

## Client Information

### VAT

Federal Ministry of Finance - Circular letter dated 6. January 2009

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#### Documentation requirements for intra-Community supplies

The courts have been occupied in the not too distant past once again by the question of supporting documentation for intra-community supplies (ICS). Particularly relevant here are the ECJ decisions from 27.09.2007 Collée (C-146/05), Twoh (C-184/05) and Teleos (C-409/04), in which, amongst other things, the questions of legal certainty and proportionality in connection with the exemption of ICS were addressed [Note - as EU legislation uses the term "exemption" for ICS, this term has been used in this bulletin in preference to the term "zero-rating", most commonly used in the UK]. These decisions gave rise to further questions concerning the German requirements surrounding the accounting of ICS and supporting documentation. This in turn has further complicated the legal position. Therefore, the German Ministry of Finance (BMF) has published its interpretation of the current position, dated 06.01.2009, which is to be applied to all transactions which are not finally completed. The accounting and supporting documentation requirements still primarily relate to the identity of the customer and to the physical delivery of the goods. However, in addition to certain welcome clarifications, the BMF circular in many respects signifies a tightening of the tax authorities' practice, which bears little relation to commercial practice.

#### Customer related requirements

An ICS normally takes place when the customer is an entrepreneur, acquires goods for business purposes and is required to tax the acquisition in the destination country (sec. 6a para. 1 sentence 1 no. 2 a and no. 3 German VAT Act (GVA)). The identity of the customer plays a decisive role in being able to check whether these requirements are met.

A customer as defined by German VAT law is normally the person, who is entitled to receive the supply of the goods and who is obliged to make payment for them.

The entrepreneurial character of the customer can normally be assumed when the customer is in possession of a valid VAT EU ID number at the time of the supply and uses this in respect of the transaction. The ID number should be checked by the supplier using the "qualified check" which additionally confirms the name and address of the owner of the number according to sec. 18e GVA. According to section 11 of the circular, it is not acceptable if the customer only applies for an ID number at the time of the transaction. This interpretation has the consequence that there is no exemption available for the period between the delivery of the goods and the issuing of the ID number. Whether this interpretation is compatible with EU legislation (article 138 VAT System Directive) is questionable.

Holding details of a valid ID number is, however, not enough, as this does not necessarily confirm the identity of the customer. For cases where goods are transported (directly by the supplier or customer) - in practice it is cases where the goods are picked up that are of relevance - the circular considers that the identity of the customer should be confirmed by a combination of the sales contract and copy of the passport. In cases where a third party represents the customer (this includes employees of the customer), the supplier must also, according to sections 29 and 41 of the circular, hold a document authorising the third party for the specific transaction, as well as additional evidence supporting the authorisation e.g. an extract from the commercial trade register confirming the

entitlement of the signatory to sign the authorisation. This supporting documentation is to be held for each individual transaction (no general authorisation is allowed), even in the case of existing commercial relationships. Doubts about the existence of the alleged customer could lead to denial of the exemption.

## Requirements related to the physical delivery of the goods

In addition to confirming the identity of the customer, the supplier also must prove that the goods have been transported or dispatched to another EU country (sec. 6a para. 1 sentence 1 GVA) in order to benefit from the exemption. This proof must primarily be evidenced by supporting documentation. The documentation required is unchanged and is listed in sections 17a (Transport and Dispatch) and 17b (Processing) of the VAT Implementation Ordinance (UStDV). As noted above, "transport" of goods is understood to be transport directly by the supplier, customer or employee of either (i.e. driver) using their own means of transport. "Dispatch" on the other hand involves delivery of the goods by an independent agent (e.g. forwarder, courier) or this agent arranging delivery of the goods.

## Transport cases

Section 27 of the circular envisages that the supplier holds records concerning the town and area in the destination country, even in cases where goods are transported. Simply stating the country alone is insufficient and would lead to the exemption being denied. This is also true for chain transactions. The business interest of an intermediate party in a chain, not to disclose to the first supplier the final destination of the end customer, is rejected by the BMF.

The identity of the customer must also be recognisable in the confirmation of receipt (sec. 17a para. 2 no. 3 UStDV) or the declaration required in cases where the goods are transported by the customer that the goods are to be transported to another EU Member State (sec. 17a para. 2 no. 4 UStDV). Again, section 29 of the circular envisages that a copy of the passport of the customer or his representative would meet this requirement. The link between the customer and any representative is again to be evidenced by authorisation of the representative by the customer for the specific transaction, as well as additional evidence supporting the authorisation e.g. an extract from the commercial trade register confirming the entitlement of the signatory to sign the authorisation. It must be clear from the authorisation to pick up the goods that the customer has authorised the representative to collect the goods in the context of a supply to the direct customer and not in the context of a supply to a later customer in the chain. In the case of a pick up by the customer or his representative, the declaration that the goods will be transported to another EU Member State must be in German language and include a date and signature (circular section 31). This is the case, even if the customer or his representative cannot speak German. The signatures in the authorisation and the declaration should, according to section 32 of the circular, be compared with those contained in the relevant passport copies.

## Dispatches

In cases where the supplier or his customer is responsible for dispatching the goods to other EU Member States, the existing requirements to evidence the delivery by way of consignment documentation (e.g. waybill or bill of lading) or other commercial documentation (e.g. the "white" certificate - see sec. 10 para. 1 UStDV for the details to be provided) are still valid. According to section 36 of the circular, a waybill should always show the signature of the person who placed the order with the forwarder. The BMF justifies this statement by reference to section 408 para. 2 of the German Commercial Code, according to

which three copies of the waybill are to be signed by the sender (the contractual partner of the forwarder). A waybill which has not been signed by the sender of the goods is not to be accepted as valid consignment documentation.

If it not possible or reasonable for the supplier to meet these documentation requirements for deliveries of goods within the EU, it is still possible for him to adopt the standards for cases where goods are transported e.g. by way of customer confirmation of receipt. A CMR waybill is only recognised as being valid evidence as defined by sec. 17a para. 4 sentence 2 UStDV) when it is completed in full. This includes the description of the contractual partner of the sender (even if this is identical with the recipient of the goods) and the confirmation of receipt of the goods in box 24. However, according to section 37 of the circular, the difficulty or unreasonableness must be evidenced. What form this evidence must or can take is however not covered by the circular.

## Record keeping

Section 47 of the circular confirms the current position that, in the base case, the accounting records related to ICS should be held in Germany. The tax authorities can permit that these records are kept abroad, provided it can be demonstrated that keeping them in Germany is disproportionately complicated, and that the records are made available to the tax authorities on request. However, it should be noted that, strictly speaking, approval is required from the tax authorities before these records are kept outside of Germany. This approval can be withdrawn at any time. In practice, at the time of applying for VAT registration, the location of the accounting records is notified, but it is not clear whether this constitutes making a formal application. Our experience with tax offices indicates that this formal approval is rarely the subject of queries. Nevertheless, we recommend including this point in any review of the other issues contained in the circular.

## Legal certainty

The supplier continues not to be obliged to fulfil the requirements of sec. 6a para. 1 GVA beyond all possible doubt. Provided the accounting and supporting documentation requirements are fulfilled promptly and in full, then, in the case where believable information turns out later to be incorrect, the obligation to pay the VAT due on the transaction is shifted to the customer, insofar that the inaccuracy of the information was caused by the customer and this could not be known by the supplier (sec. 6a para. 4 GVA). Supporting documentation which is generally free of doubt as to its accuracy can even compensate for incorrect accounting documentation (circular section 27). However, incorrect supporting documentation regularly has as its consequence the loss of the protection of legitimate expectations.

## ECJ compatibility

It is questionable whether the narrow interpretation of the destination to be shown is compatible with EU legislation. Similarly unclear is the compatibility of the demand from the BMF for a third party to provide an authorisation to pick up goods. For example, the Hessen Tax Court (decision of 7.11.2006, appeal reference V R 65/06) has already decided, that information not listed in sec. 17a UStDV does not need to be documented (and this section does not refer to the requirement to hold such an authorisation).

## Recommended course of action

In order to avoid or minimise risks for your business, we recommend reviewing the available accounting and supporting documentation in the light of this circular and, where necessary, to adapt your internal processes accordingly. We would be pleased to assist you with these actions.

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