



VAT NEWSLETTER

German Federal Fiscal Court: Scope of human intervention in case of electronically supplied services

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1 Facts

The plaintiff, with registered office abroad, organised a so-called secondary lottery. It offered bets on the outcome of various terrestrial lottery draws (so-called primary lotteries). The players had the chance to win the same amount as in a primary lottery. They won if they had bet on the numbers that the draw of the corresponding primary lottery had produced. The players could place the bets via the plaintiff's website or by telephone via the customer service. The contract between the plaintiff and the players only came into effect after the game receipt was emailed to the player. The electronic provision of the game receipt was preceded by the plaintiff's securing of the promise of financial benefit by means of insurance or the purchase of corresponding lottery tickets of the respective primary lottery (so-called hedging). The plaintiff entered the result of the primary lottery manually. Several computer systems then independently determined the winners of the secondary lottery. The plaintiff also checked these results manually. Subsequently, the plaintiff manually identified all winners who received a winning amount in excess of EUR 100,000 (a so-called Big Win) and contacted them via its customer service, as well as by means of a German lawyer.

It was disputed whether the secondary lottery constituted an electronically supplied service within the meaning of sec. 3a para. 5 sentence 1 no. 1 in conjunction with sentence 2 no. 3 of the German VAT Act. In essence, the question was whether the human intervention in the present case considered as not only insignificant and concerned the actual process of the supply of services. The Lower Saxony Fiscal Court denied the existence of an electronically supplied service because the plaintiff was rendering a supply of services characterised by human intervention. As a result, the place of supply, in accordance with sec. 3a para. 1 sentence 1 of the German VAT Act, is at the plaintiff's registered office abroad.



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2 German Federal Fiscal Court decision

In its judgment of 03.08.2022, the German Federal Fiscal Court rejected the tax office's appeal as being unfounded (Ref. XI R 36/19). In the German Federal Fiscal Court's view, the fiscal court had ruled in a manner that was not objectionable, according to the principles of appeal proceedings, that no electronically supplied service was given. According to Art. 7 para. 1 of the Council Implementing Regulation 282/2011, an electronically supplied service is deemed to be a supply of services provided via the internet or a similar electronic network, the provision of which, due to its nature, is essentially automated and involves minimal human intervention and would not be possible in the absence of information technology. It is crucial that the human intervention concerns the actual process of the supply of services.

Concerning the VAT assessment, what the German Federal Fiscal Court considers decisive, is what the player is paying his participation consideration for. In the German Federal Fiscal Court's view, the decisive factor for the players in the case at issue is the determination and payment of winnings. Because, if the player does not physically participate in the drawing of the lottery numbers, what matters to the player is not only the process of playing, but the possibility of winning. The player pays his stake, in particular, to ensure that his winnings are reliably determined and paid out to him. Therefore, the manual determination of the results of the primary lottery, as well as the winners in the present case, concern the actual process of the supply of services and go beyond minimal human intervention.

The plaintiff performed the determination and payment of winnings exclusively in person and not electronically. Moreover, this activity affected all of the players, not only the winners. Therefore, the German Federal Fiscal Court left open the question of whether human intervention in the payment of winnings in "Big Win" cases could also result in the plaintiff having provided its supplies of services to all players not with only minimal human intervention.

3 Consequences for the practice

Already in the past, the German Federal Fiscal Court has dealt with human intervention within the framework of electronically supplied services in the case of an automated dating service. However, since human intervention did not concern the actual process of the supply of services, the German Federal Fiscal Court was not required to comment on the question of how extensive human involvement must be in order to be opposed to electronically supplied services. The situation was different in the present case. Here, the German Federal Fiscal Court had to decide whether the manual determination of both the results of the primary lottery and winners constituted more than minimal human intervention. The special feature was that these were processes that the plaintiff carried out in the background, i.e. of which the player was not necessarily aware. Nevertheless, these activities concerned the actual process of the supply of services. For it is crucial for the player that his winnings are reliably determined and paid out to him. The German Federal Fiscal Court's decision is convincing. For in the secondary lottery, the player does not pay for a gaming experience, but primarily for the chance of winning.

The Federal Fiscal Court judgment is a landmark decision and is not only relevant for secondary lottery cases. This is why the judgment was awaited with great interest by the industry. Practical significance arises, in particular, for online offers where similar processes involving human intervention take place in the background, which are crucial for the customer. This includes, for example, online offers in which the supplier manually accesses other databases. Companies concerned should therefore check whether electronically supplied services are provided in the specific case or whether manual processes, carried out in the background, are contrary to this assumption. This question can have an impact on the place of supply, as in the present case.