

October 2009

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Editorial

The countdown to the implementation of the so-called VAT package in the European Union has begun. It will enter into force in approximate 90 days, on 1 January 2010. At its core are new rulings on the place of supply of services, on the reverse charge procedure, on notification obligations, and on the input VAT refund procedure within the European Union.

“Is my business ready for the VAT package?” This is a question most companies will need to ask themselves, because these are the most far-reaching amendments to VAT regulation since 1993. The BMF guidance on the place of supply of services of 4 September 2009 alone, encompasses 147 numbered points. Further important indications from the tax authorities on the input VAT refund procedure are in the pipeline. The technical implementation of the new rulings and the extended notification obligations in particular will pose new challenges for companies. Along with the latest BMF guidance, the VAT package is the main focus of this edition of our newsletter.

Alongside recent VAT developments at European level we present a ruling by the German Federal Tax Court (BFH) on the transfer of a business as a going concern. A further BFH ruling pertains to the important question for companies of how to calculate the amount of VAT to be adjusted when accounting for discounts.

Yours

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German Federal Ministry of Finance: new guidance on the place of supply of services valid as of 1 January 2010

BMF guidance of 4 September 2009 (IV B 9 - S 7117/08/10001)

In over 147 numbered points, the tax authorities have annotated the new provisions for the place of supply of services, which are valid as of 1 January 2010. The guidance from the Federal Ministry of Finance (BMF) applies to all supplies made after 31 December 2009, and supersedes Sections 33 to 42i of the VAT Guidelines (UStR 2008). Notes on the new § 3a (2) UStG (place of supply of services where the recipient is acting in a business capacity and has received supplies for the purpose of his business) contained in points 7 to 20 and 139 to 145 are of particular relevance.

The importance of the VAT identification number

The new basic rule for supplies of services between businesses (§ 3a (2) UStG) applies where the recipient is a business and the supply is received for the purposes of the business. As a rule it is left to the supplying business to decide how to evidence the fulfillment of these criteria. If the recipient of the supply is an EU business acting under a VAT identification number, the authorities will assume that the recipient is a business using the service for business purposes.

Please note:

The VAT identification number is only effective in this respect if the supplier has verified it by a special procedure before making the supply, as per § 18e UStG.

The European Court of Justice (ECJ) still has to determine the circumstances under which the "use" of a VAT number can be assumed (cf. BFH decision of 1 April 2009 – XI R 52/07 against Section 42c (3) UStR 2008 and Note 16 of the BMF guidance of 4 September 2009; see also the [June 2009 edition of the MwSt.VAT Newsletter](#)).

Legal persons under public law as recipients of supplies of services

If the recipient of the supply of services is a legal person under public law, the place of supply of the services shall be where the legal person under public law conducts his activities (as per § 3a (2) sent. 3 UStG). Due to German legal provisions (which cannot necessarily be derived from Art. 43 (2) of the VAT Directive 2006/112/EC), the legal person under public law must have been issued a VAT identification number for this rule to apply. As a rule the legal person under public law must also use this number when placing the order. If this does not happen, the supplier may not assume that § 3a (2) sent. 3 UStG does not apply. Instead, the BMF guidance obliges him to inquire as to whether such a number has been issued.

Please note:

The rule of § 3a (2) sent. 3 UStG does not just apply to legal persons under public law; legal persons under private law acting as non-business customers are also subject to this provision. In particular this includes so-called financial holding companies, which perform no economic activities but engage purely in asset management. If they have been issued a VAT identification number, the place of supply will be determined in accordance with § 3a (2) sent. 3 UStG.

Further notification obligations

The rule of § 18a (1) UStG requires that, from 1 January 2010 onwards, German suppliers have to declare the services they provide in the EC Sales List if:

- the service is taxable in another EU Member State, and
- the recipient in another EU Member State is liable for the tax.

The EC Sales List is submitted quarterly but may be subject to a permanent deadline extension as per §18a (1) sent. 7 UStG in conjunction with § 48 German VAT Operating Regulation (UStDV). According to EU regulations (Directive 2008/117/EC of 16 December 2008, ABI. EU No. L 14/2009, 7), the deadline for the submission of EC Sales Lists should be shortened to one month generally (without the existing option of a permanent deadline extension). However, this has not been implemented into German law so far.

Please note:

In § 18a UStG, German law imposes an obligation of notification for every transaction where the place of supply of taxable services is another EU Member State and where the reverse charge mechanism applies. In contrast, Art. 262 (c) of the VAT Directive requires notification of supplies of services only where the place of supply is another EU Member State under Art. 44 of the VAT Directive (§ 3a (2) UStG)). The notification obligation under German law therefore goes further than the European provisions and extends to supplies taxable in other EU Member States falling under § 3a (3) no. 1 UStG (supplies of services connected with immovable property), § 3a (3) no. 2 UStG (short-term hiring of a means of transport), § 3a (3) no. 3 a) UStG (artistic, sporting, and entertainment services and particularly trade fair services), and § 3a (3) no. 3 b) UStG (restaurant and catering services).

German Federal Tax Court: non-taxable transfer of a business as a going concern for leased property that is partially vacant

BFH, ruling of 30 April 2009 (ref. no. V R 4/07)

In its ruling of 30 April 2009, the German Federal Tax Court broadened its judgment on the non-taxable transfer of a business as a going concern for leased property. Even the mere intention to lease part of the building to be sold is sufficient for the acquisition of the property to be construed as continuation as a going concern. The preconditions are that the rest of the building must be leased, and the purchaser must assume the lease agreements and intend to lease the vacant sections of the property. Beyond this, the German Federal Tax Court upheld its previous position on the non-taxable transfer of a business as a going concern. Accordingly, continuation of a concern must be intended and the activities carried out before and after the transfer must be the same or sufficiently similar. Changes to the layout or renovation of a property do not preclude the transfer of a business as a going concern.



The case

The case under consideration concerned the transfer of a partially leased building. The seller had claimed input tax deduction for the original construction costs. The transfer was VAT exempt in accordance with § 4 no. 9 a) UStG. Despite the change in the use of the property arising from the VAT exempt sale (cf. § 15a UStG), the seller claimed that an adjustment of input tax at his expense was not necessary. He invoked the regulations on the transfer of a business as a going concern set out in § 15a (10) UStG, under which the purchaser enters into the position of the seller as his legal successor.

What distinguishes this particular case is that only 37 % of the building was leased at the time of its sale; the rest was vacant. The purchaser entered into the lease agreements with the remaining tenant and intended to lease the rest of the building.

Please note:

The BFH explicitly did not decide whether the lease of only an insubstantial area of a building would qualify for a transfer of a business as a going concern. But it did rule at any rate that the 37 % of this property being leased constituted a not insubstantial portion of the building.

Classification as transfer of a business as a going concern is the legal consequence of a legal evaluation. The will of the contractual parties has no bearing in this regard comparable to an option. Even if the contractual parties do not intend as legal consequences to carry out a business transfer, if the transaction qualifies as such a transfer, then the corresponding legal consequences will be triggered. This also affects the adjustments to input tax deduction in accordance with § 15a UStG.

German Federal Tax Court: discounts actually paid are always gross payments

BFH, ruling of 28 May 2009 (ref. no. V R 2/08)

In its ruling of 28 May 2009, the German Federal Tax Court (BFH) stated its position on the question of how agreeing a rebate on a net basis (e.g. 6 % of a net figure of EUR 100) influences the adjustment of VAT (change of the assessment basis pursuant to § 17 (1) sent. 1 UStG). The claimant, a pharmaceutical company, wanted the actual payment (EUR 6 in this case) to be regarded as a net payment and, consequently, to include a VAT reduction of EUR 0.96 (EUR 6 plus 16 % VAT) in its monthly/quarterly VAT return. In contrast, the tax authorities viewed the actual payment, in this case EUR 6, as a gross figure and only permitted a VAT reduction of EUR 0.83 (i.e. EUR 6 less VAT).

Agreement does not equal payment

The Federal Tax Court based this decision on the principle that a simple agreement cannot influence the actual payment in the context of § 17 UStG. Even if a net rebate has been agreed upon, only the actual payment made can generate a reduction in the assessment basis and the VAT. The actual payment made always includes the correct amount of VAT. A deviation from this rule would only be permitted if, on the basis of the net agreement, the actual payment also contained the additional VAT applicable to the net figure. In other words, here the actual payment would have to equal not EUR 6, but EUR 6 plus 16 % VAT, or EUR 6.96.

Please note:

In its ruling of 18 September 2008 (ref. no. V R 56/06, Federal Tax Gazette (Bundessteuerblatt) 2009 II p. 250), the Federal Tax Court held that the assessment basis may not be altered after the payment has been made on the basis of an agreement about a reduction in consideration under civil law, but only on the basis of the actual repayment.

However, the tax authorities distinguish in Section 223 (2) UStR 2008 between two scenarios: If the claim becomes partially void due to a later change to an agreement, the payment already decreases at the time the change is made. If the purchase price is reduced because a complaint has been lodged, the assessment basis changes at the time of the actual realization of the claims. This distinction has now been superseded by the new ruling.



News from Brussels: amendment to the right to deduct input VAT for immovable property also used for private purposes and other objects used for private purposes

In its meeting of 9 June 2009, the Council of Economic and Financial Affairs (ECOFIN Council) agreed to amend the VAT Directive in principle. It is intended that the suggested amendments will, following another public hearing by the European Parliament (if necessary with modified wording), be formally adopted by the Council with no changes. It should be possible to implement the legal changes in national law by 1 January 2011.

For Germany one amendment in particular is of practical significance: a newly inserted Art. 168a of the VAT Directive will limit input tax deduction for property otherwise wholly allocated to business assets to the extent that the property is used for business purposes. Art. 168a (1) (2) of the VAT Directive allows for the correction in the case of a change in use (comparable to § 15a UStG).

As a result, the continued advantageous nature from a financing point of view of the ECJ ruling in the case of "Wolfgang Seeling" is lost (see also the article concerning the ECJ ruling in the case of "Sandra Puffer" in the [June 2009 edition of the MwSt.VAT Newsletter](#)). In addition to the proposal initially put forward by the European Commission, Member States may also integrate further objects used for mixed purposes but wholly allocated to business assets into the new regulation.



Seminar Notes

We would like to inform you about the following seminar with KPMG contacts as speakers:

FORUM Seminar **VAT 2010** on 25 November 2009 in Cologne

As speakers – among representatives from the tax authorities, industry and tax courts – participate inter alia Ursula Slapio and Peter Rauß (both KPMG)

Topics:

- VAT Package: legal changes and effects for practice
- Guidance of the tax authorities concerning place of services
- Intra-Community supplies of goods: Practical experience and recommendations
- Latest jurisprudence
- VAT in corporate groups (combined with a case study)

Click here for more information: <http://www.forum-institut.de>



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You can also get up-to-date information via the homepage of [KPMG Europe LLP](#)* with Belgium, Commonwealth of Independent States (CIS), Germany, Luxembourg, the Netherlands, Switzerland, Spain, Turkey and United Kingdom as member firms.

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* denotes Trade & Customs
** denotes Financial Services Tax

Imprint

Issuer

KPMG AG
Wirtschaftsprüfungsgesellschaft

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