



The German Ministry of Finance comments on liability of operators of electronic marketplaces

1 Background

The legislator has inserted sec 22f, on the special obligations for operators of electronic marketplaces, and sec 25e, on the liability of marketplace operators, into the German VAT Act. These regulations came into force on 1 January 2019 (see KMLZ Newsletter 32/2018). In its letter dated 28 January 2019, the German Ministry of Finance provides comprehensive comments on these new regulations.

2 Recording obligations of marketplace operators

The German Ministry of Finance specifically comments on the recording obligations specified in sec 22f para 1 sentence 1 no 4 and no. 5 German VAT Act. Marketplace operators are not obliged to retain records on returned goods. However, the recording obligations do extend to cover any rebates and discounts granted by the online retailer to the recipient of the goods. Since marketplace operators are unlikely to be kept up to date with these rebates and discounts, they are now required to request this information from the online retailers.

In order to record the place of destination, in accordance with sec 22f para 1 sentence 1 no. 4 German VAT Act, the German Ministry of Finance requires the full address to be provided. This requirement goes beyond the wording of the law. This requirement is in contrast to comparable provisions (e.g. sec 14 para 4 sentence 1 no. 1 German VAT Act), where the law only requires the place of destination to be recorded, which means the relevant town/community (see sec 6a.3 para 2 sentence 1 German VAT Circular reg. the place of destination for intra-Community supplies of goods).



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3 Certificate of tax registration

The German Ministry of Finance also comments on the certification procedure and refers, in this context, to the model Form VAT 1 TJ for the application and to its explanations, as contained in the letter of the German Ministry of Finance of 17 December 2018. According to the German Ministry of Finance, the certification may be waived in the following two cases:

- distance sales supplies made by the online retailer not taxable in Germany in accordance with sec 3c German VAT Act
- supplies from non-EU countries for which the place of supply does not shift to Germany pursuant to sec 3 para 8 German VAT Act

At the request of the marketplace operator, the online retailer's tax office must inform the marketplace operator as to whether the certificate is valid, in circumstances where there is reasonable doubt as to its authenticity. It is unclear what actual threshold of doubt necessitates this query being made. It is also doubtful whether the tax authorities concerned (in particular, the tax office in Berlin-Neukölln, which is responsible for online retailers including those from China and India) have the necessary resources to provide marketplace operators with information within a reasonable period of time. In any case, the query, once lodged with the tax office, will quite probably cause economic damage to both the marketplace operator and the online retailer concerned. Due to the liability risk, marketplace operators will doubtless block online retailers in these circumstances, until such time as the tax office has confirmed the authenticity of the respective certificate.

4 Liability of marketplace operators

The German Ministry of Finance also comments on the liability of marketplace operators. Any liability claim against a marketplace operator presupposes that it is aware of or should have been aware that the relevant supplier is either not at all, or only partially, fulfilling its VAT obligations. For the purpose of the awareness of the specific marketplace operator, the German Ministry of Finance only refers to the supplies generated by the relevant marketplace operator.

The marketplace operator will not be held liable for a supplier's breach if it points out the breach of duty to the online retailer operating on its marketplace and requests that it be remedied within a specific period of time (no longer than two months) and the taxable person complies with this request. It is unclear upon what legal premise the period of two months is based. In any event, the statutory provision in sec 25e German VAT Act does not provide for such a two month limitation.

5 General transitional provisions

For reasons of simplification, the tax authorities will not raise any objections if marketplace operators do not fulfil their recording obligations, with respect to online retailers based in non-EU countries, until 1 March 2019 and for other online retailers until 1 October 2019.

This non-objection rule is to be welcomed. It will ensure that the recording obligations of marketplace operators are synchronized with the corresponding liability regulations, in terms of timing. This is because the liability for supplies of online retailers, based in non-EU countries, applies from 1 March 2019 and for supplies of other online retailers from 1 October 2019 (sees KMLZ Newsletter 32/2018).