



# KMLZ VAT NEWSLETTER

## Electronic service despite human intervention

### 1. Background

B2C services rendered electronically to German customers are subject to German VAT. If B2C services are not rendered electronically, they are taxable at the place where the service provider is located. For taxpayers, it is therefore desirable, that their B2C services are not considered to be electronically rendered.

An electronically supplied service exists when the following four requirements are met: The supply of service is rendered via the internet or via an electronic network. It is essentially automated. It is impossible to render the supply in the absence of information technology. The supply must be rendered in such a way as to involve only minimal human intervention.

Particularly, as regards the last two requirements, a dispute arose between the German tax authorities and the US based plaintiff.

### Federal Fiscal Court says Online Communities are subject to German VAT

The German Federal Fiscal Court has recently decided that a US American operator of online communities is subject to VAT in Germany. The plaintiff's services were partially rendered by staff members. Nevertheless, the Federal Fiscal Court regarded plaintiff's services as being rendered electronically. This decision should catch every entrepreneur's attention. They should examine whether they render electronically supplied services. If yes, the services could be subject to VAT abroad.

### 2. Facts

The plaintiff operated several online dating platforms. Its users were required to pay a regular membership fee. In return, the users were able to create user profiles, also in the form of video profiles. Membership entitled users to the following services:

- Access to personal information of other users
- Contact to other users
- Search function including a filter
- Online news magazines
- Chat rooms
- Complaint hotlines
- Assistance from department controlling user activities, invasion of privacy and abuse.



Contact:  
Matthias Luther  
LL.M. Tax., Lawyer  
Phone: +49 (0) 211 / 540953 - 95  
Matthias.luther@kmlz.de

The plaintiff took the view that its services were taxable in the USA. The German tax authorities and the fiscal court of first instance, however, took the view that the plaintiff rendered its services electronically. Its supplies were therefore taxable in Germany at the standard VAT rate (i.e. 19%).

### 3. Decision of the German Federal Fiscal Court

The German Federal Fiscal Court confirmed the views of the tax office and the fiscal court. Its opinion was that the plaintiff rendered electronically supplied services. It provided a database. The Federal Fiscal Court therefore apportioned the aforementioned supplies of services as follows: They are either an element of the dominating service (e.g. access to other user's profiles and search function). Otherwise, they are deemed to be ancillary services (e.g. chat rooms and news magazines). As such, from a VAT perspective, they are treated like the dominating service (making available of databases).

What is remarkable in this context is that the Federal Fiscal Court took the view that collecting data also fell within the scope of the dominant service. It does not matter how the data is collected, i.e. automatically (e.g. by a web crawler) or manually (e.g. by user input).

The supervisory department was deemed to be a preparatory and accompanying measure. Its services were not rendered within the scope of the "actual supply", which was making the database available. That is why the "actual supply" is to be carried out in the absence of human intervention.

Finally, the supply is only possible where information technology is involved. How the supply is actually rendered is decisive. It is irrelevant that the supply can also be rendered "offline".

### 4. Significance of the Decision

The Federal Fiscal Court's decision is primarily relevant for foreign businesses rendering B2C services to German customers. This is especially true if the services are rendered via the internet or a similar electronic network. The Federal Fiscal Court is relatively rigorous in its interpretation and thereby supports the German tax authorities' view. This decision could be used to justify forcing foreign businesses to register in Germany for VAT purposes. On the other hand, the Federal Fiscal Court decided on an individual case. It is questionable whether the Federal Fiscal Court would have taken the same stance if the plaintiff's employees had provided support to the users, for instance, in making contacts or creating a profile.

Nevertheless, there is no reason for German businesses to relax. Discussion about the VAT treatment of electronically supplied B2C services has picked up considerable speed since 01.01.2015. For example, it has appeared repeatedly on the agenda of the EU Commission's VAT Committee. The EU Member States will be paying very close attention as to whether the supplies of foreign businesses (especially from Germany) are subject to VAT in their respective countries. Therefore, German companies need to carefully examine whether they are exposed to any risk.