GERMANY/EU: COMPLIANCE WITH FORMAL REQUIREMENTS REMAINS OF GREAT IMPORTANCE

Entrepreneurs in Switzerland are usually confronted with a pragmatic tax administration in the area of value-added tax, which orients its actions to the meaning and purpose of a regulation rather than to purely formalistic requirements. Three recent examples from German case law show that entrepreneurs can regularly hope for less understanding in the case of formal errors as soon as they move (for VAT purposes) within the EU area. Germany offers itself as a strong trading partner for Swiss companies as an example. The countries to the east and south of the EU in particular are by no means less strict than their immediate neighbour to the north. In view of an average tax rate in the EU of over 20%, the consequences can be serious.

By Christoph Drexl

VAT "correct" invoices and right to deduct input tax

The first case presented here as an example (Federal Fiscal Court, ruling of 7 July 2022, V R 33/20) dealt with the question of retroactive invoice adjustment. It should be noted that according to European law, the right to deduct input tax arises at the time the service is rendered and in the amount of the tax owed - that the tax has also been paid, is not decisive (unlike in Switzerland). However, the prerequisite for exercising the right to deduct input tax is the possession of a proper invoice.

According to the German tax authorities and case law, an invoice can only be corrected retrospectively if the document to be corrected has five essential characteristics (issuer of the invoice, recipient of the service, description of the service, remuneration and the amount paid). The invoice must contain a separate value-added tax (VAT). If one of these elements is missing, the invoice does not qualify as an invoice for VAT purposes. Until now, it was not detrimental to the qualification as an invoice for VAT purposes if the content of the features was incorrect (the invoice was then not correct, but at least represented an invoice document that could also be corrected retroactively). In the case decided here, the supplying party mistakenly came to the conclusion that the recipient of the service was resident abroad and that the service was therefore not subject to VAT in Germany. Accordingly, it invoiced with "VAT 0%". In the course of a tax audit, it later turned out that the recipient of the service was resident in Germany and should have been invoiced with German VAT.

In the opinion of the court, however, the document was so faulty due to the lack of separately stated tax that it no longer constituted an invoice and the correction had no retroactive effect on the input tax deduction.

Proof of the conditions for a tax-exempt intra-Community supply I

In an older ruling (Federal Fiscal Court, ruling of 22 July 2015, V R 23/14), the Federal Fiscal Court (Bundesfinanzhof, BFH) deals with the conditions under which it is possible to prove that goods in the context of an exempt intra-Community supply have actually left the territory of one Member State and entered the territory of another Member State. And again, the issue was the question of a correct or sufficient determination of place.

In the underlying case, the customer had confirmed this in writing to the supplier upon collection of the goods:
"The vehicle will be transported by me to the destination country Spain on ...". However, this was not sufficiently precise for the German tax authorities because the specific (!) destination was not named and could not be equated with the company address of the buyer without further ado.

Once again, the BFH agrees with the opinion of the administration - and thus denies the tax exemption for the intra-Community supply. And again, the BFH emphasises that the question of good faith protection did not arise in the present case, as formal completeness was lacking (protection could be granted to all goods).

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Proof of the conditions of a tax-exempt intra-Community supply II In

the last example briefly presented here (BFH, ruling of 19 March 2015, V R 14/14), the BFH also deals with the conditions for proving the conditions of intra-Community supplies. And once again, the decision is to the disadvantage of the taxable person.

The issue in dispute was whether the plaintiff had succeeded in proving that all the conditions for an intra-Community supply had been met. In particular, the question was whether a witness statement was suitable as evidence to confirm the existence of the conditions for intra-Community deliveries at the time of delivery. The lower court denied this and considered the evidence not to have been provided.

The BFH shares this view. The legislator has determined that the proof is to be provided by corresponding bookkeeping and documentary evidence. Only in blatantly exceptional cases, in which formal proof cannot be provided or cannot reasonably be provided, does the principle of proportionality allow for a reduction of the tax burden.

The BFH confirmed the refusal of tax exemption for the intra- community supply in question. Since such an exceptional case was not recognised in the present case, the BFH confirmed the refusal of tax exemption for the intra- community supply in question.

Conclusion

The examples make it clear that the German tax authorities (but also tax authorities in other EU member states) place high demands on entrepreneurs in terms of formal requirements. The
The "good" news for entrepreneurs is that they can (but also must) take countermeasures, because the formal requirements are regularly clearly specified in the relevant laws. It is therefore advisable for entrepreneurs who trade in the EU and provide or receive services to establish internal processes, controls and/or checklists at an early stage to ensure that, for example, incoming invoices are (also) checked for formal correctness and that all necessary proof is available in the prescribed form for their own, possibly tax-exempt, services.

AUTHOR
Christoph Drexl is a partner at Primetax AG. He specialises in the area of value added tax and advises clients on complex issues of national and international VAT law.

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