

Note for companies receiving goods from third countries with the delivery term DDP

To Whom it May Concern,

You or your supplier have referred in the order/commercial invoice to the delivery term (Incoterms®) "DDP – Delivered Duty Paid" and requested import customs clearance in accordance with the specifications of this clause.

With regard to the delivery term DDP, there is often uncertainty about the exact content of this clause and its correct application in practice. In this letter, we would therefore like to set out some of the practical difficulties in implementing this delivery term from a customs and VAT law perspective.

Please note, however, that the following information is in no way intended as a substitute for tax advice from a tax advisor but should be treated solely as general, non-binding information on our part. Please therefore check (consulting your tax advisor if necessary) whether the following applies to your imports and review the legal implications in your specific case.

This information does not cover tax-related particularities that came into force on July 1, 2021 due to the implementation of the VAT package for e-commerce and apply to imports of goods in consignments to the value of less than EUR 150 (import one-stop shop (IOSS) and special arrangement).

The Incoterms® DDP clause

The acronym DDP stands for "Delivered Duty Paid," a clause from the Incoterms® (International Commercial Terms). Incoterms® are a set of documents established by the International Chamber of Commerce to simplify cross-border trade. They provide internationally standardized civil law contractual and delivery terms for foreign trade. The Incoterms® do not have force of law but are merely suggested wordings for sales contracts under civil law.

The DDP clause applies to all modes of transportation, including multimodal transport and represents the maximum responsibility for the seller under a contract of sale. If DDP is agreed between the parties to a purchase transaction, the seller bears all costs incurred in connection with the carriage of the goods to the named destination as well as the risk of accidental loss of the goods. At the same time, the seller is obliged to clear the goods for both export and import and thus to pay any applicable export and import duties. In addition, the seller must complete all customs formalities for export and import.

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Content of the DDP Incoterms® clause for the import of goods in Germany:

The seller must observe the following in the case of DDP delivery:

1. Licenses, permits and formalities

The seller of the goods must obtain, at its own expense and risk, the export and import licenses, official permits and other documents required for the transport of the goods to the destination. The seller must also handle all customs formalities. The seller is therefore responsible for import customs clearance in Germany and must arrange this on its own account.

Sellers who are not established in the European Union are not permitted to act in their own name vis-à-vis the German customs authorities and must therefore use an indirect representative.

2. Delivery

The seller must place the goods at the buyer's disposal ready for unloading (i.e. not unloaded) from the arriving means of transport at the agreed destination within the agreed delivery period or at the agreed time.

3. Passage of risk

The seller bears the risk of accidental loss of the goods until such time as the goods are placed at the buyer's disposal (without unloading) at the destination. The seller is responsible should the goods perish for any reason beyond the control of the buyer.

4. Cost sharing

In addition to transport costs up to delivery at the destination, the seller bears the costs of customs formalities necessary for import and export, as well as all duties, taxes and other charges incurred in the export and import of the goods and in their transit through any intermediate countries. The seller of the goods is therefore obliged to pay the customs duties and import VAT arising from the import clearance.

Customs and VAT implications of the DDP Incoterms® clause when importing to Germany

It should be noted that, for DDP, there is a distinction between import (customs duties and import VAT incurred) and supply, i.e. the sale of the goods. Import VAT is charged for the import, and VAT may additionally be due on the supply.

Import – import VAT incurred

The import of goods into the EU customs and tax territory and the release of goods for free circulation is subject to the levying of import duties as well as import VAT. Under Section 21 (2) of the German Value Added Tax Act (*Umsatzsteuergesetz*, "UStG"), the import VAT is incurred together with the customs duty and is collected by the same authority, the Central Customs Authority.

In accordance with Section 1 (1) no. 4 UStG, import VAT is only incurred if the item is being imported from a third country and the import in question is subject to value added tax. In the case of the release of goods for free circulation, import VAT is incurred when the customs declaration is accepted by the customs authorities.

The party liable for both the customs duty and the import VAT is the declarant. This is the person who submits the customs declaration to the customs authorities in his/her own name. In the case of DDP, the person deemed to be the declarant depends on whether the seller uses a direct or indirect representative to make the customs declaration. A direct representative (Art. 18 (1) sentence 2 part 1 of the Union Customs Code, "UCC") acts in the name and on behalf of another person, namely the declarant. An indirect representative (Art. 18 (1) sentence 2 part 2 of the UCC) acts as a declarant in his/her own name but on behalf of another person. The usual scenario for indirect representation is the representation of a non-EU-established importer (represented party) by a third party based in the EU, e.g. a subsidiary or carrier (representative). However, any other party established in the EU may also act as an indirect representative. Art. 170 (2) UCC requires the declarant to be established in the EU customs territory.

Exception: At the Swiss border, some German customs offices in the customs office districts of Ulm, Lörrach and Singen will accept a Swiss- or Liechtenstein-based company with a German EORI number as the declarant. This exception only applies if the Swiss or Liechtenstein declarant guarantees access by the German customs authority to documents and accounting records in order to enable a subsequent audit (paragraph 7a of customs clearance regulation (*Dienstvorschrift Zollbehandlung*) VSF Z 0701). No other customs offices in Germany allow clearance where the declarant is not established in the EU. In such cases, the third-country person must appoint an indirect representative to represent him/her for import purposes.

In case of direct representation, only the represented party, as the declarant in whose name the customs declaration was made, is liable for the customs duty and import VAT (Art. 77 (3) part 1 UCC). In case of indirect representation, the representative, as the declarant, is jointly and severally liable with the represented party for the customs duty and import VAT (Art. 77 (3) part 2 UCC).

In the case of a DDP delivery, the seller is usually established in the third country, meaning that the seller must opt for indirect representation. The EU-based representative therefore becomes a debtor with respect to customs duty and import VAT. The seller, as the represented party, is also a debtor. Indirect representation thus allows a seller who is not established in the EU customs territory to nevertheless make customs declarations for release for free circulation in the EU customs territory.

The following overview shows who is liable for the tax and duty in the different circumstances.

Type of customs clearance	Declarant	Debtor (customs duties and import VAT)	
No representation	Declarant	Declarant	
Direct representation	Represented party	Represented party	
Indirect representation	Representative	Representative	Person on whose behalf the customs declaration is made (represented party)

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Supply – VAT incurred

Under Section 3 (6) sentence 1 UStG, the supply and thus the sale of goods involving the carriage or consignment of physical items are deemed for VAT purposes to have taken place at the time when and place where the movement of the goods began. In the case of deliveries from a third country to Germany, supply is thus deemed to have taken place in the third country, meaning that the supply is not taxable in Germany. However, if the DDP delivery term is correctly applied and the goods are cleared for free circulation on behalf of the (third-country) seller, the supply (i.e. the sale of the goods by the seller to the buyer) is deemed under Section 3 (8) UStG to have taken place in Germany. Unless a tax exemption applies, the supply is taxable.

The shift in the place of supply to Germany means that the seller must register in Germany for VAT purposes and comply with the corresponding reporting obligations to the relevant tax office. The invoice to the customer must include German VAT stated separately, and the VAT must be paid to the relevant tax office.

One possible exception to this is the tax exemption due to intra-Community supply, when the goods are transported to another EU country immediately after they have been imported to Germany (customs procedure 42).

Deduction of input VAT

Under Section 15 (1) sentence 1 no. 2 UStG, the business that has the right of disposal over the imported goods at the time of import may treat the import VAT incurred from customs clearance as input tax.

In the case of DDP and customs clearance on behalf of the seller, it must be assumed in accordance with Section 3 (8) UStG that the seller still has the right of disposal over the goods at the time of import and that this right only passes to the buyer after import clearance in Germany. Therefore, only the seller is entitled to deduct the import VAT as input tax in such cases. The buyer, on the other hand, does not have the option to reclaim the import VAT.

If the goods are cleared in the name and on behalf of the buyer (all Incoterms® with the exception of DDP), the supply and therefore the transfer of the right of disposal over the goods for VAT purposes takes place at the departure point for the physical movement of goods, i.e. usually in the third country (Section 3 (6) sentence 1 UStG). In this case, the seller does not have to register in Germany for VAT purposes and does not show German VAT on the invoice to the customer. In this case, only the recipient/buyer of the goods can deduct import VAT.

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Summary of clearance for free circulation with delivery term DDP

CUSTOMS DUTY/IMPORT VAT

- Sellers not established in the EU cannot act as declarants vis-à-vis the customs authorities and submit customs declarations themselves. This means that the seller must generally use an indirect representative for customs clearance.
- If the seller is established in Liechtenstein or Switzerland, he/she can under certain conditions act as declarant in the customs office districts of Ulm, Singen and Lörrach.
- In the case of indirect representation, the representative acts as declarant and becomes liable for customs duty and import VAT. The represented party is also liable. Both the seller and the representative are debtors and are jointly and severally liable to the customs authorities for customs duty and import VAT.
- The customer/buyer is not involved in the import process and is therefore not a debtor.
- If the goods are transferred elsewhere in the EU after import, a potential exemption from import VAT should be examined (customs procedure 42, intra-Community supply immediately after import).

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VAT

- If the goods are to remain in Germany, the seller must separately state the VAT on the invoice to the customer (using the VAT rate applicable at the time of clearance).
- If the goods are subsequently transferred elsewhere in the EU, a potential VAT exemption for intra-Community supply should be examined.
- If the seller is not based in the EU, he/she must register for VAT in Germany with the relevant tax office. It must submit regular declarations showing the VAT on its supplies and claim the import VAT from its imports as input tax.

VAT registration / Involvement of an indirect representative

If the seller is required under the sale contract to ship the goods on a DDP basis, it must register for VAT purposes in Germany and fulfill the resulting obligations. The involvement of a German tax advisor is generally required or advisable for this purpose.

A tax advisor may provide the following services to the supplier:

- Application for an EORI number (customs number) in Germany
- Application for a customs deferment account (businesses based in the EU as well as in Switzerland and Liechtenstein)
- Application for tax number from the relevant tax office in Germany (*Umsatzsteuerzuständigkeitsverordnung*) and application for VAT identification number from the Federal Central Tax Office (if required)
- Preparation of monthly VAT return and annual VAT return
- Submission of Intrastat declaration and recapitulative statement (if required)
- Accounting and archiving of documents
- Assistance with tax audits by the tax office or customs administration

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Alternatives

The Incoterms® clauses DAP and DPU

The delivery term/Incoterms® clause DAP stands for "Delivered at Place." According to this clause, delivery is deemed to take place when the seller places the goods at the disposal of the buyer on the arriving means of transport (arranged by the seller) ready for unloading at the agreed destination. In the case of DPU ("Delivered at Place unloaded" introduced by Incoterms® 2020), the seller is additionally obliged to unload the goods at the agreed destination.

The seller assumes all risks and costs related to transportation in the case of both DAP and DPU. The only additional costs borne by the seller in the case of DPU are those of unloading. Unlike with the DDP delivery term, the seller is not obliged under DAP and DPU to clear the goods for import, pay import duties or import VAT or handle the customs formalities. Under DAP and DPU, goods are therefore released for free circulation in the name and on behalf of the buyer (who is usually established in the European Union). As the declarant, the buyer becomes the sole debtor for customs and import VAT purposes.

In accordance with Section 3 (6) sentence 1 UStG, supply of the goods occurs at the place of departure in the third country, meaning that the supply and sale of the goods is not subject to VAT in Germany. This means that the seller does not have to register for VAT in Germany or make VAT declarations.

At the time of customs clearance, the buyer has the right of disposal over the goods and is entitled to deduct the import VAT incurred as input tax in Germany.

If it is intended that the seller will cover the customs duties as well as the cost of customs formalities in Germany, despite the agreement of DAP or DPU terms and despite import clearance in the name of and on behalf of the buyer, this should be agreed separately in the purchase contract. Such an arrangement is merely a civil law agreement between the parties to compensate each other and does not affect the buyer's right to deduct input tax.

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Please confirm the following information:

In relation to deliveries by the seller/supplier

.....
(name, legal form, address)

we

.....
(name, legal form, address)

in all cases or
only in this individual case,

Option 1

request clearance for free circulation in our name and for our account despite the delivery term "DDP Incoterms®" stated on the invoice. Accordingly, we declare explicitly that we will act as the declarant and debtor for the purposes of the customs declaration.

We are to be named as the declarant in the customs declaration. Schenker Deutschland AG / SW Zoll-Beratung GmbH will act as direct representative. All further details can be found in the form:

"Instructions and authorization to prepare customs declarations for transferring goods to free movement (direct representation)."

Option 2

We are prepared to act as indirect representative for the seller/supplier. All further details can be found in the form:

"Instructions and authorization to prepare customs declarations for transferring goods to free movement (indirect representation)."

Place, date

signature/company stamp