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VAT'S UP

VAT NEWSLETTER

ECJ: No VAT for influencers on the platform *OnlyFans*

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1 Background

Influencers and streamers generate billions in revenue via social media platforms. When it comes to VAT, the question arises as to whether the service provider is the one supplying the service to the end customers or whether it is the platform which is doing so within the framework of a deemed supply chain of services. The answer to this question is crucial, because it determines who owes the VAT for the entertainment service to the end customer. If the tax authorities assume a service to consumers - for influencers or platforms - horrendous additional VAT demands and numerous follow up questions are likely to ensue.

2 Facts of the case

Fenix International Ltd. is based in the UK and operates the social media platform *OnlyFans*. Influencers maintain profiles there where they upload and post content such as photos and videos. In addition, videos can be streamed in real time. Anyone who wants to watch this content must pay a fee to subscribe to the influencer's profile. For more extensive content and private messages, a special payment is usually required. *OnlyFans* not only provides the platform, but also organises the collection of payments from subscribers and the pay outs to influencers. Of the subscribers' payments collected, *OnlyFans* forwards 80% to the influencers. The remaining 20% is charged to the influencers as a fee for the portal service. In the years in dispute, *OnlyFans* declared UK VAT only on this fee of 20% of the subscription price.

OnlyFans assumed itself to be the supplier of a service to the influencers and that it was the influencers themselves who provided their service directly to their subscribers, and as a result were remunerated with the entire subscription fee.

Dr. Markus Müller, LL.M.
Dipl.-Finanzwirt (FH),
Certified Tax Consultant

+49 (0) 211 54 095-387
markus.mueller@kmlz.de

The British tax authorities, on the other hand, assumed a deemed supply chain of services on the basis of Art. 9a para 1 VAT Implementing Regulation in conjunction with Art. 28 VAT Directive. The consequence of this was the finding that influencers provided a B2B service to *OnlyFans* and *OnlyFans* provided electronically supplied services to subscribers. As a result, *OnlyFans* faced the prospect of being required to pay VAT on the entire worldwide subscription price, depending on the residence of the consumer. The UK Tax Court had doubts about the validity of Art. 9a para 1 VAT Regulation and referred the matter to the ECJ.

3 Decision of the ECJ (case 695/20 – *Fenix International Ltd.)*

The ECJ went on to confirm the legal validity of Art. 9a para 1 VAT Implementing Regulation. The provision is limited to clarifying the VAT Directive without supplementing or amending it. Thus, the Council of the EU had not exceeded its powers.

In the case of *OnlyFans*, there was also no substantive argument raised against the application of the deemed supply chain of services of Art. 9a para 1 VAT Implementing Regulation in conjunction with Article 28 VAT Directive. A portal is irrevocably deemed to be acting in its own name and on behalf of a third party if it authorises a settlement with a service recipient, authorises the provision of the particular services or determines the general conditions of the provision. Taking into account the economic and business reality, these circumstances justified considering the portal operator as a service provider in the supply chain of services between the influencers and subscribers.

4 Consequences for the practice

For *OnlyFans* influencers, the decision is a blessing. Anyone who operates outside the UK and has paid VAT to the tax authorities in the past, whether German or foreign VAT, should immediately check the possibility of applying for a refund. Influencers can also argue on the basis of the decision for comparable platforms to provide a B2B service according to sec. 3a para. 2 German VAT Act. If the platform is based abroad, the supplies are consequently not taxable in Germany.

For *OnlyFans* and comparable social media platforms, the decision can lead to far-reaching declaration and recording obligations. The agency service to the influencers is negated for VAT purposes. Instead, if the platform provides electronically supplied services to private persons, which they are in the majority of cases, the place of supply is determined by his or her place of residence, according to sec. 3a para. 5 German VAT Act. According to Art. 24a and Art. 24b VAT Implementing Regulation, the portal must check, in a comparatively complex manner, where the service is consumed and pay VAT in accordance with the requirements of this state. Consequently, registration issues arise, worldwide. In addition, the VAT base of the platform service does not correspond to the commission, but to the disproportionately higher subscription fee. If, up to now, only the commission has been taxed, horrific VAT repayments are imminent.

The question of whether the *OnlyFans* content is an entirely electronically supplied service was not subject of the proceedings. For the mere viewing of posted videos and photos, this seems plausible. However, real-time streaming and private messaging require more than only minimal human intervention, which is contrary to an electronically supplied service and the application of the deemed supply chain of services of Art. 9a para 1 VAT Implementing Regulation in conjunction with Article 28 VAT Directive. Platforms need to examine closely whether an electronically supplied service is provided.

In addition, platforms must comply with the Platform Tax Transparency Act (DAC7 Directive), which has been in force since 01.01.2023, and the associated recording obligations (see KMLZ VAT Newsletter 08 | 2023).

KMLZ Rechtsanwaltsgesellschaft mbH | www.kmlz.de | office@kmlz.de
D-80331 München | Unterer Anger 3 | Tel.: +49 89 217501220 | Fax: +49 89 217501299
D-40221 Düsseldorf | Speditionstraße 21 | Tel.: +49 211 54095320 | Fax: +49 211 54095399