



Procurement of services by undisclosed agents increasingly VAT-exempt

1 Principles of the undisclosed agents scheme

The fact that civil law and VAT law are not always consistent is demonstrated by the example of the procurement of supply of services by undisclosed agents. Undisclosed agents render services to their customer in the name and on behalf of another person and receive a commission in return. Insofar, they do not differ from a disclosed agent. However, undisclosed agents act differently from disclosed agents, in that they act in their own name. Pursuant to civil law, these supplies are based on an agency agreement (sec 384 para 2 German Commercial Code; sec 675 German Civil Code). In accordance with sec 3 para 11 German VAT Act (Art. 28 EU VAT Directive), the agency service, made pursuant to civil law, is disregarded. Rather, from a VAT perspective a deemed supply chain of services is assumed. From a VAT perspective, an undisclosed agent shall be deemed to have received and supplied those services himself.

2 Fiscal authority's view regarding personal characteristics for VAT-exemption

If the procured service, which is considered to be received by the undisclosed agent, is VAT-exempt, the question arises whether the supply of service supplied by the undisclosed agent is also VAT-exempt. In sec 3.15 para 3 sentence 1 of the German VAT Circular, the fiscal authority takes the view that the personal characteristics of those involved in the supply chain should be assessed separately for each supply. Where the undisclosed agent receives services from small businesses (sec 19 German VAT Act), farmers applying average taxation (sec 24 German VAT Act), blind people (sec 4



Eveline Beer
Lawyer,
Certified Tax Consultant

+49 (0) 211 54 095-335
eveline.beer@kmlz.de

no 19 letter a German VAT Act) or theaters (sec 4 no 20 letter a sentence 1 German VAT Act), according to the administrative opinion, the personal VAT-exemption rules do not automatically apply with regard to the services supplied by the undisclosed agent.

3 Federal Fiscal Court decision

The decision of the Federal Fiscal Court of 25 April 2018 (XI R 16/16) deals with the procurement of opera tickets by a hotel service and is therefore quite special. However, the Federal Fiscal Court makes general statements on the legal consequences regarding the procurement of services by undisclosed agents. In accordance with the administrative opinion, the Court takes the view that the service received as well as the service provided by the undisclosed agent within the fictitious supply chain must be treated equally. The provisions, which are applicable to the supply received by the undisclosed agent, therefore also apply to the service provided by the undisclosed agent. Contrary to the tax authority's view, this fiction also covers the personal characteristics which are relevant for the application of a VAT-exemption. In the Federal Fiscal Court's view, both the service received by the undisclosed agent and the service provided by the undisclosed agent share, in principle and from a VAT perspective, the same fate and are consistently either subject to VAT or exempt. As a rule, the undisclosed agent charges a surcharge for his service. The decision clarifies that the fiction also extends to this surcharge. The Federal Fiscal Court is of the opinion that, in cases where the service received by the undisclosed agent is VAT-exempt, the VAT exemption applies to the entire remuneration paid to the undisclosed agent. In this context, it would also be irrelevant whether the undisclosed agent invoices the total amount. A separate settlement of the remuneration earned is not required.

4 Consequences for the practice

The Federal Fiscal Court's statements on the VAT-exemption of procured services can be transferred to all undisclosed agents. The decision potentially results in a change, which affects all undisclosed agents procuring services that are VAT-exempt or VAT-privileged, on the basis of personal characteristics. One possible application is the procurement of services rendered by small businesses. Small business is a personal characteristic which – following the Federal Fiscal Court decision – must be transferred to the services provided by the undisclosed agent. The same must apply also with regard to services rendered by blind people (in terms of sec 4 no 19 letter a German VAT Act) and farmers and foresters who apply the average rate of taxation, according to sec 24 German VAT Act, to their businesses. Personal characteristics also apply to professions for which a certain qualification is required. Changes could also result from the Federal Fiscal Court's decision for the provision of medical service supplies (sec 4 no. 14 German VAT Act).

Undisclosed agents should check whether they procure VAT-exempt services. In certain circumstances, this VAT-exemption will not only apply with regard to the services received by the undisclosed agent but also with regard to the services provided by the undisclosed agent. Where VAT continues to be charged, VAT may become due in accordance with sec 14c para 1 German VAT Act.

The decision applies to all open cases. Where undisclosed agents have procured VAT-exempt services in the past, they should check whether a VAT refund can be taken into consideration.