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VAT'S UP

VAT NEWSLETTER

Pleasing clarification from the Federal Ministry of Finance on weight accounts

02 I 2022

1 Background

Weight accounts are not only held when trading in precious metals, but in all sectors that work with metal. Due to the varying value of metals, weight account transactions are, in practice, of considerable importance. If an owner delivers metal to a taxable person in the metal industry, and this taxable person books the metal as a credit on the deliverer's weight account, the ownership of the metal generally remains with the deliverer. The physical metal itself is usually held in collective custody by companies in the metal industry. This means that the delivered metal is mixed with other customers' metal, so that it is no longer possible to identify the delivered metal. Under civil law, this basically results in co-ownership. The weight account serves as a reflection of the ownership of rights to the total physical metal present.

2 Challenges from a VAT perspective

The classification of co-ownership under civil law gives rise to VAT challenges. What is the situation when weight accounts are disposed of (for consideration)?

The industry previously followed the circular from the Regional Finance Authority (*Oberfinanzdirektion)* Karlsruhe of 19 February 2015, which classified the disposal of the weight account for consideration as a supply of services. This classification was based on previous jurisprudence of the Federal Fiscal Court, according to which the transfer of a co-ownership share was always to be classified as a supply of services. There was much agitation when the Federal Fiscal Court suddenly changed its jurisprudence on the transfer of a co-ownership share. In a decision of 2016, the Federal Fiscal Court stated that the sale of a co-ownership share in a book constitutes a supply of goods. The tax authorities have

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reacted accordingly and expanded the list of possible supplies in sec. 3.5 para. 2 no. 6 of the German VAT Circular to the effect that the transfer of co-ownership shares (partial ownership) in an object is always to be considered as a supply of goods. For the (precious) metal industry, this change in administrative interpretation resulted in a great deal of uncertainty, as many transactions take place on a cross-border basis and thus the particularities of (cross-border) supplies of goods would have had to be taken into account.

3 Clarification by the Federal Ministry of Finance

As the Federal Ministry of Finance now clarifies, the mere fact that weight accounts trigger co-ownership does not necessarily mean that a weight account transfer is considered to be a "supply of goods". In fact, such transfer might constitute a supply of services. The contents of the underlying transaction agreements, on which the transfer is based, are decisive for the classification. The Federal Ministry of Finance's clarification is systematically correct: although VAT law often follows civil law, the EU VAT Directive and the ECJ's jurisprudence based on the Directive are to be given priority. Compared to the EU VAT Directive, German civil law is therefore of minor importance. In contrast to the gold sector, in the form of investment gold (see sec. 25c of the German VAT Act – fiction of a supply of goods), neither the German VAT Act nor the EU VAT Directive provide for any explicit regulation with regard to other metals.

A supply of goods, within the meaning of VAT law, is, by definition, deemed to exist only if the right to dispose of tangible property in one's own name as owner is transferred (see sec. 3 para. 1 of the German VAT Act and Art. 14 para. 1 of the EU VAT Directive). Rights and other assets, including services, are, from a VAT perspective, not considered tangible property. Thus, rights cannot be the subject of a supply of goods. Parties conducting business in connection with weight accounts must therefore ask themselves: Has the right to dispose, within the meaning of the EU VAT Directive, of the (precious) metal been transferred to the business partner (= supply of goods) or not (supply of services)? In order to facilitate the classification in practice, the tax authorities work with indications: as long as there is no agreement between the parties on the place of delivery, form, denomination and purity of the metal, the weight account holder has a claim for realization of rights which requires further concretization – no more and no less. In these cases, the right of disposal, within the meaning of Union law, is not transferred. This means that there is no supply of goods. The disposal of the weight account can only be qualified as a supply of services.

In addition to "supplies of goods" and "supplies of services", there is a third category of transactions in connection with weight accounts. According to the Federal Ministry of Finance's letter, these are non-taxable transactions:

- Weight account transactions without an underlying transaction (e.g. reposting between banks or deliveries booked as credit on the weight account).
- Contracts for difference / hedging transactions (at the time of the sale of the precious metal, a contract of repurchase is already concluded with the contracting party in order to reduce price and liquidation risks).

4 Recommendations for the practice

The Federal Ministry of Finance's letter has to be applied to all open cases. In doing so, legal certainty also extends to the past. Since the underlying transaction is decisive, the classification for VAT purposes is to be made on the basis of the indications established by the Federal Ministry of Finance (place of delivery, form, denomination and purity of the metal). Taxable persons must therefore take into consideration the underlying transaction and, if necessary, amend the terms and conditions to include the relevant indications in order to arrive at clear results.

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