. However, on the other hand, it has limited this option for supplies of immovable property.

Since VAT assessments are regularly subject to subsequent review, pursuant to sec. 164 German General Fiscal Code, taxable persons now have a longer timeframe within which to waive the VAT exemption or to withdraw from it.

However, in the case of supplies of immovable property, taxable persons must, at the time of concluding the underlying sales contract, carefully consider whether to waive the VAT exemption or not. A later waiver and a subsequent withdrawal of that waiver are no longer possible. If, in the past, a taxable person has opted for VAT liability in notarized supplementary certificates, it should submit corresponding declarations to the German tax authorities by 31 December 2017, at the latest.

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