

April 13 2022

New VAT stipulations for carriers in connection with import and export of goods to and from Germany

Arnecke Sibeth Dabelstein | Aviation - Germany



CARSTEN
VYVERS

- › [Introduction](#)
- › [ECJ case](#)
- › [Between 2017 and 2022](#)
- › [Comment](#)

Introduction

Since 1 January 2022, the scope of application of article 146(1)(e) of the EU Value Added Tax System Directive (VAT Directive) and of section 4(3) of the Value Added Tax Act, which is based on article 146(1)(e) of the VAT Directive, has been severely restricted.⁽¹⁾

A shipment from Germany to third countries is only exempt from VAT in a business relationship between the consignor and the first forwarder or the shipper and the main carrier. This is usually the contractual relationship between the seller or buyer of the goods to be transported and its service provider (eg, principal or contractor).

Subcontractors or sub-subcontractors are no longer eligible for this type of VAT exemption. According to the European Court of Justice,⁽²⁾ there is no direct connection between the underlying commercial transaction in relation to the transported goods (purchase or sale) and the transport service to be performed by the other companies involved in the logistics chain:

Article 146(1)(e) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the exemption laid down in that provision does not apply to a supply of services, such as that at issue in the main proceedings, relating to a transaction consisting in the transport of goods to a third country, where those services are not provided directly to the consignor or the consignee of those goods.

Article 146(1)(e) of the VAT Directive must be interpreted as meaning that the exemption provided for in that provision does not apply to a service such as that at issue in the main proceedings, concerning a transaction in the form of the transport of goods to a third country, where the services in question are not supplied directly to the consignor or consignee of those goods.

ECJ case

A shipper placed an order with a forwarder to transport goods from Latvia to Belarus. The forwarder instructed a subcontractor to transport the goods. The subcontractor had neither a licence to provide transport services nor its own vehicle, so used a vehicle leased from the forwarding company for the transport. The subcontractor invoiced its services to the forwarding company without VAT.

The local tax authorities demanded payment of VAT from the subcontractor after a tax audit and the subcontractor took legal action against the claim. Legal action was dismissed in two instances, but the subcontractor filed a further appeal. The case was referred to the ECJ.

The ECJ determined that the invoicing without VAT was incorrect. Without a proper licence, the subcontractor could not carry out any transport services and, therefore, could not apply for an exemption from VAT. The ECJ also stated that tax exemption is an exception, and exceptions must be interpreted narrowly. It follows from the term "direct connection" that only the first (main) carrier can apply a VAT exemption. The subcontractor had no direct contractual relationship with the seller. Therefore, it was not directly connected to the seller and could not apply the VAT exemption (anymore).

Between 2017 and 2022

At first, the German Ministry for Finance completely ignored the ECJ ruling. There was no reaction for roughly two-and-a-half years. Eventually, the Ministry decided not to apply the ECJ ruling to open cases, if the transport was performed before 1 July 2020.⁽³⁾ This deadline was first changed to 1 January 2021⁽⁴⁾ and later to 1 January 2022.⁽⁵⁾

Comment

The risk for German carriers, as well as German shippers, has increased significantly. It is expected that the tax authorities will start VAT audits over the course of the next year that will focus on cross-border-transactions from Germany to third-party countries. Additional payment claims from service providers are possible; however, the applicable deadlines have to be observed.

German carriers should adapt their contract documents and document as precisely as possible which goods they are transporting for their principals. Whether the goods are owned by the shipper or by a third party is an important distinction for the assessment of whether the VAT exemption can be claimed.

In the case of a so-called "mixed transport" (ie, when a shipper entrusts both its own and third-party goods to the service provider for transport to the same recipient) the entire transport may be treated as subject to VAT for reasons of simplification.

In the event of incorrect handling, documents or invoicing, there lies the risk of considerable additional tax demands from the tax authorities. These demands are 19% on the part of the service provider and the withdrawal of the input tax deduction in the corresponding amount on the part of the shipper.

As these new stipulations apply to most modes of transportation (eg, truck, train and aircraft) the situation for foreign airlines offering transports out of Germany is especially challenging. Depending on the sales organisation (either the use of General Sales and Service

Agent or working through an own permanent establishment in Germany, known as a fixed branch) and the concrete services performed (which can be limited to or more than administrative tasks for the main service of transportation) the applicable VAT stipulations might also differ.

For further information on this topic please contact [Carsten Vyvers](mailto:c.vyvers@asd-law.com) at Arnecke Sibeth Dabelstein by telephone (+49 69 97 98 85 0) or email (c.vyvers@asd-law.com). The Arnecke Sibeth Dabelstein website can be accessed at www.asd-law.com.

Endnotes

- (1) See BMF letters of 14 October 2020, III C 3 - S 7156/19/10002:002 and 27 September 2021, III C 3 - S 7156/19/10002:006.
- (2) ECJ, judgment of 29 June 2017, C-288/16.
- (3) BMF letter dated 6 February 2020, III C 3 - S 7156/19/10002 :001.
- (4) BMF letter dated 2 June 2020, III C 3 - S 7156/19/10002 :002.
- (5) BMF letter dated 14 October 2020 - III C 3 - S 7156/19/10002 :002.