

VAT UPDATE: VAT- PARTIAL REVISION POSTPONED FOR ONE YEAR, BUT THERE ARE STILL CHANGES



Florian Hanslik, Senior Manager, florian.hanslik@primetax.ch
Olivia Pfister, Senior Consultant, olivia.pfister@primetax.ch

Many changes to the VAT Law have been planned and discussed for a long time. These changes should actually have become effective on 1 January 2016. Unfortunately, for various reasons this ambitious plan could not be maintained; the partial revision has been postponed until 1 January 2017. Nonetheless, important changes come into force immediately, which from the Swiss VAT perspective need to be taken into account:

1. DISTINCTION BETWEEN BUSINESS/NON-BUSINESS ACTIVITY

FUNDAMENTALS

The Federal Tax Administration (FTA) has up to now assumed basically that anyone who renders services against compensation over a longer period operates a business and therefore would be liable for VAT. A supply as defined by Art. 3 lit. c VAT Law is „the concession of a usable economic asset to a third party in expectation of a consideration“. As the supply should also be over a longer period, it is to be rendered inter alia systematically and repeatedly. An occasional, in particular only one-time performance of this activity would therefore not be sufficient to constitute subjective tax liability (cf. BGE 138 II 251). It is this Federal Court judgement which cites as examples the following indications for the existence of the longer-term rendering of a service: performance over several years, systematic approach, an activity geared to repetition, the generation of several turnovers, undertaking several similar actions using the same facility, the intensity of the activity, involvement in the market, maintaining a business and the manner of appearing before authorities.

25/75 PER CENT RULE

If it is foreseeable that in the longer term less than 25% of the revenues will consist of revenues from supplies and services and more than 75% of donations, subventions, etc., the FTA denied a business activity. This principle was defined by the

FTA in Heading 7.2 of its MWST- Info 02 "Steuerpflicht". Accordingly the FTA took the view that the longer term achievement of revenues cannot be presumed (and therefore a business activity), if it is a priori clear that with the activity in question no, or to an obviously subordinate extent, considerations for supplies and services can be earned.

FACTS

It was not in dispute that in the case in question a business activity was given. Revenues were earned over the longer term. However, the FTA believed that, based on the 25/75 per cent rule it had developed, the turnovers were in the end too low to trigger the subjective tax liability, because the consideration of the appellant from supplies and services lay below 10% of the total costs. An activity geared to the long-term earning of revenues was therefore denied by the FTA.

On the other hand the appellant took the view that this administrative practice infringed the legality principle; that no basis was given in the law. The appellant therefore went to court.

Both the Federal Administrative Court in its judgment of 15 July 2014 (A-5017/2013) and also the Federal Court in its judgment dated 19.4.2015 (2C_781/2014) have ruled on this question. Both took the view that administrative ordinances (e.g. leaflets, guidelines) should serve to interpret provisions of the law. While they offer a certain freedom of design (including that such interpretations by the authorities may include schematic solution proposals) and therefore serve uniform execution of

the law. It is, however, important that, despite this freedom of design that they enjoy, they may not include content that is contrary to the constitution or the law; they may not act as legislation.

In the view of the courts, however, the 25/75 per cent solution developed by the FTA does not satisfy the legal requirements. Nowhere does the VAT Law require a minimum amount of revenues earned from supplies and services measured against the total costs. Both the Federal Administrative Court and the Federal Court therefore rejected use of the 25/75 per cent rule. Further, the court states that in the present case this solution developed by the FTA leads to a „result inconsistent with the facts“.

Finally this very clear and precise judgment has clearly indicated the limits of the FTA: interpretations and solutions must lie within the framework of the VAT Law, to avoid undermining the legality principle. In addition, enterprises, which in the past have been struck out of the Register because of inadequate considerations, should review their entitlement to retroactive registration in order to be able to make a possible input tax claim retroactively.

2. ELECTRONIC VAT REPORTING

What is commonplace in all EU member states has since 15 September 2015 become possible in every canton. In future the following functions are available over the electronic portal of the Swiss Federal Tax Administration (SFTA):

- Submission of VAT returns
- Submission of annual reconciliation
- Submission of deadline extensions
- Overview of transactions with outstanding and already submitted returns

PROCEDURE

Advance registration in the system of SFTA SuisseTax and the opening of an individual user account are necessary in order to be able to use the functions available. For data security reasons an authorisation by the person with power of signature is required.

ADMINISTRATION OF SEVERAL VAT MANDATES

Fiduciaries can of course exercise several mandates, but would have to apply only for a single user account. Corresponding powers of attorney would, however, have to be applied for over their respective

user account, which, as soon as they have been signed by the persons represented, would be immediately reviewed by the FTA and approved.

We expect that the enabling of electronic submission will result in a simplification of the entire declaration process. Apart from that, the red tape can finally be reduced. This process is definitely to be welcomed and supported.

Kontakt

PrimeTax AG
Seestrasse 356
CH-8038 Zürich

PrimeTax AG
Hansmatt 32
CH-6370 Stans

Telefon:

Fax:

E-Mail:

PrimeTax AG
Bahnhofstrasse 11
CH-6301 Zug

PrimeTax AG
Waisenhausplatz 14
CH-3011 Bern

+41 58 252 22 00

+41 58 252 22 99

info@primetax.ch

For further information, please contact the author, Florian Hanslik, or his colleagues in the Prime Tax team:



Florian Hanslik
Senior Manager
+41 58 252 22 15



Olivia Pfister
Senior Consultant
+41 58 252 22 26