



KMLZ VAT NEWSLETTER

Explanatory Notes on services connected with immovable property

1. Background

CIR 1042/2013 of 07.10.2013 contains numerous amendments to CIR 282/2011 of 15.03.2011. For example, the regulation contains important supplementary statutes as regards the place of supply rules on services connected with immovable property (sec 13b, sec 31a and sec 31b of the VAT Implementing Regulation new version). The statutes will not enter into force before 01.01.2017. Nevertheless, similar rules can already be found in sec 3a.3 German VAT Circular. In particular, sec 13b CIR 282/2011 new version, which provides for the interpretation of the term “property”, has been included with almost identical wording, in sec 3a.3 para 2 sentence 3 German VAT Circular. The legislator has also transposed rules from CIR 1042/2013 in the German VAT Act. Sec 13b para 2 no 4 German VAT Act, which was reformulated due to the Tax Amendment Act 2015, partly adopts the definition of property from sec 13b CIR 282/2011 new version. More specifically, lit b of the statute has been copied into the German VAT Act.

Explanatory Notes help with argumentation

The EU Commission has published Explanatory Notes on the EU VAT place of supply rules on services connected with immovable property. The publication follows extensive consultations with the EU Member States and business representatives. While the Explanatory Notes partly correspond to current German legal practice, there is also some significant deviation away from the German Federal Fiscal Court’s case law and the opinion of the German tax authorities. Insofar, the Explanatory Notes can provide valuable guidance in court proceedings.

The Commission has now published Explanatory Notes amounting to 55 pages on sec 13b, sec 31a and sec 31b of CIR 282/2011 new version. Below we outline some of the most important statements to be found in the Explanatory Notes:

2. Content of Explanatory Notes

2.1 Definition of “Immovable Property”

The term “immovable property” shall, inter alia, cover:

1. any building or construction fixed to or in the ground above or below sea level, which cannot be easily dismantled or moved
2. any item that makes up an integral part of a building or construction
3. any item, equipment or machine permanently installed in a building or construction which cannot be moved without destroying or altering the building or construction.



Re no 1 the Explanatory Notes contain a list of objective criteria: Accordingly, a construction cannot “*be easily dismantled or moved*”, if such work requires professional skills. Also the costs, the time needed and the effects on the remaining building are decisive.

Re no 2 the EU Commission states: The use and the purpose of a structure determine which elements make up an integral part of it. Consequently, smoke extractors shall, for example, make up an integral part of a factory building. In contrast, the German Federal Fiscal Court held that operating facilities, such as smoke extractors, do not constitute constructions within the meaning of sec 13b para 2 no 4 German VAT Act old version (German Federal Fiscal Court, judgement of 28.08.2014 – V R 7/14). Sec 13b para 2 no. 4 German VAT Act has recently been revised by Tax Amendment Act 2015 and a wider definition of “immovable property” has been included. The said definition corresponds to the wording of Art 13b lit. d CIR 282/2011 new version (see **no 3** above). Amongst other things, operating equipment is also deemed to be covered by this definition.

However, the German Federal Fiscal Court and the legislator agree that the facilities have to be installed permanently in the building or construction. According to Art 13b lit c CIR 282/2011 new version, it is sufficient if an item “*makes up an integral part*” of a building or construction. A permanent installation is not necessary (see also KMLZ Newsletter 27/2015 of 16.11.2015, heading 1). The term “immovable property” in Art 13b CIR 282/2011 new version, is therefore wider than sec 13b para 2 no 4 sentence 1 German VAT Act.

Re no 3 according to the EU Commission, it has to be differentiated with regard to the term “*permanently installed*”. At the outset, the intention of the person installing the item

is decisive. With regard to items already installed in buildings, the actual time of installation shall be decisive.

Moreover, the EU Commission states **re no 3**: A building or construction will obviously not be altered in the case of items simply hanging on the wall, nailed or screwed to the ground or walls, the removal of which will only leave traces or marks on the ground or walls, (e.g. mounting holes), that are easy to hide or repair.

2.2 “Connection with Immovable Property”

According to Art 31a para 1 lit b CIR 282/2011 new version, services are sufficiently connected with immovable property where they are provided with respect to or directed towards immovable property, having as their object, the legal or physical alteration of that property.

The EU Commission defines “*legal alteration*” as any modification of the legal situation of property. The said statement is not further elaborated upon. It thus leaves a wide scope for interpretation.

The EU Commission defines “*physical alteration*” comparatively liberally. Again, any kind of physical modification of an immovable property shall be sufficient. The term even covers services provided which seek to prevent any physical alteration. The EU Commission cites the following further examples of services leading to physical alteration: maintenance or cleaning of roads, tunnels, bridges and buildings.

2.3 Hiring of Staff

In the EU Commission’s opinion, the hiring of staff can constitute a service connected with immovable property if the supplier assumes responsibility for the performance and



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results of the construction works. The EU Commission's guidelines are especially helpful with regard to this matter since, to date, neither the German tax authorities nor the German fiscal courts have dealt with the issue.

2.3 Provision of a Stand Location

An interesting passage may be found towards the end of the Explanatory Notes. Here, the EU Commission comments on the question: When is the provision of a stand location at a fair or exhibition site no longer connected with immovable property? According to the EU Commission, it is sufficient that the provider of the stand location renders at least one additional related service. Insofar, the EU Commission is less stringent than the German tax authorities, which require at least three additional related services (sec 3a.4 para 2 sentence 5 German VAT Circular).

2.4 Supply of Legal Services

Many legal professionals may find the following difficult to come to terms with: According to sec 31a para 2 lit q CIR 282/2011 new version, the supply of legal services relating to the transfer of a title to immovable property shall be a service connected with immovable property. This also covers the establishment or transfer of certain interests in immovable property or rights in rem over immovable property. If the property is located abroad, the consultant might even have to register for VAT purposes in that particular country.

Sec 31a para 3 lit h CIR 282/2011 new version, specifies when the supply of legal services is not deemed to be services connected with immovable property. The Explanatory Notes contain detailed clarifications for differentiating between these provisions.

2.5 Impact on Practice

Firstly, it has to be noted, that the EU Commission's Explanatory Notes are not binding, neither for the tax authorities nor the fiscal courts. Nevertheless, these Explanatory Notes are helpful in practice. They actually serve as the Commission's commentary on EU VAT law.

If you refer to these Explanatory Notes in your day-to-day business, you should inform your competent tax office in this regard. In this context, please bear in mind: The Federal Ministry of Finance has expressly pointed out that the EU Commission's Explanatory Notes are not binding with respect to the German tax authorities (Federal Ministry of Finance, administrative guideline of 17.12.2014). The same applies to the VAT Committee's guidelines (Federal Ministry of Finance, administrative guideline of 03.01.2014).

If, however, there are no deviating statements by the German tax authorities, such as, for example, with regard to the hiring of staff, the Explanatory Notes may well be used for the application of the law. This applies, in particular, to fiscal court proceedings.