VAT Newsflash

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# Federal Ministry of Finance decree on intra-Community supplies of goods

The Federal Ministry of Finance's (Bundesministerium der Finanzen, or BMF) decree dated 9 October 2020 gives an interpretation of two of the four Quick Fixes implemented in the German VAT Act (Umsatzsteuergesetz, or UStG) in 2020, amending the VAT Application Guidelines accordingly. The decree covers the VAT identification number (VAT ID) being a substantive requirement for zero-rating of intra-Community supplies of goods (including timely submission of correct and complete EC Sales Lists), and new documentary evidence for zero-rating. No guidance has so far been issued on the new provisions for chain transactions and the simplification for call-off stock. This newsflash deals with the most important amendments to the VAT Application Guidelines.

## Use of a VAT ID

Regarding the use of a foreign VAT ID being a new substantive requirement for zero-rated intra-Community supplies, the decree states that subsequent use of a VAT ID valid at the time of supply will have a retroactive effect. This would seem to suggest that zero-rating will not be possible if no VAT ID had been issued at the time of supply. This appears to fall short of the rule given in the Explanatory Notes issued by the European Commission (though these are not binding for the German tax authorities), where it was held that a VAT ID could be subsequently used if it had been applied for but not yet issued at the time of supply. This means that great care must be taken when dealing with new customers who have yet to receive a VAT ID at the time of their order, as intra-Community supplies performed in such cases are likely to be subject to VAT claims from the tax authorities. Regarding the question of whether the VAT shown on invoices for intra-Community supplies of goods is deductible as input VAT, the BMF has only commented on the VAT refund procedure for taxable persons not established in Germany, under which input VAT cannot be refunded if the subsequent use of a valid VAT ID is still possible. The question thus remains unanswered, even though there appear to be several reasons why VAT on intra-Community supplies should generally be deductible as input VAT. Recipients of supplies should therefore take care to use a valid foreign VAT number when dealing with the supplier.

The decree clarifies that a foreign VAT ID does not necessarily need to be issued by the EU member state to which the goods are to be supplied. In addition, where the tax authorities of another member state issue a single VAT ID for an entire VAT group, the use of that VAT ID by a VAT group affiliate must be accepted by the German tax authorities. If the customer uses a VAT ID issued by the member state where the transport of the goods starts (for instance, if the recipient of an intra-Community supply of goods from Germany uses a German VAT ID), the BMF states that the supply in question does not meet the legal criteria for an

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intra-Community supply of goods at all. In the aforementioned scenario, this could mean that a German VAT ID would not trigger a fictitious intra-Community acquisition in Germany and no VAT liability under Article 41(1) of the VAT Directive would arise. However, this matter has yet to be comprehensively clarified, so an argument of this nature should only be used in defensive cases.

The decree defines “use” of a recipient’s VAT ID in terms of the provisions of the VAT Application Guidelines governing the criteria for “using” a VAT ID for intra-Community services. Essentially, the same principles apply as with intra-Community services: namely, using a VAT ID requires positive action. It is possible that this requirement is not in line with Article 138 (1)(b) of the VAT Directive, which refers to a VAT ID number being “indicated” (German: “mitgeteilt”). However, it appears that the BMF is trying to make this matter less relevant in practice: the decree states that a positive action should also be assumed if the recipient “has made an objectively demonstrable statement of his status as a taxable person and of the use of the goods purchased for business purposes, and has declared the receipt of the supply in a correct manner”, provided that the supply was also reported in the EC Sales List and the same VAT ID was stated in the invoice. This seems to suggest that failure to demonstrably “use” the VAT ID exactly as per requirements should not be an issue, provided that there is no problem with the VAT ID or with the reporting of both the supplier and the recipient. However, this may also fall short of the European Commission’s Explanatory Notes, which state that “the communication of the VAT identification number does not need to be done according to any special formality. It can be done by any means allowing to prove that the communication has been received by the supplier”. To avoid any misunderstanding (particularly because the BMF rule cited above inter alia requires certain activity by the recipient that the supplier usually cannot verify), the recipient should explicitly use their valid VAT ID when dealing with the supplier. In addition to declaring the use of their VAT ID, the VAT Application Guidelines allow the recipient to declare that this VAT ID should be used for all future orders performed within the scope of the taxable activity.

## Submission of an EC Sales List

The BMF decree also comments on the new requirement for zero-rating of intra-Community supplies consisting of a correct and complete EC Sales List submitted at the proper time. As the decree outlines, the question whether or not these criteria have been met can only be determined after the deadline for submission of the EC Sales List has passed, which means that zero-rating may only be retroactively denied for this reason. However, corrections of the EC Sales List subsequently reinstate the zero-rating. Correcting the current EC Sales List would not be sufficient; instead, the original, incorrect EC Sales List would need to be corrected. The decree does not explicitly comment on late submissions of EC Sales Lists; however, given the provisions above, it can apparently be assumed that the zero-rating would be reinstated in such cases as well. However, the decree also makes reference to an existing provision requiring incorrect EC Sales Lists to be corrected within one month.

The decree confirms that this requirement also applies to the zero-rating of intra-Community transfers of own goods. This could mean that an intra-Community transfer of goods without a valid foreign VAT ID could create a definite VAT burden. The question of whether a VAT ID is a substantive requirement for an intra-Community transfer has not yet been conclusively settled. However, if this were the case, there would be a particular risk of a definite VAT burden. Care should therefore be taken to identify such transfers at an early stage and stop them where appropriate so as to prevent possible VAT exposure.

## Documentary evidence of the requirements for zero-rating

The German Federal Government has also amended Section 17a of the German VAT Ordinance (Umsatzsteuer-Durchführungsverordnung, or UStDV), which sets out the requirements of a documentary evidence for zero-rated intra-community supplies of goods. This amendment is effective from 1 January 2020.

The amendment to the VAT Ordinance makes a distinction between “presumption of arrival” and “evidence of arrival” (the latter is the documentary evidence that is currently admissible for proving that the conditions for zero-rating have been met). However, the BMF decree only seems to attach importance to this distinction insofar as the new rules provide for an explicit presumption that goods have been dispatched or transported to another EU member state (“presumption of arrival”). If the conditions for this presumption have not been met, documentary evidence may be produced as before; as the BMF decree states, no type of evidence has precedence over the other. As a result, there will usually be no immediate need to change established processes for zero-rating intra-Community supplies of goods, as long as these processes ensure that correct and complete evidence is produced in line with the previous provisions of the VAT Ordinance. The BMF’s comments on the new evidence provisions are quite brief, and do not give compre-

hensive explanations – for instance, the decree does not deal with the requirement that two different documents must be issued by two different persons, nor does it deal with the question of when these two parties are considered independent of each other, of the vendor and of the acquirer.

## Application of the decree

The principles outlined in the BMF decree are applicable to intra-Community supplies performed after 31 December 2019.

## Sources

BMF decree of 9 October 2020 amending the VAT Application Guidelines

Explanatory Notes of 20 December 2019 on the EU Commission's website about the 2020 Quick Fixes

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