INTERNATIONAL VAT ASSOCIATION

Neuilly-sur-Seine, 15 February 2017

European Commission
DG TAXUD
Unit C3 - Infractions Unit
Brussels

For the attention of Mr Patrice Pillet

Dear Patrice,

We are writing in response to the Commission's Pre-Closure letter of January 17th outlining the decision to close the infringement proceedings against Germany in respect of Formal Notice Art.258 TFEU - Reference 20162018 – "VAT refund to taxable persons not established in Germany".

We note the comments outlined in your January 17th communication, and would like to take the opportunity to provide you with more detail and background as to Germany's existing practice. You indicate that our original complaint is only about Article 20; we think that there is a misunderstanding here as reference only to Article 20 manifestly understates the extent to which the practice in Germany contravenes Council Directive 2008/9/EC (the "Directive") and EU law in general.

The original complaint was filed in October 2012. After a period of investigation which lasted over 3 years, the infraction unit of the Commission launched formal proceedings against Germany in July 2016. We were advised of the decision to launch formal proceedings against Germany in September 2016.

In your letter of January 17th 2017 you advise that in response to these formal proceedings, Germany maintains its legal position in relation to Article 20 and has advised you of a change in administrative practice (which took place in November 2014). The infraction unit appear to be satisfied with the latter position outlined by Germany when indicating that there seems to be (in the unit's view) no grounds to continue the formal proceedings.

The change in administrative practice outlined by Germany however, changes nothing from the taxpayer's perspective and in our view the Commission should be prepared to pursue this issue further.

It is difficult to understand why Germany are only now advising the Commission about a change in practice that was implemented in 2014 particularly as the investigation phase of the complaint procedure would have allowed a number of opportunities for Germany to make this known.

In any event, we cannot agree with the Commissions' present view that this administrative practice introduced by Germany is an acceptable approach to bring Germany's practices (in conjunction with their legal position re: Article 20) into line with the Directive. We continue to assert our position that Germany's rejection of VAT Refund applications as "not submitted" where the German authorities subjectively determine as "meaningless", the information provided in the application where Code 10 –"Other" is selected, is, in our view, a clear and systematic abuse of Article 15(1) of the Directive which cannot be allowed to continue.

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Original Complaint

It is not yet evident the extent to which consideration has been given to other aspects of the Directive (other than Article 20) in assessing this part of the original complaint and no detailed findings have yet been provided by the Commission detailing its assessment.

The original complaint was in respect of systematic rejections by the German authorities of refund applications where Code 10 of Article 9(1) of Council Directive is selected.

The complaint in relation to Code 10 –"Other" was made on the basis that Germany were rejecting as "not submitted", invoices which they felt had inadequate (or "meaningless") entries provided in the free text box accompanying Code 10 - "Other" pursuant to Article 9(1) of the Directive. In interpreting domestic case law, they have argued that in the cases of Article 9(1) all information required in order for a decision to be made on the refund application needed to be present in the refund application. In the case of Code 10 – "Other" this meant that entries which did not meet the criteria were to be deemed as "not submitted" and were to be rejected pursuant to Article 15 (1). Germany however, cannot look to domestic legislation and case law alone and must consider the specific legislation (Council Directive 2008/9/EC) on which the VAT refund process is based.

In our complaint we had quoted specific examples where the terms "Goods" and ProFees" had been entered to satisfy the requirement for Article 9 (1) where Code 10 – "Other" was selected. These entries were determined by Germany to be meaningless and effectively Germany deems the free text box to be empty. As a result they consider that the requirements for Article 9 (1) were not satisfied and rejected the invoices associated with these entries as "not submitted" under Article 15 (1) para 2 of the Directive.

While these ("Goods" and "ProFees") are examples the Association's members have significant evidence of, the complaint extends to any potential other (or future) rejections of applications (or any part thereof) as "not submitted", on the basis that Germany subjectively determines that the information provided in the free text box accompanying Code 10 – "Other", is inadequate.

The complaint requires that Germany be precluded from any future application of this practice, whether or not they have reviewed the application and requested additional information prior to the expiry of the preclusive deadline.

The assessment of the complaint therefore should, in our view, involve looking at questions such as, but not limited to:

i) whether there is a threshold level of information required under Article 9(1) where Code 10 - "Other" is selected, as this cannot be assumed from the Directive text alone.

ii) whether it was the Commission's intention by reference to "application" in Article 15(1) para 2 of the Directive text, that a Member State of establishment could deem part of an application as "submitted" and a different part of the same application as "not submitted" depending on the entries provided by the applicant where Code 10 –"Other" is selected. Such a concept of part of a claim is specifically contemplated by Article 20 but no such reference is seen in Article 15(1) para 2 of the Directive. Germany's current practice interprets the Directive as such.

iii) whether a Member State of refund should be allowed to render Article 20 otiose by demanding that sufficient information be provided in order to allow a decision on the

refund application to be made based only on the information provided in the application by the preclusive deadline date

iv) whether Member States are free to interpret differently, what is intended by Article 9(1) in conjunction with Article 15(1) para 2 of the Directive to the extent that they result in materially different outcomes for taxpayers.

v) whether the use of terms such as "Goods" or "ProFees" in conjunction with Code 10 – "Other" specifically have meaning in terms of the requirement to satisfy Article 9(1) of the Directive.

Germany's Practice is against Council Directive 2008/9/EC (the "Directive") for the following reasons:

i) Neither Article 9 (1) nor Article15 (1) of the Directive make any special requirements as to the extent and scope of the indication that is required for the underlying products and services acquired when Code 10 – "Other" is used. Neither the wording of the Directive or its intention can produce a different interpretation.

ii) Contrary to the viewpoint held by Germany on this issue, it is not true that the terms "ProFees" and "Goods" have no content or meaning. In fact, the terms "ProFees" and "Goods" have a "substantial" meaning in the context provided. One has to consider that Code 10 is only used by the applicant if codes 1 to 9 are not applicable. Therefore, the terms "Goods" and "ProFees" in connection with code 10 imply that these goods and services could not be classified under codes 1 to 9 (e.g. no fuel, no food, drink or restaurant services). This is more specific than Germany assumes and cannot therefore be deemed to be meaningless.

iii) Article 9 (1) of the Directive states *'In the refund application, the nature of goods and services shall be described by the following codes'*. This is followed by codes 1-10 inclusive, thereby giving each code equal status and by selecting any of the codes 1-10 inclusive, the applicant satisfies the requirement of Article 9 (1) ie to select a code from the list provided.

Rather than indicating all purchases as 'Other', where codes 1-9 are not applicable, the Directive requires that the goods and services are 'indicated' if code 10 is chosen. The Commission in drafting Article 9 (1) para 2 therefore only intended that all purchases not covered under codes 1-9 were not merely described as 'Other' but that the purchases be indicated. The choice of code 10 itself therefore, satisfies the requirement of Article 9 (1) to select a code from the list provided.

Further, the wording of Article 9 of the Directive limits itself to declaring that the nature of the goods and services acquired must be indicated. However, Article 9 of the Directive does not require any extent of the indication required. Had any particular grade of indication been required Article 9 would have read ... the nature of goods and services 'and their intended use,' **or** 'accurately and comprehensibly shall be described by the following codes'

iv) The sub-codes published by the Commission are a further classification of the codes 1 to 10 set out in Article 9 of the Directive. These sub-codes permit a differentiated classification of the goods and services acquired and could be required by the respective Member States of refund as an additional indication for a valid application.

However, Germany has dispensed with this requirement and considers refund applications valid even without the use of the relevant sub-code. Accordingly, Germany agrees in principle to accept less detailed information than could be made available had they elected to require sub-codes to be provided.

In our view it is unreasonable for Germany to adopt the position that a certain threshold level of information is required for a valid application where code 10 – "Other" is selected as Germany specifically decided not to require the use of sub-codes.

v) Even within these sub-codes however the terms *goods* and *services* are used to specify the acquired services and goods",eg. 10.14 "**Goods** purchased for resale other than 1.6" or 10.15 "**Services** purchased for resale other than 6.6 and 7.4". This illustrates that from the Directive perspective the terms "Goods" and "ProFees" can be used as a sufficient indication for the acquired goods and services

vi) Pursuant to Article 20 of the Directive, the Member State of refund may request additional information from the applicant or from the Member State of establishment if the Member State of refund considers that it does not have all the relevant information on which to make a decision in respect of the whole or part of the refund application.

This provision would be otiose if only such applications which contained all decision-relevant information (as maintained by Germany) had to be considered as valid pursuant to Article 15 (1) para 2 of the Directive. In such a case, Article 20 would not be applied at all because there would be no circumstances under which the Member State of refund would have to request information.

However, this cannot have been the intention of the Commission because the Member State of refund's option to request additional information in accordance with Article 20 of the Directive was explicitly included as a new provision in the Directive. There was no comparable provision in the 8th VAT Directive. Therefore, it should be assumed that the Commission (and all of the Member states who voted unanimously for the particular wording) considered that there was a need for such provision in practice and that it should have its scope of application.

Article 20 was introduced to protect the taxpayer due to the problems which occurred under the refund procedure as set out in the 8th Directive. Although some Member States operated similar process under the 8th Directive, the European Commission thought that this issue was too important not to be specifically provided for within the Directive to achieve its objective to protect the taxpayer.

The current practice by Germany is against the spirit of Article 20 (i.e. to refuse applications under Article 15 without any request for additional information where they believe they do not have all the information on which to base a decision.) and therefore violates, in our view, EU law.

Germany's position in light of relevant legislation

Germany maintains its position that there is no obligation for Member States to use Article 20 to request missing or additional information. This position is taken directly from the Directive text which states:

*"Where the Member State of refund considers that it does not have all the relevant information on which to make a decision in respect of the whole or part of the refund application, it **may** request, by electronic means, additional information"*

This text however, cannot be read in isolation and must be viewed in the spirit and context of the entire Directive (in particular Article 15 (1)) together with the benefits that the new Directive was intended to bring.

Application of CJEU rulings – (Yaesu BV case C-433/08)

If we look at the CJEU judgement in the Yaesu BV case, it is suggested that according to the settled case law (of the CJEU) in interpreting a provision of EU law, it is necessary to consider not only its wording (of the legislation) but also the context in which it occurs and the objectives pursued by the rules of which it is part. Also it should be noted that the aim pursued by any Directive, cannot be attained unless the terms used are attributed the same meaning and scope in all the Member States. The following quote further emphasises this principle:

"According to settled case-law, it follows from the need for uniform application of Community law and from the principle of equal treatment that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purposes of determining its meaning and scope must as a general rule be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the objective pursued by the legislation in question." (Emphasis added)

Interpretation in relation to the existing complaint

In providing (such as the case in Article 9(1) of the Refund Directive) a model for VAT refund applications, the aims of the Directive cannot be attained unless the terms used in that model are attributed the same meaning and scope in all the Member States, in a way that does not go beyond the requirements specifically provided for in the model.

To allow a Member State (Germany) to impose on a taxable person requirements other than those provided for in such a model (eg. the requirement that the taxable person provide such a level of information so as to allow a decision to be made, or to apply a threshold level of information which cannot reasonably be known to the taxpayer in advance) would be a requirement which would be incompatible with the objectives pursued by the Directive.

Germany's legal position should then be tested against these principles.

Germany holds the view, that Article 15(1) para 2 of the Directive requires a comprehensive and detailed indication of the goods and services acquired to be provided where Code 10 – "Other" is selected and that only a detailed indication enables the Member State of refund to decide on the refund application. Accordingly, the refund application is invalid if it does not contain all decision-relevant information.

This interpretation which is applied by, we understand, the German authorities to Article 15(1) para 2 of the Directive contradicts, however, not only the clear wording of the Directive but would also make Article 20 of the Directive otiose.

Pursuant to Article 20 of the Directive, the Member State of refund may request additional information from the applicant or from the Member State of establishment if the Member State of refund considers that it does not have all the relevant information on which to make a decision in respect of the whole or part of the refund application. This provision would be otiose if only such applications which contained all decision-relevant information had to be considered as valid pursuant to Article 15 (1) para 2 of the Directive.

In such cases, Article 20 would never be applied at all because there would be no circumstances under which the Member State of refund would have to request information.

However, this cannot have been the intention of the Commission in the drafting of Council Directive 2008/9/EC because the Member State of refund's option to request additional information in accordance with Article 20 of the Directive was explicitly included as a new provision in the Directive.

It follows therefore that if the Member State of refund (Germany in this instance) believes that it does not have all of the information to make a decision in respect of all or part of an application, then it should invoke Article 20 to request additional information to allow the decision to be made.

It should not in any circumstances be permitted to reject the application (or part thereof) as "not submitted" based on the information provided being insufficient when the applicant has given an indication in the box provided when Code 10 - "Other" is selected.

No other Member State, we understand, interprets Articles 9 (1) or 15 (1) para 2 of the Directive in the same way as Germany has done and continues to do. Neither do they impose any additional requirements on the Taxpayer that go beyond the Directive in terms of achieving its aims and objectives.

Effect of the updated administrative practice (Null effect)

The effect of Germany's change in administrative practice (in 2014) is in any event, of little effect. In reality a very significant proportion of the claims filed under the Refund Directive are made in the last days and weeks leading up to the September Deadline.

The Administrative practice in Germany to review the claim and to outline what information they deem to be missing or inadequate will not therefore apply to any of these claims, as simply no time will exist to do so prior to the preclusive deadline.

For any such claims therefore the same practice applies today as applied at the time the original complaint was filed ie. that the invoices in the claim will be rejected as "not submitted" as Germany can deem the information provided in Code 10 - "Other" as inadequate and the preclusive deadline will have passed.

The fact that Germany may have a reduced number of rejections for this reason howsoever arising is not reason enough in our opinion for the proceedings to cease. Any instance of a rejection of this nature should in our view be considered as contrary to EU law and Germany should be informed that it must stopusing this practice under similar circumstances.

Legal Certainty

Consideration needs to be given to the effects of the current practice in Germany with respect to taxpayers' legal certainty (or lack thereof) as regards the applications they file. Germany are of the view that they have the right to reject as not submitted any invoices submitted under Code 10 – "Other", where they deem as inadequate the entries provided in the free text box provided. In addition they enforce the preclusive deadline in relation to these entries.

As a significant proportion of these claims will be filed in the final days before the applicable September deadline, no practical opportunity is afforded to the taxpayer to amend the entries in the event that Germany deem the entries used as inadequate, once the deadline has passed (as the application is treated as not-submitted).

No guidance is provided anywhere in the Directive text or national legislation or any of the portals of the Member States' of establishment as to what threshold level of description Germany will

accept as adequate to deem the invoices in the application as "submitted". Given the infinite number of descriptions that could be used to indicate the nature of goods and/or services for any given expenditure, the taxpayer has no way of knowing if the entries used will be acceptable until it is too late.

Further there is no certainty that all of the assessors within the administrative function of the German Tax authorities will apply exactly the same 'threshold' (as to what is an 'adequate' description) to the entries provided. This goes against the spirit of the Directive which was intended to reduce the burden on administrations and taxpayers alike.

Where then is the Taxpayer to turn for guidance in terms of appropriate entries to provide in the applications filed for refunds of VAT in Germany and how can legal certainty be assured over the entries it subsequently provides given the lengths that Germany goes to, to deny the taxpayer of their basic rights to a VAT Refund.

The only option left to the taxpayer would be to confirm in advance of filing of the application with the German Tax Authority an appropriate description for all invoices where it intended to use Code 10 – "Other". This would render it practically impossible for taxpayers generally to comply, and defeats the objective of the new regime as set out in Directive 2008/9/EC to simplify and render more robust the whole of the VAT refund procedure.

The imposition therefore by Germany of the additional requirement to provide a sufficient description of the expenditure over and above what the Directive (and other Member States) requires is incompatible with the aims and objectives of the Directive.

Further without legal certainty in this regard, the imposition by Germany of the additional requirement on taxpayers to describe to an unknown level of detail, the nature of goods/services where Code 10 – "Other" is selected, goes against the principle of neutrality and proportionality.

Entries such as "Goods" and "ProFees" are not « inadequate or meaningless »

Contrary to the legal view held by the German Tax Authority, our view is that the use of terms such as "Goods" / "ProFees" are not meaningless (so as to render them as not provided at all) and satisfy the requirement of Article 9(1) of the Directive.

This view was also upheld by the domestic court in Cologne in its ruling in the case Ref.: 2 K 1514/13 Italcom S.r.l. - Claimant v Federal Central Tax Office when reviewing the facts of the case in conjunction with both domestic and applicable European legislation (Refund Directive).

In the opinion of the court, by entering the information "Goods", the applicant explained that the invoice was for the supply of goods. In doing so (indicating the supply of Goods), it precluded services as the subject matter of the invoice. It stated that such an explanation is not "meaningless" and does have a minimum explanatory value of its own. It explained that the invoice was for "other goods". In terms of the requirement to indicate the "nature of the goods and services supplied", such an explanation does have additional explanatory value.

The court further stated that the same applies to the entry "ProfFees". Pointing out that the explanation provided can be understood by interpretation to mean that the claimant acquired a service. Again the information which was entered was not meaningless in terms of the requirement to indicate the nature of the goods and services supplied and, at the very least it has – albeit indirectly – described the subject matter of the invoice as a service.

The fact that the information entered by the applicant in the example given is very minimalistic and may give rise to queries cannot render the entries invalid. Invalidity depends on there being no explanation at all or no additional explanatory value. The court did not find that such was the case in the example provided (ie Goods / ProFees).

The court compared these entries with an application that merely contains the entry Code 10 – "Other" without any description of the goods or services. If Code 10 alone is entered, the subject matter of the invoice would remain completely unknown. If, at the very least, "goods" or "service" is entered under "Code 10 – Other", that provides more information on the subject matter of the invoice than no entry.

The court further found that while such entries would likely give rise to queries, that this was not relevant, as an application does not have to be ripe for decision in order to be valid. Queries and rectifications the court stated, do not necessarily undermine the validity of the application. The Directive itself assumes (Article 20) that valid applications may give rise to queries. This is corroborated by the fact that an entry on the application which is materially and manifestly wrong may give rise to queries, but is legally valid.

In assessing this issue, the court indicated that it should be acknowledged that the explanation of the "nature" of the goods/services is not a decisive factor in terms of explanatory value. This follows they stated, from the Directive itself.

Importantly the court pointed out that not all the language versions of the Directive require the nature of the goods "and" services supplied to be indicated when code 10 is used, the court suggested that "and" was not a decisive factor for the legislature when editing the attributes of the requirement.

Clarifying its point the court referred to a number of language versions of the second para of Article 9(1) of the Directive which requires an indication of the nature of the goods "or" service. Examples of these are the Spanish, Czech and Estonian versions of the second para of Article 9(1) of the Directive.

It is very difficult therefore to disagree with the view that "and" was therefore not a decisive factor for the legislature when editing the attributes of the requirement. Insofar as the legislature also used the word "or", then it suffices that if Code 10 is described using the word "goods" or "service" as, in terms of the requirement to indicate "the nature of the goods *or* services supplied", the indication "goods" or "service" does have an explanatory value of its own.

In its detailed assessment of the issue, the court pointed to the context of the historical development of the Directive which it said was essentially only intended to reform the procedural aspects of the input tax refund procedure by redefining the deadlines and enabling applications to be filed online rather than in the previous paper form (see the preamble to the Directive, especially recital no. 2). The Directive was not intended to reform the substantive aspects of the Eighth VAT Directive. The procedure was merely to be simplified and modernised (see third clause of recital no. 2 of the 2008/9/EC Directive).

Referring to the previous directive (Eighth VAT Directive), the court stated *"merely provided in the attachment to the application for the "nature of the goods or service". If, in the attachment to the Eighth Directive application form for example, the business entered "purchase of goods", that would be seen as an explanation with an explanatory value of its own".*

"The Refund Directive makes provision in the online procedure for codes to be used in the electronic data set attached to the application for the purposes of simplification and improved clarity. Based on the spirit and purpose of the Refund Directive, this should simplify the procedure rather than increasing the requirements governing the entries. The wording originally used in the Eighth Directive is adopted in the second clause of Article 9(1) of the Eleventh Directive, which requires the nature of the goods and services to be indicated under code 10. Here again, based on the spirit and purpose of the Refund Directive, this is not intended to increase substantive requirements. It is simply an editorial, materially insignificant, difference compared to the wording of the Eighth Directive. That being so, several language

versions of the Refund Directive still refer to the "nature of the goods or service", as explained previously."

Germany dispensed with the requirement for Sub-codes

Unlike the majority of the Member States, Germany does not require applicants to enter sub-codes within the meaning of Article 9(2) of the Directive.

Article 9(2) of the Directive grants the individual Member States the facility to require that applicants provide additional electronic coded information as regards each code set out in Article 9(1).This allows additional information on the subject matter of the invoice to be obtained from the application. It also provides, in particular, for more details on the subject matter of invoices listed under Code "10 – Other".

Germany however does not require these sub-codes to be entered, and in doing so accepts in general a less detailed description of the goods or service, that may otherwise be provided. In light of this, the explanation ("Goods" or "ProFees") would appear to suffice in order for the attachment to the application to be valid.

Remaining issues from our original complaint

A number of other issues which were included in the original complaint letter from the IVA of October 2012 and our note to the Commission from July 2013 have still not been addressed.

In particular we would refer to the issue of images subject to Article 10 of the Refund Directive which were (or could) not be provided at the time of submission.

Our letter to your offices dated June 20th 2014 (attn. Mme Wieme) outlined that we had not received any update on this issue (and others) and as a result that we considered these items still "open". We maintain this position to date in respect of the issue of images required under Article 10 of the Directive, ie that this complaint is still pending.

The complaint in respect of this issue is that Article 15(1) of the Directive specifically omits Article 10 as a requirement for a claim to be validly submitted. Despite this Germany continues to reject claims on the basis that Invoice images are required to be submitted electronically to be received by Germany by the preclusive deadline date.

If the European legislator had intended this to be the case then Article 15 (1) would have read

"The refund application shall be submitted to the Member State of establishment at the latest on 30 September of the calendar year following the refund period. The application shall be considered submitted only if the applicant has filled in all the information required under Articles 8, 9 and 11". This clause shall also apply to the extent that any Member state has made it a requirement to provide invoice images pursuant to Article 10"or some other such language to the same effect.

Attention needs to be drawn to the historical failures of the Portals of the Member States in the initial implementation of the Refund Directive.

In addition there is the ongoing limitation of 5MB that imposes restrictions preventing the transmission of all invoice images exceeding the threshold in Article 10 which has not been addressed satisfactorily at either national or EU levels.

Of those Member States that have invoked Article 10 of the Directive, Germany is the only Member State to refuse an application (or part thereof) under Article 15(1) in circumstances where invoice images subject to Article 10 are not provided at the time the application is filed.

A different interpretation (or practice) of Article 10 in conjunction with Article 15(1) by Germany, to that of other Member States, is precluded. We refer you to the points previously outlined above in relation to the CJEU's interpretation of EU legislation in the Yaesu BV case.

Request for continuation of proceedings

Given the significance of the risks to taxpayers in the event Germany is allowed to continue its current practice, we would respectfully request a continuation of the infringement proceedings in respect of Germany's rejection as "not submitted" any invoices which it determines not to have an adequate level of indication where Code 10 – "Other" is selected.

In addition we would request confirmation that the practice to reject as "not submitted" any invoices which do not have an image included in the application, is the subject of open and ongoing investigation by the infringement unit of the Commission. Further an escalation of this issue is urgently required given the number of cases that are currently before the highest domestic court in Germany. If these are allowed to be heard, then future action by the Commission may not help the taxpayers affected in these cases.

Given the significance of these issues we would appreciate a meeting to discuss the details of both practices in Germany and to allow us to clearly indicate how Germany applies this rule in practice.

We continue to assert that any future rejections of this nature by Germany and their current interpretation of the Directive, to deny Taxpayers their right to VAT Refunds, are to be precluded. If the only mechanism capable of having Germany discontinue their existing practice is a referral to the CJEU as part of the infraction proceedings, then we request that the proceedings are expedited to this end before more Taxpayers VAT Refunds are denied.

We look forward to your response

Yours sincerely

Stephen Dale
International VAT Association

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