



Annual Tax Act 2022: relief for intra-Community supplies / restrictions in the input VAT refund procedure

1 Intra-Community Supplies (ICS)

ICS are VAT exempt according to sec. 4 no. 1 letter b of the German VAT Act (UStG) if they are correctly declared in the EC Sales Lists (ECSL). Until now, sec. 4 no. 1 letter b sentence 2 UStG contained a reference to sec. 18a para. 10 UStG, which stipulates that an incorrect ECSL must be corrected within one month after discovery of the error. This reference meant that ICS were not VAT exempt if the relevant ECSL was incorrect and had not been corrected within the one-month period. However, there was no basis for this under EU law. Art. 138 (1a) VAT Directive, on the basis of which a correct ECSL has been a condition for the VAT exemption of the ICS since 01.01.2020, does not contain such a deadline.

Sec. 4 No. 1 letter b sentence 2 UStG will now be deleted by the Annual Tax Act 2022 with effect from 01.01.2023. The submission of a correct and complete ECSL thus remains a condition for the VAT exemption of the ICS. However, the one-month deadline in sec. 18a para. 10 UStG only has to be observed to avoid a penalty according to sec. 26a para. 1 no. 5 UStG. Only the general assessment period according to the German Fiscal Code, within which the ECSL can be submitted or corrected, is still relevant for the VAT exemption.

From a practical point of view, the amendment is not particularly significant. In its letter dated 20.05.2022, the German Federal Ministry of Finance (BMF) had already adjusted the administrative opinion with retroactive effect to 01.01.2020 and amended sec. 4.1.2 of the German Administrative VAT Guidelines (UStAE) to the effect that the monthly deadline is no longer relevant (see KMLZ VAT Newsletter 22 | 2022). However, the following part of the justification of the law is very interesting: *"By submitting an accurate ECSL for the relevant reporting period, the taxable person's previous failures are deemed to be sufficiently excused. This is in line with Art. 138(1a) of Directive 2006/112/EC..."*



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The safeguard clause in Art. 138 (1a) VAT Directive is mentioned here for the first time, which, unfortunately, has not been transposed into the UStG. According to this provision, a failure to submit an ECSL or to submit an incorrect ECSL can be harmless for the VAT exemption if the shortcoming is duly justified to the satisfaction of the competent authority. It would be welcome if the BMF also included something on this in the UStAE. If possible, the full scope should be used. According to the justification of the law, the shortcoming is only excusable if a correct ECSL is ultimately submitted. In practice, however, there are cases where this is technically impossible. It is not uncommon, for example, for an intra-Community transfer of own goods (ICT) to only be recognised retrospectively and for a retroactive registration to then be applied for in the country of destination, but without the VAT-ID being retroactively registered in the VIES. Ultimately, the ICT cannot be reported in the ECSL and thus results in an ultimate VAT liability. A classic example of this is when the 12-month period for consignment warehouses is exceeded. Contrary to the example in sec. 6b.1 para. 17 UStAE, the ICT would then inevitably become subject to VAT under German law.

2 VAT Refund Procedure

The following sentence 3 is added to sec. 18 para. 9 UStG concerning the VAT refund procedure for non-resident taxable persons: *"The VAT invoiced for export supplies where the goods were transported or dispatched by or on behalf of the customer, which are VAT exempt pursuant to sec. 4 no. 1 letter a in conjunction with sec. 6, or for intra-Community supplies which are VAT exempt pursuant to sec. 4 no. 1 letter b in conjunction with sec. 6a, or which may be VAT exempt pursuant to sec. 6a para. 1 sentence 1 no. 4, shall be excluded from the refund."*

This topic is not entirely new. The BMF previously included a similar regulation in sec. 18.11 para. 1a UStAE with its letter of 16.02.2016 (see KMLZ VAT Newsletter 09 | 2016). The background to this was tax losses. The Federal Central Tax Office (BZSt) had initially refunded input VAT from invoices for ICS and exports. Later, the suppliers cancelled the VAT charge and had it refunded by the tax office. However, the foreign customers did not pay the input VAT back to the BZSt. The BMF wanted to counteract this practice. It has therefore determined that, in the above-mentioned cases, there is an unduly charged VAT according to sec. 14c (1) UStG (Art. 203 VAT Directive), for which the deduction of input VAT is excluded. The basis for this under EU law is found in Art. 171(3)(a) of the VAT Directive for third-country businesses and Art. 4(a) of Directive 2008/9/EC for EU businesses.

The amendment to the law is apparently intended to flank the not entirely uncritical administrative regulation that already exists in the UStAE. For this purpose, the scope under EU law of Art. 171(3)(b) VAT Directive and Art. 4(b) of Directive 2008/9/EC is used. The input VAT refund is thus denied by law if VAT was charged for a

- VAT exempt export where the goods were collected by a non-resident customer (sec. 6 para. 1 sentence 1 no. 3 letter a UStG / Art. 146(1)(b) VAT Directive),
- VAT exempt ICS (sec. 6a in conjunction with sec. 4 no. 1 letter b UStG / Art. 138 VAT Directive),
- ICS which may be VAT exempt but for which the customer has not (yet) indicated the VAT-ID issued to him by another Member State (sec. 6a para. 1 sentence 1 no. 4 UStG), but for which the other conditions for VAT exemption are objectively fulfilled.

The last group in particular is problematic for the tax authorities. The subsequent use of a VAT-ID which is valid at the time of the supply has retroactive effect for the purposes of VAT exemption (sect. 6a.1, para. 19 sentence 3 UStAE). As a result, a supply that was initially subject to VAT subsequently becomes VAT exempt with retroactive effect, which may lead to the tax losses described above if the input VAT refund procedure was not restricted for such cases.