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VAT

NEWSLETTER

■ **Supplies of mobile phones and integrated circuits subject to the reverse charge scheme in Germany**

As of 1 July 2011, domestic supplies of mobile phones and integrated circuits became subject to the reverse charge scheme in Germany. Although the new law setting out the underlying legal basis for the change was published some time ago, there has, nevertheless, been a great deal of uncertainty concerning the interpretation of the new provision. Therefore, the administrative circular of the German Ministry of Finance, released on 24 June 2011 dealing with the provision, has met with great interest.

**Supplies of mobile phones and integrated circuits subject to reverse charge in Germany**

Like the United Kingdom, Germany applied to the European Commission for the application of the reverse charge scheme to domestic supplies of mobile phones and integrated circuits in order to prevent VAT fraud. In its decision of 22 November 2010, the Council authorized, not only Germany, but also Austria and Italy, to apply the reverse charge scheme for domestic supplies of mobile phones and integrated circuits.

Due to the bill passed on 16 June 2011, ("Sechstes Gesetz zur Änderung von Verbrauchsteuergesetzen"), a new no. 10 was added to Sec. 13b para 2 of the German VAT Act:

*"10. Supplies of mobile phones, as well as of integrated circuits, prior to their assembly as an item suitable for retail sale: in the case where the total amount to be invoiced during one unique economic process exceeds the threshold of EUR 5,000; subsequent decreases of the invoiced amount are disregarded."*

Although the wording of the new provision has already been published for some time, there has been great uncertainty about its interpretation. On 24 June 2011 the long-awaited administrative circular revealing the view of the German Ministry of Finance and amending the German VAT Administrative Circular was finally been released.

**Definition of mobile phones**

According to the definition of the German Ministry of Finance, mobile phones are appliances produced or prepared for the use via a mobile communications network and on certain frequencies. It is irrelevant whether these appliances could

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also be used for other purposes, e.g. smart phones. Excluded from the definition are computers, like tablet PCs, which could be used for telephoning via the internet but not via mobile communications networks. Product bundles sold at a unique price fall within the definition when the supply of the mobile phone could be considered as the main component of the bundle. Even the subsidized supply of mobile phones carried out in connection with the conclusion of a mobile communications contract should fall under the reverse charge scheme if supplied to business customers.

**Definition of integrated circuits**

Great Britain has limited the application of the reverse charge scheme for the supply of integrated circuits to goods falling under customs tariff number 8542 3190 00, a regulation which, in practice, is easy to handle. Unfortunately, Germany did not adopt this regulation by limiting the application by HS-codes. Rather, the German Ministry of Finance has implemented the following definition of integrated circuits, which is afflicted with some uncertainties:

*"An integrated circuit is an electronic circuit (electronic device with wire connection) manufactured on a substrate of semiconductor material (so-called chip)."*

In other words, an integrated circuit is an electronic circuit manufactured by the patterned diffusion of trace elements

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into the surface of a thin substrate of semiconductor material. However, integrated circuits are also defined as electronic circuits which are small in size that consist of a large number of passive components and semiconductor devices. This would not only cover monolithic integrated circuits but also hybrid integrated circuits.

This definition is much broader than the UK regulation. It covers not only micro-processors and CPU's, but, for example, also memories. It seems that all goods falling under customs tariff number 8542 "Electronic integrated circuits" are covered by the new provision. However, some questions remain unanswered. It is unclear, whether, for example, the following products fall under the new regulation:

- boards containing integrated circuits as well as other components
- boards containing integrated circuits (chip in board)
- memory cards with integrated circuits (smart cards)
- components containing multiple integrated circuits
- assembled electronic circuits

Another prerequisite for the application of the reverse charge scheme to integrated circuits is that they are not yet assembled as an item suitable for retail sale. How the goods are used upon supply is irrelevant.

#### Threshold of EUR 5,000

The reverse charge scheme should be applied only in the case where the total amount invoiced during one unique economic process exceeds the threshold of EUR 5,000. By mentioning assignments, purchase orders and master agreements as examples within its administrative circular, it is clear that the German Ministry of Finance considers the scope of a unique economic process to be quite broad. Decisive with

regard to the threshold is, therefore, not the amount shown on a single invoice but the total order value. In cases where master agreements are concluded for a longer time period, it is the overall amount of all supplies planned for this time period which is decisive. Single orders, however, must not be added together. Even subsequent increases in the invoiced amount, e.g. in the case of reorders, have to be disregarded.

This is consistent with the fact that subsequent decreases in the invoiced amount also have to be disregarded. The question of whether the threshold is exceeded or not, depends only on the overall order value. Subsequent credit notes or invoices have to be treated like the initial invoice.

#### Simplification provision

According to the German Ministry of Finance, the simplification provision, as defined in Sec. 13b.1 para 23 of the German VAT Administrative Circular, also applies to the supply of mobile phones and integrated circuits. Where the parties are unsure about whether the reverse charge scheme applies, they can agree upon its application on the condition that the recipient reports the supply with its correct taxable amount. In most cases, the recipient will not be in a position to prove the reporting of the correct amount. Therefore, the supplier bears a certain risk in this regard.

#### Application provision

The new regulation applies to supplies carried out after 30 June 2011. In the case where prepayments have been received and invoices have been issued prior to 1 July 2011 for supplies after 30 June 2011, a correction would, in general, be necessary. According to the German Ministry of Finance, only for prepayments received prior to 1 July 2011, a correction is not necessary.

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