VAT Newsflash

Issue 1, February 2020

Annual Tax Law 2019 published - Part 1: Quick Fixes

The Act on the Further Tax Promotion of Electric Mobility and on the Amendment of Further Tax Regulations (*Gesetz zur weiteren steuerlichen Förderung der Elektromobilität und zur Änderung weiterer steuerlicher Vorschriften*), often referred to as the Annual Tax Law 2019 for short (*Jahressteuergesetz 2019*, or JStG 2019), was published on December 17th 2019 in the Federal Law Gazette. Apart from amendments to a large number of tax laws and other laws, it provides for a number of important amendments to the German VAT Act (*Umsatzsteuergesetz*, or UStG) and the VAT Ordinance (*Umsatzsteuer-Durchführungsverordnung*, or UStDV). This issue deals with the so-called Quick Fixes, certain amendments prescribed by EU law with respect to intra-Community trading of goods. Other amendments are dealt with in part 2 of this newsflash.

Quick Fixes – general matters

By the end of 2018, the EU, in anticipation of a final VAT system, had passed four measures for intra-Community trading of goods, which are commonly called the Quick Fixes. These measures were implemented in the UStG and UStDV with effect from January 1st 2020. They include additional conditions for zero-rated intra-Community supplies of goods, a common system of evidence for intra-Community supplies, a harmonised simplification scheme for intra-Community call-off stock and harmonised provisions on intra-Community chain supplies.

Please note that the German tax authorities have not yet commented on these amendments.

Zero-rating of intra-Community supplies of goods: VAT identification number

The use of a VAT identification number

Zero-rating of intra-Community supplies of goods (except for intra-Community supplies of new means of transport to non-taxable persons) is subject to two additional conditions. Firstly, the acquirer of the intra-Community supply of goods must provide the supplier with a valid VAT identification number (VAT ID) issued by another EU member state. Secondly, the supplier must have complied with their duty to submit a correct and complete EC Sales List in a timely manner.

The first of the new conditions above can be attributed to European Court of Justice (ECJ) case law: the ECJ, under certain conditions, had allowed zero-rating of intra-Community supplies of goods even without a

VAT ID from the customer – which, as a mere "formal requirement", was considered non-essential. The explanatory memorandum to the JStG 2019 provides that the acquirer of the intra-Community supply of goods must be in possession of a VAT ID at the time the goods are supplied. This means that a VAT ID issued after the start of the transport or dispatch (even retroactively) does not permit zero-rating of the corresponding intra-Community supply of goods.

Therefore, there is no clear way forward in the case of a VAT ID issued subsequently. The Explanatory Notes issued by the "VAT Experts Group" for the European Commission proposes correcting the invoice in such cases (section 4.3.3). However, neither the "Explanatory Notes" themselves nor the VAT Committee Guidelines occasionally cited in them are binding for the German tax authorities. It is currently unknown whether the authorities would approve this solution, or whether they favour another remedy. If, however, the zero-rating could not be achieved under any conditions, it could be possible that VAT on the intra-Community supply of goods is considered to be deductible as input VAT, if necessary by means of the VAT refund procedure. However, if this is the solution favoured, third-country acquirers not registered in Germany would in many cases be denied input VAT refunds due to lack of reciprocity, among other things.

It should be noted that the explanatory memorandum for the JStG 2019 provides (in another context, but the rule seems to concern zero-rating matters as well) that the VAT ID must be actively "used" by the acquirer; it would not be sufficient if it was merely communicated in a form such as the footer of company stationery, for example. However, the Directive merely requires that the number is "indicated" to the supplier; thus, the German requirements might be too strict. Such use must have happened before the transport or dispatch of the goods starts.

Intra-Community transfers of goods are generally considered to be intra-Community supplies of goods as well. It is still unclear as to whether intra-Community transfers of goods require a VAT ID of the destination country in the sense referred to above. If so, the consequences would be severe: the VAT burden of the transfer may be fixed if the transferring taxable subject does not possess a VAT ID number at the time of transfer.

Timely filing of a correct and complete EC Sales List

Moreover, zero-rating of an intra-Community supply of goods will not be granted (or, to be more exact, will be cancelled again) if the taxable person has not complied with their duty to submit a correct and complete EC Sales List in a timely manner. This could also be an issue in intra-Community transfer cases. The wording used in the JStG 2019 implies that if an incomplete or incorrect list is submitted, the zero-rating will only be cancelled to the extent of the omission, mistake etc, rather than for all supplies in a reporting period. In cases where the fault cannot be clearly assigned to specific intra-Community supplies, eg, in case of a calculation error, the consequences are unclear – after all, zero rate is granted for supplies only, not for balances.

As the explanatory memorandum for the JStG 2019 provides, the correction of an EC Sales List or the delayed submission of a correct and complete list retroactively renders the supplies concerned zero-rated. However, the JStG 2019 itself does not clearly state that this is the case; it merely provides a reference to another provision where it is stated that, if a taxable person realises that an EC Sales List is incorrect or incomplete, they shall be obliged to correct that list within one month. It is not known why the wording of the JStG 2019 is so unclear, especially as the Directive is worded quite differently ("unless the supplier can duly justify his shortcoming to the satisfaction of the competent authorities"). It remains to be seen whether the German tax authorities will provide an unambiguous rule, eg, by adopting the wording of the JStG 2019 explanatory memorandum.

Intra-Community supplies of goods: evidence

The standardised provisions on evidence for the conditions of zero-rated intra-Community supplies of goods have been carried over into the UStDV, although they are included in a self-executing EU regulation. As well as the standardised evidence, evidence previously permitted may still be used. However, the UStDV wording appears to make a difference between the standardised and the previously permitted evidence - standardised evidence is called a "presumption", while hitherto permitted evidence is called "evidence" (at least, it is not expressly called a "presumption"). It is unknown whether this different wording is intended to make a difference in practice.

In any case, the standardised evidence requires at least two documents issued by two different parties that are independent of each other, of the vendor and of the acquirer: either two documents about the transport or dispatch (such as bills of lading, if they meet certain conditions), or one transport or dispatch document along with another document from a list (eg, an insurance policy regarding the dispatch or transport of the

goods, or a receipt issued by a warehouse keeper in the destination member state confirming storage of the goods in that member state). In cases where transport or dispatch is arranged by the acquirer, an Entry Certificate must also be provided (within 10 days of the end of the month of supply) – which means that, in such cases, a total of three documents must be provided.

As the VAT Committee has previously held (section 5.3.1 of the "Explanatory Notes", see above), parties are independent in the above sense if, in terms of Art. 80 of the main VAT Directive, among others, they do not have legal or financial ties.

Chain supplies

Reliable determination of the so-called moved supply in a chain supply is very important for several reasons. For a start, only the moved supply may qualify as intra-Community supply of goods (which can be zero-rated under certain additional conditions); moreover, the position of the moved supply within the chain supply determines the place of supply of the preceding and following supplies within the chain. Fortunately, future determination of the moved supply will mostly continue to comply with the rules hitherto applied in Germany. The JStG 2019 goes even further than the Main VAT Directive by expressly stating that, if the first supplier arranges transport or dispatch, the first supply in the chain is considered the moved supply, whereas if the last recipient arranges transport or dispatch, the last supply is considered moved. As has been the case before, where an intermediary operator arranges for the transport, the supply carried out to them (as recipient) is considered the moved supply, unless they provide evidence that they have transported or dispatched the goods as supplier. The aforementioned rules are generally applicable, not just – as the Main VAT Directive provides – for intra-Community trading of goods.

The above evidence for determining the moved supply is considered furnished, in the case of chain supplies from one EU member state to another, at least if an intermediary operator, until the start of the transport or dispatch, uses (in the sense mentioned above) a VAT ID of the member state in which the transport or dispatch starts; in this case, the transport or dispatch is allocated to the supply carried out by that intermediary operator. There are additional rules for chain supplies in third-country scenarios: the above evidence is provided, and the supply carried out by the intermediary operator is considered the moved supply, if the intermediary operator (until the start of the transport or dispatch) provides to the supplier a VAT ID or tax number issued by the member state where the transport or dispatch starts. In the opposite direction – goods transported or dispatched from a third country into Community territory – the above proof is considered furnished if the supplied good is customs cleared for free circulation in the intermediary operator's name, or by means of indirect representation on behalf of that person under Art. 18 of the Union Customs Code.

Call-off stock

The fourth Quick Fix concerns a simplification for intra-Community supplies regarding call-off stock. In such cases, the supply to the acquirer, at the time the supply to the acquirer is performed, is considered a zero-rated intra-Community supply as regards VAT of the country of departure, followed by an intra-Community acquisition by the acquirer in the country of destination.

The conditions for the application provide, among other things, that the supplying taxable person must transport or dispatch the consignment goods from the country of departure to the country of destination for the purpose of supplying them, in accordance with an existing agreement, to a fixed acquirer after the end of the transport or dispatch. The acquirer (ie, their complete name and address) must already be certain at the start of the transport or dispatch, and they must, at the same point in time, have used a VAT ID issued by the destination member state. As a general matter, the goods must remain in the destination member state, and the supplier must not have the registered office or place of management of their business, nor any fixed establishment (nor, moreover, in the absence of a place of business or a fixed establishment, their permanent address or usual residence) located in the member state to which the goods are dispatched or transported. In this respect, it should be noticed that a warehouse which is run by the supplier with his own means could possibly be considered a fixed establishment. Finally, the supplier must have separately recorded the transport or dispatch of the goods and must submit a complete and correct EC Sales List in a timely manner. The acquirer is also required to make certain records of their own, although this is not considered essential for applying the simplification. Supply to the acquirer must be carried out within twelve months after the end of the transport or dispatch. It is, however, possible to reverse the transfer of the goods without too much difficulty and transfer them back to the country of departure – or to exchange the acquirer for another, provided that the goods remain in the country of destination.

If the goods have not been supplied within twelve months of transport or dispatch, the transport or dispatch of the goods is considered an intra-Community transfer of goods, with a corresponding intra-Community acquisition performed by the supplier. Essentially the same applies if any of the conditions for simplification have ceased to apply, including but not limited to destruction or theft of the goods (as for Germany, no guidance about a possible “de minimis” rule for small losses is available to date). This may be problematic, since an intra-Community transfer is assumed, while (generally) no VAT ID of the country of destination has been issued: as detailed above, this may lead to a definite VAT burden and an obligation to register in the destination country.

Until 2019, supplies of call-off stock were considered intra-Community transfers followed by domestic supplies of goods at the time the customer removed the goods from stock. However, the Federal Fiscal Court (Bundesfinanzhof, or BFH) has, under certain conditions, ruled that direct supply of goods from another EU member state to a German consignment stock was an intra-Community supply of goods followed by an intra-Community acquisition of goods performed by the acquirer. It is currently unknown whether this judgment (which, in brief, requires that the acquirer is already committed to take delivery of the goods at the time the transport or dispatch starts) will continue to be applicable.

In a decree dated January 26th, 2020, the Federal Ministry of Finance (BMF) has commented on the reporting of the transport or dispatch to call-off stocks, as well as of reverse transfers and the exchange of acquirers. Such reporting, for the time being, needs to be made using a separate form (i.e. not within the EC Sales List), which is only available electronically on the form server of the federal tax authorities. This file can be uploaded on that server, or sent over a secured transmission route to the tax authorities.

Sources

Gesetz zur weiteren steuerlichen Förderung der Elektromobilität und zur Änderung weiterer steuerlicher Vorschriften (Act on the Further Tax Promotion of Electric Mobility and on the Amendment of Further Tax Regulations) in the Federal Law Gazette No. 48 of December 17th 2019 (BGBl. I 2019, p. 2451; in German only)

The explanatory memorandum for the JStG 2019 provisions can be found in the draft (Gesetzesentwurf) of September 23rd 2019 (BT-Drs. 19/13436; in German only)

Explanatory Notes published December 2019 (in English)

Decree issued by the BMF on EC Sales List reporting of call-off stock transactions, instruction leaflet issued by the BZSt

Contacts

Berlin

Götz Neuhahn
Tel: +49 30 2636-5445
goetz.neuhahn@pwc.com

Nicole Stumm
Tel: +49 30 2636-3733
nicole.stumm@pwc.com

Düsseldorf/Cologne/Essen

Alexandra Hartenfels
Tel: +49 211 981-2598
alexandra.hartenfels@pwc.com

Sounia Kombert
Tel: +49 221 2084-384
sounia.kombert@pwc.com

Frankfurt

Frank Gehring
Tel: +49 69 9585-2771
frank.gehring@pwc.com

Gerald Hammerschmidt
Tel: +49 69 9585-5290
gerald.hammerschmidt@pwc.com

Robert Clemens Prätzler
Tel: +49 69 9585-6712
robert.clemens.pratzler@pwc.com

Hamburg

Markus Hüllmann
Tel: +49 40 6378-8858
markus.huellmann@pwc.com

Munich

Sandra Zölch
Tel: +49 89 5790-6840
sandra.zoelch@pwc.com

Stuttgart

Jens Müller-Lee
Tel: +49 711 25034-1101
jens.mueller-lee@pwc.com

ITX ERP and Data Analytics

Roberta Grottini
Tel: +49 30 2636-5399
roberta.grottini@pwc.com

Financial Services

Imke Murchner
Tel: +49 89 5790-6779
imke.murchner@pwc.com

M&A

Christian Schubert
Tel: +49 89 5790-6726
christian.schubert@pwc.com

Subscription and cancellation

If you would like to subscribe to our English PDF *VAT Newsflash*, please send an e-mail with the precise name of your company and the words “Subscribe English” in the subject line to the following address: SUBSCRIBE_Indirect_Tax_Information_E@de.pwc.com.

If you would like to cancel your subscription, please send an e-mail with the word “Cancel English” in the subject line to the following address: UNSUBSCRIBE_Indirect_Tax_Information_E@de.pwc.com.

www.pwc.de