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VAT'S UP

VAT NEWSLETTER

VAT exemption for intra-Community supplies: German Federal Ministry of Finance comments on questions of doubt

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1 Background

With effect from 01.01.2020, the legislator tightened the conditions for VAT exemption of intra-Community supplies. Consequently, the customer's VAT identification number (VAT-ID) and the declaration in the recapitulative statement became material legal conditions for VAT exemption. For a long time it remained unclear what practical consequences this tightening would have in. Only some statements of the EU Commission appeared in the Explanatory Notes. In a letter dated 09.10.2020, the German Federal Ministry of Finance has now announced how the Administrative VAT Circular (UStAE) will be adjusted with regard to intra-Community supplies. The amendments apply to all supplies carried out after 31.12.2019.

2 Use of the VAT-ID

According to sec. 6a para. 1 no. 4 of the German VAT Act (UStG), a condition for VAT exemption is that the acquirer uses a valid VAT-ID, issued by another member state, when acquiring the goods. As had already become apparent during the legislative process, the definition contained in sec. 3a.2 para. 10 UStAE is to be applied to the term "use". The new paragraph 19 in sec. 6a.1 UStAE actively refers to this. It is now clear that, in the opinion of the administration, "use of a VAT-ID " presupposes positive action on the part of the acquirer, usually already at the time of conclusion of the contract. This somewhat strict view is mitigated by the important sentence 3 in the new sec. 6a.1 para. 19 UStAE. According to this, the subsequent use of a VAT-ID by the acquirer for the purposes of tax exemption is to have retroactive effect. This removes the horror of "use", because an initially omitted use can be subsequently remedied. However, the VAT-ID (issued to the acquirer by another Member State) must have been valid at the time of supply.

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This simplification is accompanied by a new sentence 6 in sec. 3a.2 para. 10 UStAE. According to this, positive action can also be assumed without proof if the use is objectively comprehensible. This will be the case if:

- the acquirer has declared the intra-Community acquisition correctly,
- the supplier has complied with his reporting obligations in the recapitulative statement, and
- the invoice contains a reference to the VAT-ID number stated in the recapitulative statement.

The weakness of this regulation, however, is that the supplier cannot check whether the acquirer has correctly declared the acquisition. There is no real risk here because of the possibility of subsequent use (provided the acquirer is still in existence). However, it will be important that the supplier has checked, at the time of delivery, whether the acquirer has a VAT-ID from another Member State and whether it is valid (even if the acquirer has not actively used it). The verification of VAT-IDs will therefore be more important than ever. This could be facilitated by automated checks (e.g. by using the KMLZ VAT-ID Verifier).

3 Recapitulative Statements

The crux of the matter could, however, lie with the recapitulative statements. According to sec. 4 no. 1 letter b UStG, the VAT exemption can only apply if the relevant supply is correctly declared in the recapitulative statement. In this respect, the Federal Ministry of Finance has inserted new paragraphs 2 and 3 in section 4.1.2 UStAE. These new paragraphs make it clear that the timely submission of a complete and correct recapitulative statement or timely correction is a mandatory requirement for VAT exemption. The requirement of a timely submission underlines the high significance of the date of submission of the recapitulative statement. .Inadvertently wrong information is not a major problem. At least if the error is corrected in due time, in accordance with sec. 18a para. 10 UStG, i.e. within one month of the error becoming known, and the correction is also made in the recapitulative statement for the respective delivery month, i.e. retroactively.

4 Intra-Community transfer of own goods

The Federal Ministry of Finance has also slightly amended sec. 6a.1 para. 21 UStAE on the intra-Community transfer of own goods. What has been added is that the VAT exemption here also depends on the correct declaration of the transfer in the recapitulative statement. Sec. 4.1.2 is to be applied accordingly. However, the Ministry has not commented on the consequences in the instance where an intra-Community transfer is only subsequently recognised. In many of these cases, the entrepreneurs may not have a valid foreign VAT-ID at the time of the transfer. The transfer then becomes taxable without a corresponding input VAT deduction being possible. The EU Commission had already asked the Member States to find a practical solution to this problem back in 2019.

5 Input VAT refund based on Directive 2008/9/EU

According to Art. 4(b) of Directive 2008/9/EU, input VAT amounts, which are shown separately in invoices for intra-Community supplies (according to Art. 138 VAT Directive), cannot be refunded in the VAT refund procedure. This requirement of EU law can also be found in sec. 18.11 para. 1a sentence 1 UStAE. Previously, it was assumed that this provision did not apply to VAT which, since 2020, was only invoiced because the acquirer did not use a foreign VAT-ID vis-à-vis the supplier. However, as the Federal Ministry of Finance allows the retrospective and retroactive use of the VAT-ID, it must in return, exclude the input VAT deduction for a potentially VAT exempt intra-Community supply. The Ministry therefore referred to sec. 6a.1 para. 19 in sec. 18.11 para. 1a sentence 1 UStAE and added that input VAT is not refunded if the conditions of sec. 6a para. 1 and 2 UStG can be met (even if these were not met).