



## Insurance Premium Tax on guarantee commitments: Tax authorities provide further guidance

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### 1 Background

The Federal Central Tax Office (BZSt) recently published a catalogue (FAQ) with respect to various issues on the treatment of guarantee commitments. The FAQs were released in coordination with the Federal Ministry of Finance (BMF) and are intended to address the uncertainties within the business community that have emerged following the publication of the BMF letter of 11 May 2021 (see KMLZ VAT Newsletter 18 | 2021). The FAQs are a result of a campaign conducted by various trade associations, which have been pushing for more legal certainty for their members for quite some time.

As a reminder, in its ruling dated 14 November 2018 (XI R 16/17), the Federal Fiscal Court decided that the guarantee commitment of a car dealer for consideration does not constitute a dependent ancillary service to the supply of the car, but rather an independent supply of service. This guarantee commitment provided, in return for payment, is treated as an insurance contract subject to Insurance Premium Tax (IPT) but VAT exempt pursuant to sec. 4 no. 10 letter a of the German VAT Act (UStG). The BMF letter of 11 May 2021 was intended to present the tax authorities' opinion on the VAT and IPT treatment following the Court's ruling. In a subsequent BMF letter of 18 June 2021, it was announced that the principles, with regard to a guarantee commitment in return for payment, should apply to all industries. With this statement, the practical relevance of these principles has multiplied. The non-objection rule regarding the application of the principles was extended in the BMF letters of 18 June 2021 and 18 October 2021. This is likely due to the existence of a high level of uncertainty among the taxable persons affected and the ongoing discussions surrounding individual issues, which the BMF had apparently not anticipated back in May 2021. The non-objection rule expired on 31 December 2022, leaving taxable persons concerned bound by the principles on guarantee commitments in return for payment.



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## 2 Statements made in the FAQs

The FAQs answer a number of questions concerning VAT and IPT consequences for guarantee commitments. Some statements are mere repetitions, while others at least provide more clarity than was previously the case.

- Guarantee commitments given in return for payment do not constitute a dependent ancillary supply of service but rather an independent supply of service. Guarantee commitments are subject to IPT and exempt from VAT.
- It is irrelevant whether the benefit, in the case of an insurance coverage, consists of a payment in kind (repair) or a payment in cash (reimbursement of repair costs), as the IPT Act makes no distinction in this respect. This statement suggests that the tax authorities consider the Court's ruling of 10 February 2010 (XI R 49/07) to be outdated. In this ruling, a guarantee commitment for repairs was still considered to be subject to VAT, since the guarantor's obligation to indemnify the customer constituted the main object of the supply.
- The input VAT deduction for the purchase of goods and services, in connection with a guarantee commitment against payment, is excluded pursuant to sec. 15 para. 2 no. 1 UStG. The tax authorities have specified that this should include both, purchases made for the assumption of the obligation itself and those made for the fulfilment, in the event of insurance coverage (e.g., spare parts or tools).
- Specifications are provided as to what is to be understood by a full maintenance contract, which is not to be treated as a guarantee commitment against payment subject to IPT. The main object of the supply in this case is to minimize any risk through regular maintenance and inspections. It is promised that the functionality of the goods (usually machinery) will be comprehensively maintained during the term of the contract, not that the functionality will be restored in the case of any damage being sustained. The potential risks are to be actively counteracted by a full maintenance contract.
- The tax authorities do not recognize any differentiation between manufacturer and trader guarantees. It can be argued that manufacturers do not assume any third-party risk, only their own risk or that a manufacturer knows his product so well that there is no uncertainty about risks. These arguments are not addressed. Whether this statement is correct remains unclear.
- The principles on guarantee commitment in return for payment should also apply in the context of supply chains. The decisive factor is that the roles of guarantor and guarantee holder are correctly assigned.

## 3 Remaining questions

Unfortunately, the tax authorities have not taken a position on all relevant issues. For example, it is still unclear how the tax authorities will treat the extension of statutory warranty rights, for additional consideration, beyond the legally stipulated period. There are arguments against the treatment of warranty extensions as being subject to ITP. However, it remains unclear whether the BZSt will follow these arguments or consider warranty extensions as subject to ITP. The tax authorities have also not commented on how taxable persons should deal with the assessment of guarantee commitments when they are confronted with deviations in the legal interpretation from other Member States.

## 4 Consequences for the practice

Although the additional guidance provided is to be welcomed, it fails to deliver any legal certainty for taxable persons. The FAQs are merely an aid to interpretation without any binding effect. A publication of the new guidance in a BMF letter would therefore have been desirable. Some of the FAQs merely repeat statements previously made by the tax authorities without any additional explanation. In addition, there is still no reference to other highly relevant topics, such as warranty extensions.