TAXAND

Germany

General Information

I. State of play

The Quick Fixes were 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. The draft finally passed the German Parliament and was promulgated on 12 December 2019. The adopted amendments are applicable as of 1st January 2020.

II. 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. The new conditions of the German VAT Act are as follows:

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

Intra-Community supply of goods is not be exempted in case the taxable person does not comply with the obligation to provide for a recapitulative statement (EC Sales List). This condition is 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.

Regarding the requirement of the recapitulative statement, the tax authorities are very strict. If the entrepreneur does not submit the recapitulative statement correctly, completely or on time, he does not fulfil the conditions for tax exemption. The determination that the conditions have not been met can only be made retrospectively, as the submission of a recapitulative statement for an intra-Community supply always takes place later, i.e. by the 25th day after the end of each reporting period in which the intra-Community supply was carried out.

An incorrect recapitulative statement must be corrected within one month in accordance with Sec. 18a, para. 10 German VAT Act if the trader subsequently realises that the recapitulative statement submitted by him is incorrect or incomplete. If the entrepreneur does not correct the incorrect recapitulative statement for the reporting period in which the supply in question was carried out, the tax exemption for the supply in question shall be refused retrospectively. A correction of errors in a different recapitulative statement than the original recapitulative statement does not revive the tax exemption for the supply in question.

2. Art. 6a German VAT Act

The new 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 a fourth condition to Art. 6a (1) German VAT Act was added.

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 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 requires a valid VAT identification number.

The tax authorities specify in section 6a.1 para. 19 VAT Act Application Decree (UStAE) which requirements must be met for the use of the VAT ID. In accordance with Section 3a.2, para. 10, sentences 2 to 10 UStAE and Section 6a.1 para. 19 sentence 2 USTAE, the **term "use" of a VAT number** presupposes a positive action on the part of the recipient of the service, usually as early as the conclusion of the contract. For example, even if an order for the provision of other services is concluded verbally, a declaration of entrepreneurial status and entrepreneurial reference can be made by using a specific VAT registration number and this can be recorded by the contractor.

The tax authority considers it sufficient if the master data of a recipient of services is recorded for the first time, together with the VAT registration number requested for this purpose.

In difference to the aforementioned, a **VAT registration number printed on the letterhead** or a VAT registration number printed on a credit note of the recipient of the service is **not sufficient** on its own to document the entrepreneurial status and the entrepreneurial nature of the service to be provided.

The question is, what will happen if the customer does not use his VAT number until the transaction has been carried out, i.e. if he does not communicate it until that time, the supply is taxable. Here, section 6a.1 para. 19 sentence 3 UStAE has to be noticed. According to the Tax Authorities the subsequent use by the customer of a VAT registration number valid at the time of the supply has **retroactive effect** for the purposes of tax exemption. The (foreign) VAT registration number does not have to have been issued by the Member State in which the transport or dispatch ends. Nevertheless, taxable persons are should demand proof of the transaction from the customer before the transaction is carried out.

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 is treated as intra-Community supply of goods.

The Tax Authorities pointed out that the VAT exemption for an intra-Community transfer of own goods under Sec. 6a (2) German VAT Act is also dependent on the transaction being subject to VAT in the other Member State and the transfer being correctly declared in the recapitulative statement under Sec. 4 no. 1 letter b) German VAT Act.

III. 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 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. This version was also finally implemented by the legislator. 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.g. 'entry certificate', 'consignment note' or 'bill of landing' next to several other documents).

The details are listed in the letter of the Federal Ministry of Finance dated 9th October 2020.

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

The new provision about chain transactions is laid down in Sec. 3 (6a) German VAT Act which replaces 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 supplying goods to third countries.

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.

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.

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.

In this regard, the comment to the draft law are interesting. There, it was stated 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 have to amend their processes to meet with these requirements.

The same applies 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 exceeds the requirements deriving from the VAT Directive. However, it is understood that this would be in line with the Directive.

The tax authorities have not yet included the new regulations on chain transactions in the application decree or adapted it. The cases currently commented in the application decree still concern the old regulations that applied before the amendment of the law on 1 January 2020. It is assumed that the Tax Authorities will implement the new rules in the application decree later.

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

Former German VAT didn't include a call-off stock simplification. However, according to the Federal Court of Finance there had 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. The tax authorities have not yet commented on the new regulations.

Probably, 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, were 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 as the obligation to inform about any changes that might happen in that regard pursuant to Art. 262 VAT Directive.