



## Federal Ministry of Finance: Warning notices will be subject to VAT from 01.11.2021 onwards

### 1 Background

In 2016 and then in 2019 the Federal Fiscal Court (BFH) respectively decided, in terms of the Act against Unfair Competition (UWG) (decision of 21.12.2016 – XI R 27/14 (KMLZ VAT Newsletter 17 | 2017)) and the Act on Copyright Law (UrhG) (decision of 13.2.2019 – XI R 1/17 (KMLZ VAT Newsletter 24 | 2019)), that the person issuing a warning notice provides a taxable supply to the person being warned. Remuneration is the reimbursement of expenses that the warned person must pay for the assertion of the cease-and-desist claim. The supply by warning notice is to be taxed at the standard VAT rate.

### 2 Content of the letter of the German Federal Ministry of Finance (BMF)

On 01.10.2021, the BMF issued a corresponding letter. In this letter, the BMF follows the BFH rulings that warning notices are supplies of services in accordance with German VAT law. The BMF's detailed comments can be summarized as follows:

- **Content of the supply:** From the point of view of the BMF, the person issuing the warning notice confers a benefit on the person being warned. The warned person is made aware of a legal violation. He is thereby given the opportunity to avoid a legal dispute in a cost-effective manner by submitting a cease-and-desist declaration with a penalty clause. The damages claimed, on the other hand, are not subject to VAT.
- **Time of taxation:** The supply by warning notice is rendered at the time of receipt of the warning notice by the warned person. However, it is not objectionable if the person issuing the warning notice already declares VAT on his supply by warning notice in the filing period in which he sent out the warning notice.
- **Taxable amount:** The taxable amount is the reimbursement of expenses. In the area of copyright law, this is calculated according to the value of the cease-and-desist claim (note: probably meant: according to the legal



Dr. Thomas Streit, LL.M. Eur.  
Lawyer

+49 (0) 89 217 50 12-75  
thomas.streit@kmlz.de

prosecution costs). The taxable amount also includes the reimbursement of investigative expenses for identifying the infringer. Compensation for damages, on the other hand, does not count as remuneration. According to sec. 97a para. 2 sentence 1 no. 3 UrhG, letters containing the warning notice must include a breakdown between the amounts for expenses and damages. If this is not done, the total amount is to be treated as reimbursement of expenses and thus taxable amount.

- Reduction of the taxable amount: If the person being warned substantially denies the infringement, the person issuing the warning notice must adjust the taxable amount in the filing period of the denial.
- VAT rate: The supply by warning notice is taxable at the standard VAT rate, which is currently 19%.
- Unduly charged VAT: If the warning notice is unauthorised because there is no justifiable claim, the person issuing the warning notice nevertheless owes VAT in the case where the invoice to the person being warned states VAT separately. He continues to owe the VAT until the tax threat has been eliminated.
- Non-objection rule: The parties involved may continue to treat warning notices issued before 01.11.2021 and for which the person being warned has not made an input VAT deduction as non-taxable.

### 3 Evaluation

Despite the publication of the BMF's letter, the following aspects remain unclear and may cause difficulties in practice:

- The BMF explicitly refers its statements only to warning notices under the UWG and UrhG. It thus remains open as to how the BMF intends to deal with warning notices issued in other areas. Here, too, legal certainty would have been desirable, especially a non-objection provision for the past. The Federal Supreme Court (BGH) already assumes that warning notices are subject to VAT in trademark law (decision of 21.01.21 – I ZR 87/20).
- The draft version of the BMF letter still contained the restriction that a supply by warning notice only exists in the case of a justified warning notice. This restriction no longer exists in the current version. It can be concluded from the text passage, which assumes a VAT liability due to unduly charged VAT in the invoice, in the case of an unjustified warning notice, that the unjustified warning notice is not to be classified as a supply by warning notice.
- In cases of taxation on an invoice basis, the person issuing the warning notice is obliged to pay the VAT, even if he does not initially know whether he has issued the warning notice to the correct recipient and whether and when he will receive payment. The only explicitly mentioned constellation in which the person issuing the warning notice can adjust his VAT liability is if the person being warned substantially denies the infringement. However, this does not exclude the possibility of a reduction in payment for reasons that are also otherwise recognised within the scope of sec. 17 German VAT Act (sec. 17.1, para. 5 German VAT Circular).

### 4 Consequences for the practice

For warning notices issued before 01.11.2021, the person issuing the warning notice may invoke the non-objection rule vis-à-vis the tax office. For warning notices issued after 01.11.2021, issuers must ensure that the supplies by warning notices are properly taxed. The warning notices should contain a clear breakdown of the compensation being claimed for expenses and damages. If VAT is indicated separately in the warning notice or invoice, the issuer may be liable to pay the unduly charged VAT if the person being warned is not the actual infringer of the rights. If a taxable person is warned, he is entitled to an input VAT deduction. For this purpose, the person issuing the warning notice must issue a proper invoice with a separate VAT statement – at least as soon as it is established that the person being warned is the actual infringer.