

VAT Newsflash

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Annual Tax Law 2019 published – Part 2: other amendments

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 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). The so-called Quick Fixes, certain amendments prescribed by EU law with respect to intra-Community trading of goods, are dealt with in part 1 of this newsflash. This part of the newsletter deals with a selection of other amendments considered to be particularly important.

General matters

As regards VAT-related amendments, the JStG 2019 was partly enacted on the day following its promulgation, ie, December 18th 2019. Other amendments were mostly enacted on January 1st 2020. There are also transitional provisions and provisions for the application of certain amendments. In the following, we have summarised the amendments we consider to be most important. Please note that the tax authorities have not yet commented on most of these amendments.

Reform of the VAT exemption for training services, which was envisaged in the drafts of the JStG 2019, has been abandoned again for the time being.

Amendments to zero ratings and exemptions

Exports in personal luggage

The conditions for zero-rating exports of goods to be carried in the personal luggage of travellers for non-business purposes have been supplemented with one more condition: the total value of the export including VAT must exceed 50 euros. This rule became necessary due to the price gap between Germany and Switzerland, among other things, which led to an increasing number of clearances. This amendment has an expiration date – it will expire at the end of the year in which an electronic procedure for issuing certain

evidence required for zero-rating commences operations. This amendment is applicable from January 1st 2020. The Federal Ministry of Finance, by decree dated January 10th 2020, has already published corresponding guidance and an updated information sheet (in German only).

Supplies carried out by independent groups to their members

Following the European Court of Justice (ECJ) ruling in the infringement proceedings of September 21st 2017 (C-616/15), a VAT exemption for supplies carried out by independent groups of persons (IGPs) to their members has now been introduced; this was previously only available for certain supplies in the medical sector. However, further to the ECJ decision above, its scope only covers IGPs whose members carry out activities for public welfare in terms of Art. 132 of the Main VAT Directive; accordingly, IGPs in sectors such as finance or assurance are not covered.

Thus, the exemption applies to services performed by domestic IGPs for their members established in Germany if these members carry out activities for public welfare which are either outside the scope of VAT or VAT-exempt in accordance with activities shown in a list specified in the newly introduced provision. Services rendered to IGP members must be directly necessary for the exercise of members' activities, and IGPs may only claim exact reimbursement of their share of joint expenses from their members. Additionally, the exemption must not cause distortion of competition.

As the explanatory memorandum of the JStG 2019 provides, an IGP must be an entity different from its members, which provides its services to one or more of its members (not necessarily to all members at all times). The passage of the explanatory memorandum stating that the IGP must not provide its services to third parties should now be void due to the ECJ's "Infohos" ruling (C-400/18 of November 20th 2019). As regards the non-distortion of competition clause, the explanatory memorandum to the JStG 2019 provides that this clause must be narrowly interpreted, while the mere existence of an IGP is not considered a distortion as such. The explanatory memorandum provides several examples.

Other exemptions

The JStG 2019 includes further amendments made for various reasons – for example, to better adapt the German VAT Act to EU law, due to changes in other areas of legislation, etc. The amendments include VAT exemptions for medical treatment, for certain organisations called "Medizinische Dienste" (Medical Services), for services closely linked to social welfare and social security (instead of exemptions for certain welfare associations), for education and care of children and adolescents (and closely linked services), and for certain youth welfare services. These amendments entered into force on January 1st 2020. A transitional provision provides that the new VAT exemption for the Medical Services above will apply to reporting periods ending after December 31st 2019.

Place of supply for taxable free supplies

The specific place of supply for free supplies was abolished, as the Directive does not include a corresponding provision. Accordingly, the place of supply provisions applicable to supplies carried out against consideration have become applicable to free supplies as well, which may lead to changes to places of supply, particularly in cross-border scenarios. This amendment came into effect on December 18th 2019.

Reduced VAT rate

Electronic newspapers, magazines and books are subject to VAT at the reduced rate of 7%. The scope of this VAT privilege depends on whether an electronic publication functionally corresponds to conventional paper editions and audiobooks. Provision of access to databases containing a large number of electronic books, newspapers, periodicals or parts thereof is subject to the reduced rate as well. The supply of e-publications on CD-ROM is not explicitly mentioned anywhere, and the wording of the new rules is not yet fully clear. The reduced VAT rate does not apply to publications consisting entirely or mostly of video content or audible music. This amendment for e-publications came into force on December 18th 2019.

The JStG 2019 also provides for the reduced VAT rate on certain women's sanitary articles, such as sanitary towels and tampons. Unlike e-publications, the supply, import and intra-Community acquisition of these goods are only subject to the reduced VAT rate from January 1st 2020.

Reverse charge procedure

The existing application of the reverse charge procedure on greenhouse gas emission allowance trading, etc, has been supplemented to include trading in gas and electricity certificates. This amendment entered into force on January 1st 2020.

Application of the tour operators margin scheme (TOMS)

Following the judgment in the infringement proceedings against Germany (C-380/16, judgment of February 8th 2018), the requirements of the ECJ have now been implemented and the provisions on TOMS (Art 25 of the UStG) have been changed. This means that TOMS must also be applied if travel services are provided by a taxable person to another taxable person for the purpose of the latter person's business (B2B). In the future, services such as internal or external charging of accommodation in hotels to other entrepreneurs may therefore also be subject to this regulation.

TOMS applies to transactions carried out by travel agents who deal with customers in their own name and use supplies of goods or services provided by other taxable persons in the provision of travel facilities – as a general matter, except for intermediary services. Please note that this rule does not apply just to travel agencies; rather, TOMS is applicable regardless of whether supplying travel services is the sole object of the company. Services within the scope of TOMS can also be performed in the supply chain. In most cases within the scope of TOMS, the tax basis is the net margin between the travel-related inputs and the consideration for the travel service, while input VAT deduction is not permissible. Consequently, the corresponding purchases become more expensive. It should be noted that invoiced TOMS services must be specifically mentioned (and VAT must not be shown) on the invoice.

In the infringement proceedings mentioned above, the ECJ also prohibited Germany from determining the tax basis for groups of services or for all services rendered within a taxation period, rather than determining the tax base for each individual service. German lawmakers have now also complied with this requirement. While all TOMS-related changes came into force on December 18th 2019, a transitional period until the end of 2021 was granted for flat determination of tax bases and corresponding evidence of records (not for the application of TOMS on B2B supplies).

Assessment procedure and input VAT refund procedure

Following ECJ and national case law, the scope of the input VAT refund procedure has been extended to entrepreneurs who (for example) do not have a fixed establishment in Germany from which supplies subject to German VAT are performed. The wording of the regulation on the interest charge for EU VAT refund applications has been modified for the sake of accurate determination of deadlines. These changes came into force on January 1st 2020.

Taxable persons required to be VAT registered in Germany and to submit annual VAT returns purely because of VAT incorrectly or wrongly shown on an invoice are not eligible for input VAT deduction on their VAT return; instead, they must apply for deduction of input VAT via the VAT refund procedure. If the reverse charge procedure is to be applied in addition to invoices being issued with an incorrect amount of VAT, the input VAT must be deducted from the VAT returns only, however, the restrictions of the VAT refund procedure will apply to third-country taxable persons as regards reciprocity and deduction of input VAT on fuel. These provisions entered into force on January 1st 2020 and apply to assessment and refund periods ending after December 31st 2019.

Implementation of the ECJ case law on participation in VAT fraud

ECJ case law on participation in VAT fraud now has a legal basis in national law. According to the new provision, a taxable person will lose their right to deduct input VAT or to render their intra-Community supply of goods zero-rated if they knew, or should have known, that they were participating (through their input or output supply) in turnover of a supplier or other party in a preceding or subsequent stage of the commercial chain involved in tax evasion or loss of VAT revenue under criminal law. This loss of input VAT deduction extends to input VAT from input invoices, from intra-Community acquisitions and from the reverse charge procedure (including shifting of tax liability to the last purchaser under the simplification scheme for intra-Community triangular transactions); in addition, the presumption of a taxed intra-Community acquisition for triangular cases in terms of Art. 42(1) of the main VAT Directive may also be

considered void. This provision entered into force on January 1st 2020 and is applicable to reporting periods (for preliminary and annual VAT returns) ending after December 31st 2019 – which does not mean that case law on fraud is not already being applied in practice based on ECJ case law. In return, the liability clause of Section 25d UStG will be repealed.

It should be noted that the Federal Fiscal Court (Bundesfinanzhof, BFH) will probably soon deal with the question of whether the principles on fraud involvement also covers taxes evaded in third countries and thus has an effect on tax exemption for exports. Two cases are pending before the BFH on this issue.

Miscellaneous

Further reporting obligations have been imposed on fiscal representatives; in particular, they must now also submit quarterly preliminary VAT returns under their special tax number issued to them in accordance with Section 22d(1) of the UStG. They are required to enclose a list of the taxable persons they represent, with their respective tax bases, with their annual VAT returns. The regulation on filing EC Sales Lists by fiscal representatives has also been clarified. These amendments came into force on January 1st 2020 and apply to both preliminary and annual return periods ending after December 31st 2019.

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).

The explanatory memorandum for the JStG 2019 provisions can be found in the Federal Government draft (Gesetzentwurf) of September 23th 2019 (BT-Drs 19/13436)

Federal Ministry of Finance decree of January 10th, 2020, information leaflet on exports of goods for non-business purposes to be carried in the personal luggage of travellers (in German only)

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