



VAT NEWSLETTER

Amendment to supplies including installation – reverse charge mechanism limited to work deliveries

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1 Work delivery requires the processing of goods not belonging to the supplier

According to the jurisprudence of the Federal Fiscal Court (judgment of 22.8.2013, V R 37/10), a supply consisting of the processing of goods not belonging to the supplier is considered a work delivery (Werklieferung). If the supplier only processes his own goods, this is not a work delivery, but rather an assembly delivery (Montagelieferung). Germany therefore distinguishes between two types of supplies of goods including installation. This distinction, however, does not emerge from sec. 3 para. 4 German VAT Act, which defines the concept of a work delivery. For this reason, in practice, the supply of a machine that is assembled from individual parts at the customer's premises, without the customer providing any goods for this purpose, is often classified as a work delivery, even though it actually constitutes an assembly delivery.

2 Federal Ministry of Finance changes the definition of work deliveries in the German VAT Circular

The Federal Ministry of Finance has now clarified this distinction with its letter dated 01.10.2020. With reference to the judgment of the Federal Fiscal Court, sec. 3.8 para. 1 sentence 1 German VAT Circular will be amended to the effect, that a supply is considered a work delivery, only if the supplier processes goods which do not belong to him and also uses (relevant) goods procured by himself for this purpose. The Federal Ministry of Finance previously published the above-mentioned judgment in the Federal Tax Gazette II 2014, p. 128, thereby expressing that the principles mentioned in the judgment should be generally applied beyond the individual case. However, since the German VAT Circular has not been amended since 2014, the judgement has often not, in practice, been taken into account.



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3 Permanent connection of the goods is to be considered as processing

Unfortunately, the amendment of the German VAT Circular is quite brief and lacks a definition as to when goods not belonging to the supplier are considered to be processed. For one thing, this is the case, if the goods are merged into the work. However, it is also sufficient, if the goods not belonging to the supplier are permanently connected to the goods supplied. This would be the case, for example, if a building is erected on the customer's premises or if fittings are installed in a building belonging to the customer. The connection is considered permanent if it cannot be easily released again, i.e. the object is destroyed, damaged or altered when releasing the connection. However, the fact that the supplied goods cannot be moved due to their size and weight does not automatically result in a permanent connection.

4 Significance of the distinction between work deliveries and assembly deliveries

For determining the place of supply, the distinction between a work delivery and an assembly delivery is of no consequence. According to sec. 3 para. 7 German VAT Act, both categories of supplies are considered to be rendered at the place where the installation takes place.

However, the reverse charge mechanism, according to sec. 13b para. 2 no. 1 and para. 5 sentence 1 German VAT Act, only applies to work deliveries. Since there is no separate definition of the term work delivery for sec. 13b German VAT Act, the definition for sec. 3 para 4 German VAT is to be applied (see sec. 13b.1 para 2 German VAT Circular). This shows the actual effect of the clarification by the Federal Ministry of Finance. Suppliers resident abroad, who render assembly deliveries in Germany, must register in Germany for VAT purposes and charge German VAT.

No distinction between work and assembly deliveries is required for the purpose of intra-community transfers. In both cases, the transfer of goods to be installed into Germany does not have to be declared as an intra-Community acquisition, as the use of the goods is only temporary. According to the wording, sec. 1a.2 para. 10 no. 1 German VAT Circular limits the temporary use to work deliveries. However, Art. 17 para 2 lit. b EU VAT Directive is much broader and refers to Art. 36 EU VAT Directive, which includes not only work deliveries but also assembly deliveries. Since the temporary, use within the meaning of sec. 1a para. 2 German VAT Act, must be interpreted in conformity with EU law, it therefore also includes assembly deliveries. An adjustment of the German VAT Circular in this respect would certainly have been helpful.

5 Consequences for the practice

The letter of the Federal Ministry of Finance allows for a transitional period until 31.12.2020. Accordingly, until the end of the year, it will not be objected to, if a work delivery is assumed, even though only goods belonging to the supplier are processed. Therefore, no amendments for the past are necessary and a different treatment of assembly deliveries is necessary only as of 2021. The fact that the adjustment of the German VAT Circular is only a clarification but not a change of law is therefore being generously disregarded by the Federal Ministry of Finance in order to avoid administrative work.

The regulation affects foreign suppliers with projects in Germany and their customers, who will have to differentiate in the future. German suppliers with projects abroad, on the other hand, are not affected, as there are different regulations abroad, both with regard to the definition of supplies of goods including installation and with regard to supplies which are subject to the reverse charge mechanism.

Customers who are not fully entitled to input VAT deduction could benefit from this regulation. In this regard, constellations in which the statute of limitations has already ended for the supplier but not for the customer, could be of interest. The customer could correct his VAT liability arisen from the reverse charge mechanism (without input VAT deduction) with reference to the jurisprudence and the letter of the Federal Ministry of Finance, whilst the supplier cannot become liable for VAT due to the statute of limitations.