PKF

Newsletter

Key Issue:
Online retailing – Value added tax is going to be restructured

11|20

Dear Readers,

While the coronavirus pandemic is now unfortunately strongly spreading once again, **online retailers and online marketplaces** are chalking up additional market shares. They will however have to accommodate the numerous **changes related to VAT** that are contained in the draft of the 2020 Annual Tax Act. In the Key Issue for this edition of the PKF newsletter, you can read, among other things, why it will be necessary to invoice at a foreign VAT rate more frequently in future and why more mail order retailers will potentially have to register for VAT in EU member states.

In the second contribution in the Tax section, we discuss the recognition of **costs for security devices (TSS)** for cash register systems. As things stand at the moment, by 31.3.2021 at the very latest, every electronic cash register will have to have a certified technical security system (TSS) or have been retrofitted with such a system. For the recognition for tax purposes of the costs related to this it is possible to use the simplification rule that the Federal Ministry of Finance has provided. As our third topic in this section, next up is the issue of **a partner's financial settlement that is "below fair value"**. Such provisions that provide for financial settlements for outgoing partners that fall below the actual value of an ownership stake could give rise to problems related to gift tax. Contribution no. 4 deals with the requirements for **reviews by tax courts of add-back estimates**; the Federal Fiscal Court, among other things, has called for the principle of procedural equality to be maintained for such reviews.

In the Legal section we provide information about the **competition law changes** that the 10th Amendment to the German Act Against Restraints of Competition will usher in. Large digital companies, in particular, will be subject to **more stringent monitoring of abuse**; by contrast, medium-sized enterprises will be able to look forward to some **exemptions**.

In the Accounting & Finance section, we once again take up the issue of the coronavirus pandemic, which we addressed above. In **financial reports** there have been attempts to record the effects triggered by the pandemic with the help of a **new performance indicator – EBITDAC**; however, it is doubtful that this can be achieved.

During the summer, the aim of the illustrations for our reports had been to provide ideas for travel destinations in Germany. Unfortunately, as a result of the coronavirus second wave, the travel radius has decreased further while the fear of embarking on a journey has increased. Nevertheless, there are beautiful places even in the immediate environment that we are still allowed to visit. With the images in this newsletter edition we would like to provide suggestions in this respect.

We hope that you will find the information in this edition to be interesting.

Your Team at PKF

The Harz in the autumn

Key Issue

Online retailing – Value added tax is going to be restructured

Contents

TAX

StBin [German tax consultant] Sabine Rössler

Online retailing – Value added tax is going to be restructured

Online retailers and online marketplaces will have to accommodate numerous changes related to VAT from 1.7.2021 at the earliest. These changes are contained in the draft of the 2020 Annual Tax Act, which was passed by the lower house of the German parliament [Bundestag, BT] on 25.9.2020 (BT printed matter 22850). Consequently, the agreements concluded by the EU member states, in 2017, on the "VAT E-Commerce Package" as well as current Federal Fiscal Court and ECJ case law will be taken over into the VAT Act (Umsatzsteuergesetz, UStG).

1. Distance selling instead of mail order retailing

The previous designation, for VAT purposes, of "mail order retailer" for an online retailer will be replaced by the term "distance seller". If an item is delivered across borders within the EU or from a third country, in each case, to private individuals and if the distance seller arranges the transport then this would be deemed a distance sale. The transport is arranged by the distance seller ...

- if it undertakes the transport itself, collects the transport costs from the customer and passes them on to a forwarding agent, or
- if it enables a forwarding agent to undertake the transport.

The concept of arranging transport has to be interpreted more broadly than previously. The term mail order retailing, which is contained in the German VAT Act, will no longer be used.

2. Intra-Community distance sale

Intra-Community distance sales will be deemed to have been made in the country of destination and will establish

The Japanese garden in Leverkusen

VAT liability there once they exceed an annual threshold of € 10,000 for the EU distance seller. The previous country-specific sales thresholds (between € 35,000 and € 100,000) will cease to apply.

If there are deliveries to various EU countries then, when the threshold is exceeded, distance sellers could be obliged to register for VAT in all the destination countries starting already with the first sale.

Please note: The group of mail order retailers affected will be expanded by the virtual abolition of the sales threshold. In future, it will be necessary to invoice at a foreign VAT rate more frequently and more mail order retailers will potentially register for VAT in EU member states.

3. Distance selling from a third country

Distance sales of items from third countries will always be without a de minimis threshold and VAT will then have to be charged in the country of destination if the item was imported beforehand into an EU country other than the country of destination, or if the VAT is declared via the OSS scheme (see the following Section 4).

4. Reporting via the One-Stop-Shop scheme (OSS)

Distance sellers will be able to avoid registering for VAT in EU countries outside of Germany by participating in the so-called One-Stop-Shop scheme (OSS). In addition to the MOSS scheme, from 2015, businesses will now be able to centrally pay VAT that is due on distance sales in EU countries outside of Germany. This applies, firstly, to intra-Community distance sales and, secondly, to other distance sales from third countries with a maximum material value of € 150.

Please note: Distance sellers may participate in the OSS scheme consistently solely for all transactions from intra-Community distance sales, or distance sales from third countries.

Intra-Community transfers of goods between various goods depots in different EU member states, in particular, cannot be declared via the OSS scheme. It is likewise not possible to declare deliveries from goods depots within the country of destination via the OSS scheme. Input tax from other EU member states can still be claimed via the (German) input tax refund procedure.

Please note: According to the current status, it is to be feared that there will be a burdensome combination consisting of OSS reporting and local VAT returns.

5. Transactions via marketplaces (e.g. Amazon)

5.1 Destination principle

For distance sales via electronic interfaces (e.g. marketplaces) VAT is charged in the country of destination and indeed even if the VAT does not have to be declared via the special taxation scheme and import sales tax has to be paid.

5.2 Deliveries via online marketplaces (legal fiction of a chain transaction)

In future, when items supplied by a business from a third country are dispatched from a warehouse in the EU, or in the case of distance sales from a third country with a maximum material value of € 150, a chain transaction will be simulated between the online retailer, the online marketplace (e.g. Amazon) and the end customer. As a consequence, the delivery from the online marketplace to the end customer will constitute the active delivery within the notional chain transaction. In the case of a delivery within the EU, the online marketplace would be able to declare the sale via the OSS scheme (see Section 4). In the case of deliveries from a third country, the online marketplace may import the online retailer's goods tax-free and report the output transaction via the OSS scheme.

The preceding inactive delivery from the online retailer with a warehouse in the EU to the online marketplace will be tax-exempt. Likewise, in most constellations, the delivery from the third country to the online marketplace would not result in any sales that are taxable in Germany.

In the case of a notional chain transaction, the online marketplace would become the vendor to the end customer. Considerable electronic adjustments will be necessary, for example, in order to determine the correct VAT rate or to track the goods route.

5.3 Liability in the case of deliveries via online marketplaces

In cases where a notional chain transaction (see Section 5.2) does not apply, the online marketplace would continue to be liable for the VAT of the mail order retailer. The "confirmation of recording as a taxpayer" (Erfassungsbescheinigung) under Section 22f UStG, which has up to now discharged the mail order retailer from liability, will be replaced by a valid VATIN for the distance seller. The latter will form a part of the record-keeping requirements of Section 22f UStG, which have moreover been expanded.

RAin/StBin [German lawyer/tax consultant] Antje Ahlert

Recognition for tax purposes of TSS costs for cash register systems

In the last months, there have been various reports in the PKF newsletter about the need for security devices for electronic cash register systems. The planned introduction on 1.1.2020 has already been postponed several times, initially, on account of technical impossibility and, subsequently, because of the coronavirus pandemic. As things stand at the moment, by 31.3.2021 at the very latest, every electronic cash register will have to have a certified technical security system (TSS) or have been retrofitted with such a system. For the recognition for tax purposes of the costs related to this the Federal Ministry of Finance (Bundesministerium der Finanzen, BMF) has provided for the application of a simplification rule.

1. Retrofitting costs

A TSS consists of a security module, a storage medium and a standardised digital interface. The versions available on the market are very different. In some cases, each cash register gets its own TSS as an external storage medium (e.g. a USB stick), or so-called cloud solutions are used.

In the BMF circular from 21.8.2020 (case reference: IV A 4 – S 0316-a), the fiscal authority expressed its view on the tax treatment of various expenditures for the implementation of these TSS setups. Firstly, it has been clarified that the TSS in conjunction with a connector or as a USB stick, SD card, or similar, constitutes an asset. However, as a TSS cannot be used on a standalone basis it will have to be capitalised and depreciated over a normal period of useful life of three years. Including the TSS in a compound item or immediately writing it off as a low-value asset have thus been ruled out.

However, if the TSS is permanently integrated into the cash register as hardware then this would be deemed to be a subsequent acquisition cost for the cash register asset. The TSS costs would have to be capitalised and depreciated over the remaining useful life of the cash register.

Heidelberg

The cost of setting up a single digital interface including connecting the TSS to the electronic record-keeping system of the cash register as well as the interface for the fiscal authority would constitute ancillary costs for the TSS asset and would have to be capitalised along with it.

2. The simplification rule

According to the above-mentioned BMF circular, in the context of the simplification rule, there will be no objection if the full amount of the costs for subsequently upgrading existing cash register systems for the first time with a TSS and of the costs for setting up an interface for the first time are immediately deducted as operating expenses.

3. Ongoing charges

The charges incurred for servicing and maintaining the TSS or for supporting the cloud normally have to be taken into account as regular business expenses.

RA/StB [German lawyer/tax consultant] Frank Moormann

Gift tax in the case of a partner's financial settlement that is "below fair value"

Partnership agreements frequently contain provisions that provide for financial settlements for outgoing partners that sometimes fall significantly below the actual value of the ownership stake. There can be a variety of reasons for this, for example, a temporary ownership stake in a company for the management without having to finance a high acquisition price and, accordingly, without having to remunerate any hidden reserves for the subsequent departure (the so-called "manager model" or "naked-in/naked-out"). The gift tax treatment can cause problems here.

1. Permissibility of restrictions on financial settlements

In principle, restrictions on financial settlements are permissible within certain limits, in particular, both with regard to the payment modalities (paying in instalments over several years) as well as with regard to the amount of the settlement. The general principle of good faith establishes the framework. In case law especially, the reasoning is based on whether or not a partner's right of termination is unduly limited by the restrictions on financial settlements. The manager model has already basically been approved by the Federal Court of Justice.

2. Problem – A notional gift

The point of reference for the tax problem is the requirement in Section 7(7) of the Inheritance Tax Act (Erbschaftsteuergesetz, ErbStG). According to that, if, in the course of an exit, the ownership stake is transferred to the company or the other partners and the outgoing party receives a financial settlement that is below the assessed value for tax purposes of the ownership stake then this would be deemed to constitute a gift. In that case, it would be assumed that the outgoing party had made a donation to the remaining partners. As the assessed values for tax purposes of ownership stakes now largely approximate market values the legal fiction of gifting could come into play relatively quickly.

However, you should bear in mind that, even in such cases, the exemption provisions for business assets will apply insofar as the respective conditions have been satisfied and the relevant aggregate wage levels and holding periods have been complied with.

Moreover, contractual transfers – thus, the sale of an ownership stake to the remaining partners or the company – are not covered by the concept of a notional gift. In this case, if the purchase price is below the assessed value for tax purposes then, even under the general regulations, it basically cannot be assumed that a donation was made, at any rate, if the contractual parties are not related to each other.

3. Exception – The manager model

According to the prevailing opinion in the literature, if, upon joining a company, it is known that the stake is supposed to be available only for the period of active work and that, upon departure, solely the acquisition price would ultimately be reimbursed then there would be no gifting within the meaning of Section 7(7) ErbStG. This requirement, in accordance with its intention and purpose, has to be restrictively interpreted as meaning that such cases may not be covered where, from the outset, no regrouping of assets has been planned.

However, the supreme court has not yet confirmed this view. Even the most recent Federal Fiscal Court (Bundesfinanzhof, BFH) ruling from 6.5.2020 (case reference: II R 34/17) on the manager model has not provided any certainty here. In the case in question, the stake of the outgoing party was sold at its nominal value to a trustee. The latter was holding the stake for the remaining partners until such time as a new joiner would in turn acquire the stake at the nominal value. In this case, the court rejected the notion that the remaining partners were liable to pay gift tax because,

» firstly, it was not the remaining partners who had acquired the stake but instead the trustee. Therefore, what matters for Inheritance and Gift Tax law is ownership under civil law and not beneficial ownership; and,

» secondly, a purchase price was paid on the basis of a purchase agreement and not a financial settlement based on a partnership agreement.

Outcome

Admittedly, the basic applicability of the concept of a notional gift in cases of the manager model thus still remains open. By the same token, in the specific case, it has now been clearly established that it had been possible to avoid the gift tax problem through a trustee arrangement.

The requirements for reviews by tax courts of add-back estimates

In two sets of legal proceedings, the Federal Fiscal Court (Bundesfinanzhof, BFH) annulled tax court decisions because the reviews of add-back estimates had been deficient. A tax court would thus be deemed to have infringed procedural principles if, in the essential points, it had merely drawn on "publicly available sources on the internet" and had neither documented these sources with a printout nor specifically mentioned them. Furthermore, the BFH called for the principle of procedural equality to be maintained for such reviews.

1. Reviewing additions to profits

In a decision from 28.5.2020, the BFH reversed a tax court ruling because the sources of the defendant tax office had not been disclosed to the taxpayer who was the claimant and, thus, for whom there was a lack of transparency and no opportunity to present a counter-statement.

In the underlying legal proceedings, the Hamburg tax court had reviewed the add-back estimates for income and sales for a discotheque that a tax office had made in the course of a tax audit. In its ruling from 3.9.2019 (case reference: 2 K 218/18), the tax court had applied a so-called external inter-company comparison and, in the process, had used a gross profit mark-up of 300% as a basis. For this measurement the court made reference, among other things, to a specific internal compilation of standard rates, from the fiscal authority, for discotheques ("Fachinfosystem Bp NRW" [specialist information system – tax audits NRW]) that was only available in the internal intranet. This source was not made available to the discotheque that had made the claim.

The tax court ruling was annulled by the BFH in its decision from 28.5.2020 (case reference: 1X B 12/20). The tax court drawing on an internal source of knowledge from the fiscal authority constituted a violation of the right of defence. This entitlement includes the right of the parties to the proceedings to comment on the facts relevant to the decision prior to a ruling being issued. Courts are therefore obliged to provide the concerned parties with comprehensive information about all the facts and evidential findings. The tax court did not meet these requirements because, in a way that was relevant to the issue, it justified the estimated gross profit mark-up of 300% with the findings from an internal knowledge source. The contents of this internal compilation of standard rates were not disclosed by the tax court to the discotheque so that it was thus denied the opportunity to comment on the contents.

However, the BFH clarified that the fiscal authority may absolutely create and use its own internal databases for the purpose of estimates. Yet, if a court draws on this collection of data then it has to make it possible, in the manner required by law, for the audited company to acquire the same level of knowledge as the opposing party (the tax office). In this respect, the BFH made reference to maintaining procedural equality. It is now up to the tax court to either change or provide a more transparent justification of the estimated gross profit mark-up.


Schliersee lake, Upper Bavaria

2. Sources in the case of add-back estimates in a tax audit

According to the procedural rules for tax courts, the courts have to make decisions based on their freely arrived at convictions gained from the overall outcome of the proceedings. When making their decisions they have to take into consideration:

- the written statements of the concerned parties,
- their arguments at the oral proceedings,
- their conduct,
- the tax records,
- the files used,
- the information,
- official documents and
- evidential findings obtained.

The BFH has now highlighted the consequences that a breach of these principles can have.

In the case in question, (BFH decision from 23.4.2020, case reference X B 156/19) there was a dispute over the findings from a tax audit of an ice cream parlour. In the light of several formal deficiencies in the cash register and record-keeping, the auditor had carried out a "yield calculation" and had based his computations on, among other things, the ice cream parlour's sugar purchases. The Lower Saxony tax court classified the estimated income as being legitimate and declared that the sugar amounts that had been used as the basis for the auditor's calculations had come from "publicly available sources on the internet".

The BFH has now annulled the tax court decision because of a procedural flaw and it made reference to the fact that the tax court had not gained its conviction from the overall outcome of the proceedings because it had merely invoked an unnamed internet source. It was therefore not possible for either the parties to the proceedings or the BFH to verify if the sugar amounts included for the purposes of the estimate where indeed justifiable.

Outlook

In this second case, the BFH likewise annulled the decision of the tax court and referred the matter back to it. That is why the tax court now has to provide a more specific description as to the circumstances on the basis of which it had deemed the sugar amounts taken into account to be legitimate. In the first case, a more transparent justification with regard to the surcharge rate to be applied is required at the very least.

LEGAL

Prof. Heiko Hellwege

Competition law changes for large digital companies and medium-sized enterprises (10th Amendment to the German Act Against Restraints of Competition)

The 10th Amendment to the German Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) will subject large digital companies, in particular, to more stringent monitoring of abuse; furthermore, there are some exemptions in the Act for medium-sized enterprises (as adopted by the German Federal Cabinet on 9.9.2020).

1. Prohibitions directed at digital companies "with significance for competition across markets"

If the Federal Cartel Office (FCO) determines that digital companies are of "paramount significance for competition across markets" then, in future, it will be able to bar them from:

» ... favouring their own offerings over those of the competition when facilitating access to procurement and sales markets (so-called self-preferencing);
» ... hindering competitors in markets where they could quickly expand their positions;
» ... using data that they have collected, which are relevant for competition, to hinder other companies;
» ... making it difficult to profit from user data and, as a result, to hamper competition.

2. Exemptions for medium-sized enterprises

2.1 Merger thresholds

In future, mergers will only be subject to merger control by the FCO if the companies concerned generate annual sales in Germany of at least € 10m (previously this was € 5m).

Vineyards in Esslingen on the Neckar

Mergers cannot be prohibited if the reasons for a prohibition merely affect minor markets with a volume of up to € 20m (instead of € 15m previously).

Please note: Medium-sized enterprises will therefore gain greater flexibility for consolidation measures, in particular, in shrinking markets.

2.2 Cooperations

Legal certainty will be increased for companies that wish to cooperate. In the future, companies will be entitled to request an antitrust assessment of cooperation by the FCO if there is a substantial legal and economic interest in such an appraisal. Furthermore, a legal basis will be created for the so-called Vorsitzendenschreiben [literally chairman letters, or guidance documents that record the conclusions of consultations with the FCO] with which the authority can informally give cooperations the green light.

Please note

In addition to the prohibitions mentioned in Sec. 1, under facilitated conditions, the FCO will, in future, be able to issue interim measures in order to protect competition. With regard to the cooperations covered in Sec. 2, legal certainty has been created, in particular, for purchasing and sales cooperations between medium-sized competing enterprises.

ACCOUNTING & FINANCE

WP/ StB [German public auditor/ tax consultant] Ulrich Stauber

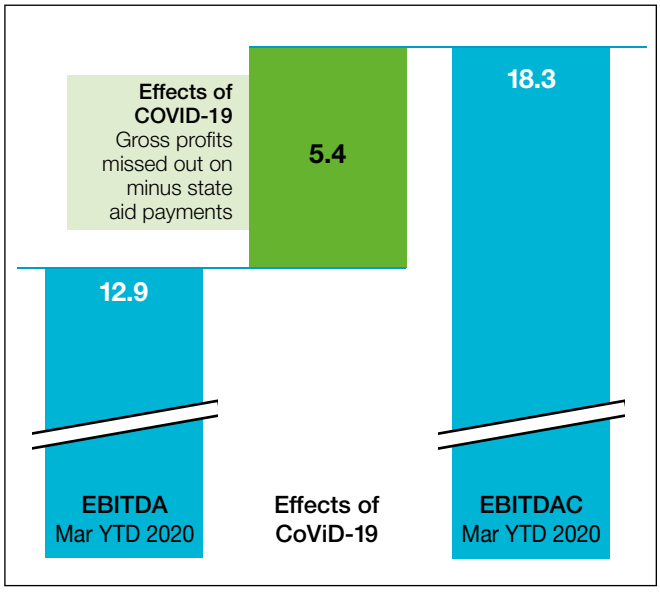
EBITDAC – A new performance indicator in financial reports; its validity is however questionable

Over the course of 2020, most companies have been directly affected by the coronavirus pandemic, particularly during the lockdowns. To record the effects of these on the financial situation the more frequent use of EBITDAC – an alternative performance indicator – has gained currency in the last months. However, a closer analysis of the indicator casts doubts on its validity.

1. EBITDAC – Earnings before interest, taxes, depreciation, amortisation and coronavirus

The new performance indicator EBITDAC is derived from the EBITDA performance measure. EBITDA represents earnings before interest, taxes and depreciation on property, plant and equipment/amortisation of intangible assets. To determine EBITDAC additional adjustments are made to take into account pandemic losses or pandemic profits.

Example: In its quarterly report as at 31.3.2020, the Schenck Process Group, a German industrial group, specified "adjusted EBITDAC" for the first time. The overall adjustment that was made amounted to € 5.4 m. In particular, the adjustments related to the gross profits that the group had missed out on as a result of the effects of the coronavirus and, working in the opposite direction, the recognition of state grants and support aid of around € 0.2 m. Schenck estimated that the gross profits that it had missed out on were around € 5.6 m so that the overall adjustment came to € 5.4 m (5.6 – 0.2 = 5.4).



Determining EBITDAC, example from Schenck Process Group (Source: www.schenckprocess.com)

2. Doubts as to the validity of the EBITDAC performance indicator

Generally, it is considered that it is only possible to objectively quantify the effects of coronavirus – which usually turn out to be very sector-specific and company-specific – with great difficulty. Admittedly, presenting a performance indicator adjusted for extraordinary effects could indeed be useful in order to make a comparison with the profit situation in previous years. However, in view of the very limited transparency or verifiability, the use of EBITDAC has definitely been viewed critically. In many cases it will not be possible to clearly assess the extent to which the coronavirus pandemic has actually affected the financial reporting data. For example, declines in sales, underutilised fixed assets or extensive restructuring and reorganisation measures are also frequently induced by impacts other than the coronavirus pandemic.

Even seemingly "straightforward" issues, such as uncollectable receivables, in many cases, will not necessarily be solely attributable to the coronavirus pandemic. Furthermore, when calculating EBITDAC, the positive effects also have to be taken into account, e.g., savings resulting from short-time working allowances, state aid (rescue packages, etc.) as well as sales increases in specific sectors (e.g. online retailing).

3. Pandemic effects in the annual financial statements and the management report

With respect to the comparability of annual and consolidated financial statements, it can be presumed that it will generally be the negative effects of the coronavirus pandemic that will result in adjustments being made in the context of calculating the EBITDAC, or that EBITDAC will only be reported as an alternative performance indicator by companies where the negative impacts predominate. It should generally be borne in mind that, in management reports, key financial performance indicators – as well as EBITDAC – have to be presented consistently (continuously). Consequently, this applies both to reporting that is backward looking as well as future-oriented (economic report and/or the report on expected developments). In this connection, in cases of doubt, difficulties will repeatedly arise when deriving EBITDAC for the forecast period.

In this respect, there will be many cases where determining both the quantitative as well as the qualitative effects of the coronavirus pandemic on the financial reporting will, in practice, cause greater problems and lead to discussions with the auditor of the annual accounts. If material – in nature and/or extent – extraordinary expenses and income affect the results in a reporting period then the disclosure requirements under Section 285 clause 1 no. 31 of the German Commercial Code will have to be complied with in the notes to the financial statements as well as in the requisite analysis of the earnings situation in the economic report section of the management report.

Conclusion

To sum up, it can be stated that it is likely that the statutory disclosure requirements in the notes to the financial statements and in the management report will frequently provide an adequate platform for a clear and comprehensible depiction of the effects of the coronavirus pandemic for users of financial statements. It would therefore appear to be questionable that it would make sense to seek to enhance the clarity and transparency by presenting EBITDAC in addition.

IN BRIEF

Minimum shareholding – Is beneficial ownership sufficient for tax exemption?

Under applicable business tax law, dividends among corporations remain virtually tax-free. Ultimately, a corporation only has to pay 1.5% in tax on the distribution it receives – provided that, at the start of the calendar year when the distribution is paid out, the shareholding is at least 10%. The Munich tax court recently had to rule on whether or not, in the case of a minimum shareholding, beneficial ownership was sufficient for tax exemption.

In the case in question, a corporation had held 9.898% in a joint stock company (Aktiengesellschaft, AG) up to


Six Lakes region Duisburg-Wedau

2013. In view of an intended distribution by the AG in 2014, the claimant had concluded a purchase agreement with the main shareholder, on 16.12.2013, for 50 shares in order to get over the 10% limit.

The purchase agreement included a condition precedent according to which ownership of the shares would be transferred to the claimant only once the purchase price had been paid. However, due to an oversight by the claimant, the planned immediate electronic bank transfer was not executed and the transfer of the purchase price was actually carried out at the start of 2014. Consequently, the Munich tax court had to decide whether or not the claimant had held the necessary 10% minimum shareholding at the start of 2014.

In their ruling from 11.9.2019 (case reference: 7 K 2605/17), the judges took into account the beneficial ownership that, in their opinion, had been transferred in December 2013 via the conclusion of a definite agreement for the purchase of the shares. Through the agreement, the claimant had acquired a position that included the right to profits and any potential changes in value of the shares that could no longer be withdrawn against its will and which had still existed on the relevant cut-off date of 1.1.2014.

Please note: The ruling is not yet final and thus not yet legally binding as there is an appeal pending at the Federal Fiscal Court under the case reference: I R 50/19.

Provision of electronic services – Is the principal place of business at home or abroad?

If it is not possible to determine that the recipient of a service operates its business abroad then it should be assumed that the recipient's location is in the home market.

A case that was decided by the Rhineland-Palatinate tax court (ruling from 25.6.2020, case reference: 6 K 1789/18) concerned a joint stock company (Aktiengesellschaft, AG) that had had an entry in the commercial register of the Local Court (Amtsgericht) of K since 1998 and that was active in the field of internet protocol television. The issue was whether or not the sales of the AG in connection with a website in Germany were liable to VAT.

End customers were able to use the electronic services of the website for free. Premium users were able to use further options in return for payment. Income also arose via advertising insertions on the website. This website was operated via servers in data centres outside of Germany. According to the AG, over the course of the relevant years of 2011 to 2015, the website had been operated by the company I AG with its registered office in the Seychelles. Its shares were held by a company based in Russia and the USA.

In the course of a tax investigation it was established that the sales from the operation of the website had to be allocated to the AG since there was no agreement between

the AG and I AG. The contact details provided in the legal notice on the website were for the company I AG in the Seychelles.

The Rhineland-Palatinate tax court dismissed the claim with the above-mentioned ruling. VAT on the services had to be charged in Germany. According to ECJ case law, the place of a company's business is where the essential decisions concerning the company's general management are taken and where the functions of its central administration are exercised. Here, various factors have to be examined (e.g. statutory seat; place of central administration; place where general business policy is determined). A notionally established base in a form that is typical for a letterbox company does not define the place of business.

Please note: Permission was granted to lodge an appeal with the Federal Fiscal Court.

Place of performance for VAT purposes in the case of hosting services in a data centre

The European Court of Justice (ECJ) recently considered the issue of the VAT treatment of hosting services in a data centre. The issue was whether or not the location of the property should be regarded as the place of performance.

A company based in Finland provided hosting services for telecommunications networks operators. In this respect, it made lockable equipment cabinets available. The scope of services likewise included a power supply, air conditioning and monitoring in order to provide an optimum operating environment for the servers. The cabinets where the servers were stored were bolted to the floor. It was however possible to remove the servers again within a few minutes. Customers did not have direct access to their cabinets but, instead, were given keys to them after completing identity checks.

The point at issue between the parties involved was whether or not making equipment cabinets available for use should be treated as VAT-exempt leasing or letting of immovable property or as a VATable service connected with immovable property. Another issue related to the question of where the place of performance would be – thus in Finland or the customer's principal place of business. The ECJ, in its judgement from 2.7.2020 (case C 215/19), rejected the notion that providing the premises where the equipment cabinets were installed constituted a letting or leasing transaction since hosting services comprise not merely the provision of storage locations for equipment cabinets but also other services. Furthermore, the ECJ did not see a sufficiently direct connection between the hosting services and the property. Firstly, the services did not constitute an integral part of the building in which they had been located such that the building could have been regarded as being incomplete without them. Apart from that, the cabinets did

Glienicke Bridge, Berlin

not constitute a permanent installation as they had merely been bolted to the floor. Moreover, the ECJ rejected the notion that the hosting services should be viewed as a service connected with immovable property.

Conclusion: According to the ECJ, the place of performance would thus ultimately not be the location of the property but rather the place from which the business provides its hosting services.

New definition of the concept of "supply and installation" (Werklieferung)

The distinction between "supply and installation" (Werklieferung) and "installation service" (Werkleistung) frequently leads to discussions particularly in the area of VAT. The fiscal authority has now responded to the case law of the Federal Fiscal Court and in the Federal Ministry of Finance's (Bundesministerium der Finanzen, BMF) circular, from 1.10.2020, it has provided a revised definition of the term "supply and installation" (Werklieferung) in the VAT application decree.

Previously, the fiscal authority held the view that "supply and installation" should be assumed if the contractor had used materials that it had procured itself for the installation and that were not just additions or other accessories. A further condition for "supply and installation" was that, in connection with the installation, the contractor also had to treat or finish a third-party object. Contrary to the previous opinion, if solely own objects are treated or finished then this would no longer constitute "supply and installation".

The differentiation between "supply and installation" and "installation service" is done mainly for the purpose of the classification as a supply or a service; this is, in turn, is crucial for determining the place of supply or place of performance. In the case of "supply and installation", the place and time of the supply are determined analogously to the provisions for supplies under Section 3(5a),(6) to (8) of the VAT Act (Umsatzsteuergesetz, UStG). Therefore, the place of supply will normally be where the transport or dispatch to the recipient begins. In the case of chain transactions, determining the place of supply can differ from that. An "installation service" has to be classified as a service for which the place of performance will be determined in accordance with Section 3a UStG. The starting point here is the principle that the service will be provided where the contractor operates its business.

This adjustment will be taken into account for all open cases, although the BMF circular includes a no objection rule – in all cases where statutory value added tax arose prior 1.1.2021, businesses will be able to treat the sales, including for the purposes of input tax deduction and cases under Section 13b UStG, in accordance with the old regulations.

Extension of time limit for lodging appeals if no reference has been made to lodging appeals electronically

After receipt of notification of an administrative order there is normally one month's time to appeal against this same administrative order (e.g. tax assessment notice). In the following, we highlight the circumstances under which this time limit would be extended.

An extension by one year to the time limit for lodging appeals would come about if the issuing authority had failed to include advice on legal remedies in the administrative order being appealed against, or if that advice had been incorrect. Correct advice would include the authority with which the appeal should be lodged and the rules that apply for calculating the time limit. On that point, the Federal Fiscal Court, in a ruling from 28.4.2020 (case reference: VI R 41/17), decided that advice on legal remedies would be incorrect and would trigger a one-year time limit for lodging appeals if it did not make reference to the option of lodging appeals electronically. The court justified this view by pointing out that, since 1.8.2013, it has been explicitly provided for in the German Fiscal Code that it is also possible to lodge appeals electronically. Since then, advice on legal remedies thus also has to make reference to this method – expressly permitted by law – for lodging appeals.

AND FINALLY...

"A country that doesn't carry out research will become a museum."

Wolfgang Clement, 7.7.1940 – 27.9.2020, German publicist and politician. From 1986 to 1989 he was chief editor of the Hamburger Morgenpost newspaper and then went into politics. In particular, from May 1998 to October 2002, the SPD politician was Minister President of North Rhine-Westphalia and, from October 2002 to October 2005, Federal Minister for Economics and Labour.

Legal Notice

PKF Deutschland GmbH Wirtschaftsprüfungsgesellschaft

EUREF-Campus 10/11 | 10829 Berlin | Tel. +49 30 306 907-0 | www.pkf.de

Please send any enquiries and comments to: pkf-nachrichten@pkf.de