



## Federal Ministry of Finance: application of the reverse charge mechanism when transferring emission allowances

### 1 Background

With the Eighth Act Amending the German Excise Tax Acts of 24 October 2022 (Federal Tax Gazette 2022 I, 1838), the legislator extended the scope of sec. 13b para. 2 no. 6 of the German VAT Act, with effect from 1 January 2023. Since then, the reverse charge mechanism has also been applicable to the transfer of emission allowances pursuant to sec. 3 no. 2 of the Fuel Emissions Trading Act (BEHG). For these supplies, the recipient, who is acting as a taxable person, is liable for VAT. In its letter of 5 September 2023, the Federal Ministry of Finance published application rules for the treatment of these supplies. The regulations are to be applied to supplies carried out after 31 December 2022.

### 2 Transfer of emission allowances pursuant to sec. 3 no. 2 of the BEHG

The BEHG is intended to create the basis for trading in allowances for emissions from fuels and to provide for the pricing of these emissions, insofar as they are not covered by EU emissions trading. An emission allowance, within the meaning of sec. 3 no. 2 of the BEHG, is a certificate that entitles the holder to emit one tonne of greenhouse gases equal to the amount in tonnes of carbon dioxide within a certain period of time. The BEHG obliges businesses to acquire and surrender emission allowances insofar as and to the extent that they exceed a certain quantity of emissions after being placed on the market. From 2027, the acquisition of such allowances is to be subject to free market pricing. The Act extends the pricing of CO<sub>2</sub> to the transport and heat sectors, which are currently not covered by EU emissions trading. The obligations arising from the BEHG exist, in principle, from the time the energy tax for the fuel concerned is incurred. The acquisition of emission allowances is effected by transfer of the allowances from the seller to the customer. The transfer requires agreement and entry in the customer's account in the national emissions trading registry, in accordance with sec. 9 para. 2 of the BEHG.



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### **3 Final invoice for supplies made after 01.01.2023, in case of down payments made prior to 01.01.2023**

If down payments are made prior to 1 January 2023 for supplies resulting from the transfer of emission allowances from 1 January 2023 onwards, the supplier must, in principle, amend his down payment invoice showing VAT in the VAT return period in which the supply is actually carried out (sec. 27 para. 1 sentence 3 of the German VAT Act). If no correction is made, the issuer of the invoice is liable for the unduly charged VAT, in accordance with sec. 14c para. 1 sentence 1, sentence 2 of the German VAT Act. The down payments need only be offset in the final invoice as gross amounts against the total amount still to be paid if, at the time of the final invoice, no refund of the VAT has yet been made to the recipient by way of correction.

However, it is not objectionable if the application of the reverse charge mechanism is only based on the consideration reduced by the amount(s) received by the supplier before 1 January 2023 (non-objection regulation). The prerequisite for this is that the down payment(s) was (were) declared by the supplier in the correct amount (= declared in a periodical VAT return or in a VAT return for the calendar year) and paid. In such cases, the invoices with which the down payments were settled do not need to be amended.

### **4 Amendment of a down payment invoice issued before 01.01.2023 if payment is made after 31.12.2022**

VAT arises at the end of the VAT return period in which the supplier receives the consideration, irrespective of when he has issued the corresponding down payment invoice (sec. 13 para. 1 no. 1 a sentence 4, sec. 13b para. 4 sentence 2 of the German VAT Act). If a down payment invoice, showing VAT issued by the supplier, was only paid after 1 January 2023, the supplier is required to correct the invoice. Otherwise he, being the issuer of the invoice, is liable for the unduly charged VAT in accordance with sec. 14c para. 1 sentence 1, sentence 2 of the German VAT Act.

### **5 Invoices after 31.12.2022 for supplies made before 01.01.2023**

For supplies carried out before 1 January 2023, the supplier is liable for VAT in accordance with sec. 13a para. 1 no. 1 of the German VAT Act. Sec. 13b para. 2 no. 6 in conjunction with para. 5 of the German VAT Act does not apply in this respect. The supplier must issue an invoice showing VAT.

### **6 Amendment after 31.12.2022 of a down payment invoice issued and paid before 01.01.2023**

If the supplier received a down payment before 1 January 2023, but it only became apparent after 1 January 2023 that the amount of the down payment was incorrect, the non-objection regulation is also applicable in circumstances where the conditions are met. The down payment invoice must then only be corrected to the extent that the overpaid amount was repaid from 1 January 2023 onwards. The recipient only becomes liable for the VAT within the framework of the reverse charge mechanism insofar as he pays further consideration to the supplier from 1 January 2023 onwards.

### **7 Practical advice**

The Federal Ministry of Finance's letter clarifies the VAT treatment of down payments. The tax authorities are thus creating legal certainty. Taxable persons who trade in emission allowances should check whether they are obliged to make an invoice correction. If this is the case, they must act to avoid the legal consequence of being liable for unduly charged VAT as the issuer of the invoice.