TAXAND

Germany

General Information

1. State of play

The Quick Fixes will be adopted into domestic VAT law by the so-called 'Gesetz zur weiteren steuerlichen Förderung der Elektromobilität und zur Änderung weiterer steuerlicher Vorschriften' Act. This Law entails many other amendments of German VAT Act („UStG").

The first draft of the Federal Ministry of Finance has been circulated on the 8th May 2019 and was already commented by various interest groups. A revised draft passed the Federal Cabinet on 31st July 2019. It is expected that the draft passes the German Parliament in autumn. Further amendments might be possible. The proposed changes shall be applicable as of 1st January 2020.

2. Conditions for the exemption of an in intra-Community supply of goods (Art. 138 VAT Directive)

The German VAT Act deals with the conditions for the exemption of an intra-Community supply of goods in Sec. 4(1)(b) and Sec. 6a German VAT Act. Under the current version of Sec. 4(1)(b) German VAT Act it is merely enshrined that an intra-Community supply of goods is exempt. Sec. 6a German VAT Act stipulates the conditions and includes of a legitimate expectation clause in case the taxable person acted in good faith and took every step which could reasonably be required in order to ensure that the conditions have been met.

It is proposed to change Sec. 4(1)(b) and 6a German VAT Act as follows:

2.1. Sec. 4 (1) (b) German VAT Act

Intra-Community supply of goods would not be exempted in case the taxable person would not comply with the obligation to provide for a recapitulative statement (EC Sales List). This condition would be enshrined in Sec. 4(1)(b) German VAT Act.

Where a recapitulative statement is not filed at all the taxable person would be obligated to treat all intra-Community supplies of goods subject to VAT. Where a recapitulative statement is incorrectly or incompletely filed the taxable person would only be obligated to treat the incorrectly or not declared intra-Community supplies of goods subject to VAT.

This means that the VAT-exemption might cease retroactively. However in the comments to the draft law it is stated that the belatedly filing of a recapitulative statement or the correction of incorrect or incomplete recapitulative statements would remedy the non-compliance – also with retroactive effect. Possibly this will find entry into the administrative guidelines on a later stage.

This also means that different deadlines for VAT returns and recapitulative statement should not be relevant.

Currently there is a discussion whether a VAT that arises from a non-compliance concerning the recapitulative statement could be deducted as input VAT by the recipient of the supply. However, it seems doubtful whether this would be possible.

2.2. Art. 6a German VAT Act

The current conditions for an intra-Community supply of goods are pursuant to Sec. 6a(1) German VAT Act:

1) Either the taxable person or the service recipient has dispatched or transported the goods to another EU Member State.
2) The service recipient
    a. is a taxable person registered for VAT purposes in another EU Member Sate and has acquired the goods for his business (taxable person acting as such),
    b. is either a non-taxable legal person or acting as such but is registered for VAT purposes in another EU Member State, or
    c. in case of a supply of new means of transport everyone (whether a taxable person or not).
3) The intra-Community supply of goods is subject to an intra-Community acquisition of goods in another EU Member State.

Because of the amendment of Art. 138 VAT Directive it is proposed to add a fourth condition to Art. 6a(1) German VAT Act:

4) Service recipients in the meaning of Sec. 6a(1)(2)(a) or (2)(b) made use of a valid VAT identification number of another EU Member State.

The wording of the German proposed transformation deviates insofar from Art. 138(1)(b) VAT Directive as the latter only requires that the person for whom the supply is made indicates his VAT identification number to the supplier. Sec. 6a(1)(4) German VAT Act would require a valid VAT identification number. The comment to the draft law expressively says that the recipient must hold a VAT identification number at the moment the supply is carried out. This could also be disadvantageous in case a VAT identification number is declared invalid by an EU Member State with retroactive effect. The comment to the draft law remains silent to this point.

According to the comment on the draft law the “use” of the valid VAT identification number is also important. It is expected that this requires an “active use” so that the supplier can’t just take the number from letterheads or imprints or other public sources but need to prove that the recipient has stated the number when ordering the goods. Currently there are discussions whether this has to be repeated with every single order (most prudent interpretation) or whether the statement e.g. in a framework agreement would suffice.

It is expected that the new law would require amendments of order-to-cash processes in the companies.

Currently there is a discussion whether the VAT that is triggered when the recipient doesn’t provide a valid VAT identification number is deductible as input VAT. At least where a recipient is newly founded and still has no number there seem to be good arguments that this is the case.

2.3. Intra-Community B2Me supplies (transfer of own goods)

The conditions for intra-Community B2Me supplies are dealt with in Sec. 6a(2) German VAT Act which states that transfer of own goods are treated as intra-Community supply of goods.

Under the current proposal there is no intention to revise Sec. 6a(2) German VAT Act. Due to the fact that under the current guidelines by the German Tax Authorities it is still required to meet the conditions pursuant to Sec. 6a(1) German VAT Act, a taxable person carrying out a transfer of own goods would inter alia need a valid VAT identification number of another EU Member State in order to apply the VAT exemption for intra-Community B2Me supplies.

3. Proof for the exemption of an intra-Community supply of goods (Art. 45a VAT Council Implementing Regulation)

The provisions concerning the proof of intra-Community supplies are currently laid down in Sec. 17a to 17c German VAT Implementing Regulation ("UStDV"). It was sufficient to present the sales invoice and an entry certificate issued by the recipient stating the name and address of the recipient, the goods, the date and destination of the movement of goods.

The proof demanded by Art. 45a Council Implementing Regulation is stricter and more cumbersome.

In the first draft there was no intention to revise the German VAT Act or German Implementing Act to adopt the new Art. 45a VAT Implementing Regulation. Obviously, Art. 45a was understood in a way that the proofs stated there were maximum requirements.

However, in the revised draft dated 31st July 2019 the new EU provisions regarding the proof of supply are transposed. The background seems to be that the lawmaker saw the danger that it might not have been clear enough what role Art. 45a VAT Implementing Regulation has played as EU regulations are directly applicable in Germany.

Therefore, German taxable persons will be able to apply either

(i) the new provision regarding the evidence for intra-Community supplies which will be completely in line with the new Art. 45a of the Council Implementing Regulation (e.g. two different documents issued by two different person which are independent from each other, the supplier and from the customer), or

(ii) the less strict current version concerning the proof of intra-Community delivery which requires only one document as a proof (i.e. 'entry certificate', 'consignment note' or 'bill of landing' next to several other documents).

4. Chain Transactions (Art. 36a VAT Directive)

According to the draft law the new provision about chain transactions will be laid down in Sec. 3(6a) German VAT Act which will replace the old German provision on chain transactions in Sec. 3(6)(5).

If the goods in question are dispatched or transported directly from the first supplier to the last party in the chain, the transport or dispatch shall only be assigned to one of the supplies.

Contrary to Art. 36a VAT Directive, which is limited to cases where the transport or dispatch of the goods ascribes to the supply **to** the intermediary or **by** the intermediary, the current proposal of Sec. 3(6a) German VAT Act also ascribes the dispatch or transport in cases the first supplier or last party in the chain manages the dispatch or transport. In addition, the German rule contains more information about the relevant proof the intermediary operator needs to provide when suppling goods to third countries.

4.1. First supplier within a chain transaction manages the dispatch or transport

Where the first supplier in the chain dispatches or transports the goods, the movement of the goods is attributed to the supply of goods from him to his purchaser under the current proposal.

4.2. Last party within a chain transaction manages the dispatch or transport

Where the last party in the chain manages the dispatch or transport, the movement of goods is ascribed to the supply made to him.

4.3. Intermediary operator manages the dispatch or transport

Where the goods are transported or dispatched by a party in the chain who is also the supplier (intermediary operator), the transport or dispatch shall be attributable to him unless he proves that he dispatched or transported the goods as supplier. In case the goods are dispatched or transported from the territory of an EU Member State to the territory of another EU Member State, such prove shall be satisfied when the intermediary operator uses a VAT identification number issued by the EU Member State where the dispatch or transport begins before the actual dispatch or transport takes place.

The comment to the draft law states that the VAT identification number has to be used before the supply is carried out. Additionally, it is required that the number is "actively used" which means that the supplier can't just take the number from letterheads or imprints or other public sources but need to prove that the recipient has stated the number when ordering the goods.

The companies will have to amend their processes to meet with these requirements.

The same shall apply for exports to Non-EU countries. Concerning imports, the transport is assigned to the intermediary operator where he is responsible for the customs declaration. Doing this the German lawmaker would exceed the requirements deriving from the VAT Directive. However, it is understood that this would be in line with the Directive.

5. Call-off stock (Art. 17a VAT Directive)

Current German VAT didn't include a call-off stock simplification. However, according to the Federal Court of Finance there have already been call-off stock situations where a direct intra-Community supply was possible. According to the Federal Finance Court it is crucial whether the purchaser is definite at the time the goods are transported or dispatched to the stock. If the purchaser is definite the Federal Finance Court regards the supply to the Call-off stock in another Member State as intra-Community supply. In our view, the current German case-law regarding call-off stock transactions doesn't need to be revised as the new rules have similar requirements. In addition to the German case law the new provisions deal with several different scenarios and their VAT treatment. Nevertheless, this could lead to some uncertainties in the transposition of the new rules.

Contrary to Art. 17a VAT Directive, it is not proposed to include the new provision on the simplification rule for call-of-stock in the section about taxable transactions but in the section about exemptions (Sec. 6b German VAT Act). The implications by this deviation from the VAT Directive were not disclosed by the German legislator. Probably, this means that the German legislator regards the new provisions as exception to the taxable standard case concerning other warehouse situations.

Art. 243(3) VAT Directive and Art. 54a VAT Council Implementing Regulation which obligate the taxable person who transfers goods under the call-off stock arrangements and the recipient to keep a detailed register, will be transformed into new Sec. 22(4f) and (4g) German VAT Act. Sec. 22(4e) and (4f) German VAT Act are essentially consistent with the aforementioned VAT Directive and include the obligation to mention the identity of the intended acquirer in the recapitulative statement as well the obligation to inform about any changes that might happen in that regard pursuant to Art. 262 VAT Directive.