



KMLZ VAT NEWSLETTER

Consignment stocks: Ministry of Finance adopts the Federal Fiscal Court's jurisprudence

In its decisions of 20 October 2016 (V R 31/15) and 16 November 2016 (V R 1/16), the Federal Fiscal Court decided under which conditions a direct delivery to the customer can be assumed in the case of consignment stocks (irrespective of temporary storage) – see KMLZ Newsletters 03/2017 and 10/2017. In its letter of 11 November 2017, the Ministry of Finance adopts these findings.

1. Defined Customer

According to the present version of sec. 3.12 para 3 German VAT Circular, a supply of goods is only deemed to have been carried out if there is a defined customer. The German Ministry of Finance is sticking to this principle. The Ministry has only added in sentence 4 (“This also applies...”) that the customer, inter alia, is considered to be defined, for example, if it has already made a binding order or made payment before the transport commences. On the other hand, the Ministry confirms that a potential customer in the absence of any effective obligation to purchase the

Supplies to stock to be examined in 2017

In 2016, the Federal Fiscal Court had to decide, for the very first time, two cases concerning how supplies via consignment stocks are to be treated. The German Ministry of Finance has now taken on these decisions in the VAT Circular. The undifferentiated view of the Frankfurt Regional Tax Office's Circular is now a thing of the past. Companies, be it supplier or customer, who have not already become active after the publication of the Court's decisions, should now examine whether their supplies, made via consignment stocks or other warehouses, are being handled correctly. This is relevant to all supplies from other EU member states as well as from non-EU countries and even for domestic supplies in Germany. Amendments can be made in a transitional phase until 31 December 2017.

goods is not sufficient. However, a customer can probably also be considered to be a defined customer in circumstances where there is no binding order or payment. Otherwise, the Ministry would have to phrase its text differently, for example “This only applies, if...”. A limitation to a binding order or an effective obligation to purchase the goods would be too restrictive. Imagine a situation in which the customer made a non-binding order or announced the intention to purchase the goods or just showed interest in general. If the supplier then does everything that is necessary to transport the goods to the customer, it should nevertheless be considered a supply of goods to the customer directly at the moment the transport is commenced. Furthermore, the question as to how a binding order is defined and where the borderline is between a binding order and the status of a potential customer remain unanswered.



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2. Interim Storage

The recent decisions of the Federal Fiscal Court are added to sec 1a.2 para 6 German VAT Circular. If a binding order or payment was made before the transport commences, a direct supply to the customer should be assumed but not an intra-Community self-transfer to the stock. This applies to a “shipment on hold” situation as well as in the case of a short-term storage in a consignment stock.

Unfortunately, some unanswered questions remain:

- What exactly does a “binding order” mean (in detail)?
- Is there a limitation to consignment stocks or even to call-off stocks?
- Does the stock have to be set up following the customer’s initiative?
- What does short-term (for some days or weeks) mean? Is it limited to a specific number of days or weeks?

Even though the Ministry does not provide any clarification in this regard, such restrictions cannot be appropriate. However, if taxable persons want legal certainty, they should – if possible – choose a structuring very close to the situations underlying the Court’s decisions.

3. Date of supply

With the addition of sec 3.12 para 7 VAT Circular, the Ministry clarifies that the date of supply – notwithstanding an (irrelevant) interim storage – is still deemed to be the beginning of the transport or shipment (to the stock) and not the time when the goods are pulled from of the stock.

This is relevant for all constellations, even for domestic supplies via a consignment stock. Thus, in the case of a

direct supply, the supplier is required to declare its supplies for the reporting period in which the transport to the stock commenced and not when the goods were pulled from the stock. Accordingly, customers could face a certain degree of risk with respect to input VAT deduction if the date of supply on the invoice is noticeably incorrect.

4. Supplies from non-EU countries

The Court’s principles should also be applied when goods are transported from non-EU countries to a German stock. The changes in sec 3.12 German VAT Circular regarding the beginning of the transport are not restricted to any particular area. In these cases, however, special attention must be paid to the fact that there might be some changes concerning who has the right to dispose of the goods and, hence, is entitled to import VAT deduction.

5. Temporal Scope

The principles presented in the letter of the German Ministry of Finance have to be applied to all open cases. However, the Ministry has granted a transitional phase until 31 December 2017. The present regulations in sec 1a.2 para 6 and sec 3.12 para 3 German VAT Circular can still be applied until that date.

6. Outlook

The EU commission just recently published its proposal for the introduction of an EU wide simplification rule for consignment stocks. For certified taxpayers, starting on 1 January 2019, supplies via consignment stock in another EU member state will be treated as an intra-Community supply, provided that specific requirements (Art. 17a EU VAT Directive) are fulfilled.