



Federal Ministry of Finance on educational services: focus on the Distance Learning Protection Act

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1 Background

The German Annual Tax Act 2024 reformed the VAT exemption for educational services as of 1 January 2025, pursuant to sec. 4 no. 21 of the German VAT Act. We previously reported on this in KMLZ VAT Newsletter 49 | 2024. Irrespective of the new regulation, suppliers must take into account the Federal Ministry of Finance's letter dated 29 April 2024, which is now, in practice, causing considerable concern. Accordingly, pre-produced content, such as video courses, learning platforms, etc., are excluded from the VAT exemption. The same applies if live content is recorded. Despite all of the criticism, the Federal Ministry of Finance has not yet changed its view on online education (see KMLZ VAT Newsletter 24 | 2024).

2 Federal Ministry of Finance refers to the Distance Learning Protection Act

The Ministry of Finance has submitted a draft letter on the new regulation of 17 January 2025 for a hearing of associations. This draft confirms the Federal Ministry of Finance's letter of 29 April 2024 and thus the VAT liability for many online educational offers. The draft implicitly refers to the letter dated 29 April 2024 and supplements the statements made therein with details of those services which are not subject to the VAT liability. A new sentence 9 is to be added to sec. 4.21.1 para. 1 of the German Administrative VAT Guidelines. It states: 'Courses and streaming services that are approved under the Distance Learning Protection Act are exempt from VAT as educational services.'

3 Scope of application of the Distance Learning Protection Act (DLPA)

According to sec. 1 para. 1 of the DLPA, distance learning is the contractual (i.e. not public) provision of knowledge and skills in return for payment, where the teacher and the student are exclusively or predominantly physically separated and



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the teacher, or his representative, monitor the learning success. Even the question of what is meant by 'exclusive or predominant physical separation', pursuant to sec. 1 para. 1 no. 1 DLPA, is highly controversial. The case law of the Higher Regional Courts on this point ranges from the view that contact, as in face-to-face events, is possible at all times during a video conference or other synchronous communication (Higher Regional Court of Nuremberg, judgment dated 5 November 2024 – Ref. 14 U 138/24), to the view that, regardless of synchronous communication, a physical separation must always be assumed in the case of online teaching (Higher Regional Court of Stuttgart, judgment dated 29 August 2024 – Ref. 13 U 176/23). Recorded (live) lessons are always qualified as physically separated tuition. The question of when learning success monitoring is deemed to have taken place has also not been clearly defined. This is often interpreted very broadly. According to the case law of the Federal Court of Justice (judgment of 15 October 2009 – Ref. III ZR 310/08), a learning success check is deemed to have been carried out if the learner is able to ask the respective lecturer questions about his or her own understanding of what has been learned and thereby receives individual instruction. It is sufficient for the learner to draw their own conclusions from the answer. A test or similar is not required.

4 Severe consequences of violation of the DLPA

In future, anyone seeking approval under the DLPA, with a view to being "on the safe side", at least in terms of VAT law for e-learning services, should consider the issue holistically. This is because one then has to ask oneself, among other things, why one did not need or apply for approval in the past. This is risky. Contracts concluded in the past, without the necessary approval, would all be null and void (sec. 7 para. 1 DLPA), and therefore the risk of the civil law reversal of such contracts would arise and thus repayment of course fees would also be in jeopardy. In the future, contracts would have to be adapted to the strict requirements of the DLPA (including waiving advance payment, increasing freedom of termination, right of withdrawal, information requirements, etc.).

Moreover, if a licence requirement is introduced under the DLPA, the Central Office for Distance Learning (Zentralstelle für Fernunterricht / ZFU) in Cologne will become the competent state authority, within the meaning of sec. 4 no. 21 of the German VAT Act, to issue exemption certificates. Certificates issued by other local state authorities would be of no substantive legal significance.

5 Consequences in practice

The planned amendment would put the DLPA in the spotlight as never before. Unless further clarification is provided, the update to the Administrative VAT Guidelines on this point can be classified as both insufficient and dangerous. It is insufficient because the legal certainty only covers a small number of educational providers in the digital sector, namely those who are approved under the DLPA. Large numbers of providers are therefore still waiting for clarification or a lessening of the restrictions from the tax authorities. Without further clarification, the consequence will be a 2-tier society. The adjustment is dangerous because it continues to focus on the DLPA; a legal matter that has, to date, been widely ignored. The consequences of offering a course without the necessary approval from the ZFU are severe, and the legal situation regarding even the basic application requirements is unclear.

A DLPA approval obligation can be avoided, if necessary, by means of a systematic restructuring of course programmes. For example, the proportion of synchronous elements could be increased and asynchronous elements reduced in order to achieve an exchange of information that is, at least, 50% synchronous overall. Adjusting a course programme can also strengthen the argument that an authorisation requirement, in accordance with sec. 12 DLPA, did not apply in the past. However, a certain level of risk remains.