



VAT NEWSLETTER

## Tax Court of Hamburg: VAT treatment of so-called in-app purchases

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### 1 Facts

In its decision of 25 February 2020 (Ref. 6 K 111/18), for the years 2012-2014, the Hamburg Tax Court had to decide who, from a VAT perspective, was the supplier vis-à-vis the end customer for these in-app purchases, the app developer or the app store operator. End customers were able to download a games app, free of charge, from an app store to their end device. The operator of the app store displayed the app, uploaded by the app developer, on behalf of the app developer. In some cases, the app store displayed the full name and legal form of the app developer, but in other cases it only displayed names in the absence of any legal form.



In the course of using the games app, the end customer had the opportunity to make in-app purchases against payment. This was facilitated by a pop-up window opening in the games app. This window included the app store logo without mentioning the app developer. The purchase was processed via the app store and the payment method stored there. The



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operator of the app store was authorized to collect the respective fee for the in-app purchases from the end customer. The operator of the app store then forwarded the collected payment, minus a commission of 30%, to the app developer.

## 2 Decision of the court

For the contested years 2012-2014, the Tax Court confirmed that the commissionaire scheme, in accordance with sec. 3 para. 11 of the German VAT Act, applies and hence came to the conclusion that the supply to the end customer must be deemed to be rendered by the operator of the app store. Here, it referred to the so-called store jurisdiction. The Tax Court held that contractual relationships existed between the operator of the app store and the end customer. This is supported by the fact that the operator of the app store also collected the payment for the app developers. The Tax Court stated that, in the case of an in-app purchase, the operator of the app store does not explicitly inform the end customer that the supply is provided by or on behalf of the app developer. In fact, the app developer was not mentioned in the context of in-app purchases. As a result, the Hamburg Tax Court concluded that the operator of the app store was involved in the provision of a service in the case of the in-app purchases in question (sec. 3 para. 11 of the German VAT Act) and was acting on its own behalf. The decision is not finally binding yet. An appeal is pending before the Federal Fiscal Court (Ref. XI R 10/20).

## 3 Criticism

For the VAT treatment of in-app purchases via app stores, it is crucial to know who the supplier is as regards the retail revenues. This can basically be the app developer or the operator of the app store. First of all, the legal situation existing in the years in dispute (until 31 December 2014) must be taken into account. The Tax Court argued, with reference to the store jurisdiction, that the retail revenue was to be allocated to the operator of the app store. However, the application of store jurisdiction can also be argued against and for retail revenues to be attributed to the app developer. This is because an app store is fundamentally not comparable to a retail store. Rather, an app store is similar to an online marketplace where products of the marketplace operator, as well as of third parties, are offered. The average end customer is also aware that the apps in question are not developed by the app store itself, but by a third-party provider and that they are offered by the latter in the app store in question.

In contrast to the legal situation in the years in dispute, the current legal situation is much clearer. With effect from 1 January 2015, the national legislator introduced a new provision in sec. 3 para. 11a of the German VAT Act, according to which, the commissionaire scheme generally applies to all supplies to end customers via platforms such as app stores. This applies, in particular, if the taxable person involved authorizes the invoicing vis-à-vis the end customer (sec. 3 para. 11a sentence 4 no. 1 of the German VAT Act). In these circumstances the retail revenue is to be allocated to the operator of the app store, in the absence of any further prerequisites, such as contractual agreements or acting in one's own name.