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VAT NEWSLETTER

Distance Sales: OSS procedure and still compulsory registration in other EU Member States?

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1 Background

The new regulations on distance sales came into force on 01.07.2021 (see KMLZ VAT Newsletter 35 | 2020). For taxable persons, the new regulations basically entailed further registration obligations in other EU Member States. To avoid this as far as possible, two new taxation procedures have been made available: One-Stop-Shop - OSS and Import-One-Stop-Shop – IOSS (see VAT KMLZ Newsletter 36 | 2020). The main objective of the new legal framework is explicitly to provide taxable persons with a solution that is as streamlined and unbureaucratic as possible. However, according to information from DATEV, this simplification will not be available in the foreseeable future, at least not for existing registrations.

2 Statement on corrections to the tax base

In a letter dated 02.08.2021, DATEV informed its customers about the Federal Central Tax Office's (BZSt) intended handling of corrections from the past with respect to the OSS. According to DATEV, in the opinion of the BZSt, corrections may not be declared via the OSS procedure if the revenues:

- were provided prior to registration for the OSS procedure and
- must be corrected after registration without retroactive effect for VAT purposes within the framework of the current taxation procedure.

Since transactions of this nature would have been reported in another country before registration for the OSS procedure, they would have to be corrected in the same way. In this instance, the respective national VAT regulations are to apply. As a result, it will still be necessary to remain registered for VAT in the respective countries concerned if the above-mentioned circumstances require correction.

Dr. Atanas Mattev
Dipl. Wirtschaftsjurist (univ.),
Certified Tax Consultant

+49 (0) 89 217 50 12-53
atanas.mateev@kmlz.de

3 Legal Situation

According to Article 369b para. 1 (a) of the EU VAT Directive, Member States must allow a taxable person to use the OSS scheme for his intra-Community distance sales of goods. What constitutes an "intra-Community distance sale of goods" is regulated by Art. 14 para. 4 no. 1 EU VAT Directive. Both standards came into force on 01.07.2021. Thus, one could conclude that the previously executed transactions are not distance sales of goods within the meaning of Art. 14 para. 4 no. 1 EU VAT Directive, but rather distance sales within the meaning of Art. 33 EU VAT Directive (old version). The previously applicable regulation on distance sales was, however, materially legally congruent. Therefore, one may well ask whether it makes sense to make a distinction at this point. In any case, there is no statement on this topic in the letter of the German Federal Ministry of Finance published on this subject (see KMLZ VAT Newsletter 12 | 2021).

Furthermore, changes in the taxable amount (sec. 17 German VAT Act, Art. 90 EU VAT Directive) constitute a separate taxable event. In Germany, such adjustments must be made in the taxable period in which they occurred (sec. 17 para. 1 sentence 8 German VAT Act). The correction of the tax liability must therefore be made in the current reporting period. On the one hand, it is irrelevant whether the original tax assessment is incontestable or even time barred. On the other hand, it is also irrelevant in which taxation procedure the originally owed VAT was reported. So much for legal certainty in Germany. It will now be necessary to examine how the remaining 26 EU Member States have implemented Art. 90 of the EU VAT Directive.

4 Consequences for the practice

The position of the BZSt may be legally comprehensible on the basis of the wording of the regulations alone. However, this fundamentally contradicts the sense and purpose of the new regulations. If the information from DATEV is confirmed, further this will have serious consequences for the practice. Corrections from credit notes, returns and other circumstances that took place before 30.06.2021 can still give rise to correction circumstances at later points in time. From the perspective of the German authorities, taxable persons should therefore remain registered in other EU Member States as long as they expect corrections in this country.

This would also mean that distance sellers would have to carry out compliance work for several more months or even years. This would result in corresponding costs for distance sellers, as well as accounting problems associated with correctly representing their corrections in terms of periods. As a result, these corrections would have to be reported using different taxation procedures depending on when the supply was rendered.

Furthermore, taxable persons would also be required to follow another compliance track in order to report their corrections using the correct procedure. The blanket statement that registrations must be maintained must therefore be questioned in an extremely critical manner. Another point to note is that the German authority seeks to make a decision for foreign administrations, but taxable persons should nevertheless observe the respective national regulations. So one might well ask whether the opinion of the German authority is supported by all EU Member States. So, in practice, it remains extremely questionable whether the additional administrative burden is justified, even if the procedure proves to be legally justifiable. Above all, however, because it is perfectly possible to take a different legal standpoint.

KMLZ Rechtsanwaltsgesellschaft mbH | www.kmlz.de | office@kmlz.de
D-80331 München | Unterer Anger 3 | Tel.: +49 89 217501220 | Fax: +49 89 217501299
D-40221 Düsseldorf | Speditionstraße 21 | Tel.: +49 211 54095320 | Fax: +49 211 54095399