



KMLZ VAT NEWSLETTER

7 % or 19 % VAT on food and drinks?

1. Background to the German Ministry of Finance's circular of 20 March 2013

The distribution of food is subject to the reduced VAT rate of 7 % if the distribution is considered to be a supply of goods according to sec. 3 para 1 of the German VAT Act (see sec. 12 para 2 no. 1 in conjunction with attachment 2 of the German VAT Act). The same applies for the distribution of certain drinks (for example, milk). However, if the distribution of food is deemed to be a supply of services according to sec. 3 para 9 of the German VAT Act, the regular VAT rate of 19 % applies. The latest German Ministry of Finance's circular focuses on the question of when the distribution can be considered to be a supply of goods or a supply of services. This is the reaction of the fiscal authority to the jurisdiction of the European Court of Justice and the Federal Fiscal Court from two years ago. At the same time, the German Ministry of Finance is reacting to an amendment made at the European level (revision of art. 6 of the Council Implementing Regulation with effect from 1 July 2011).

2. General statements by the German Ministry of Finance

Almost every distribution of food is connected to a service

New German Ministry of Finance's circular

On 20 March 2013, the German Ministry of Finance released the long awaited circular regarding the taxation of food and drinks. The circular starts by providing general information about when the reduced VAT rate of 7% will apply and subsequently goes on to give 16 examples, with a view to assisting the understanding of what is involved. The applicable VAT rate depends on the specific details of each of the sales processes. Entrepreneurs should take this into consideration when organizing the sale process.

element. Services are only harmful to the reduced VAT rate if they sufficiently outweigh the supply when looking at the process, as a whole. The rate does not depend upon the number of service elements.

According to the German Ministry of Finance, services that are necessary for the marketing of procured food are harmless. For example:

- Preparation of food,
- transport of food to the place of consumption, including related services such as cooling or heating,
- agreement of a fixed delivery date,
- usual supplementary work (such as packaging, addition of non-returnable dishes and cutlery),
- provision of devices that are primarily supporting the sale of the goods (for example, counters at kiosks).

As the applicable VAT rate no longer depends on the way the food is prepared, the previous distinction made between standard food and other food has lost its VAT related relevance.

However, services which are unnecessary for the marketing of food and therefore harmful to the reduced VAT rate are, for example:



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- Provision of an infrastructure that supports the hospitality services being offered, especially devices or equipment that support the intended consumption of food on-site (for example, tables and chairs, beer table fittings),
- serving food and drinks,
- providing dishes and cutlery,
- cleaning and disposal of items,
- individual advice for choosing food and drinks.

If items provided for use (dishes, plates etc.) are only used for packaging, they are not considered to be a harmful service element. In a case like this, the cleaning and disposal of these items is also considered to be harmless.

It is already considered to be harmful to the reduced VAT rate if the food-selling entrepreneur provides an infrastructure that supports the hospitality. It is irrelevant if the customer actually makes use of this infrastructure or not. However, the case is different if the customer states, upon the conclusion of the contract that he does not wish to eat on-site but rather take the food with him. If this is the case, an infrastructure supporting the hospitality/catering is not taken into account. Consequently, the familiar question “dine-in or take-away” retains its VAT-related meaning.

If devices used primarily serve purposes other than facilitating the consumption of food and drinks (for example bar tables, seating in cinemas, theaters or stadiums, seating in waiting areas of cinema foyers etc.), they are also not taken into account.

3. German Ministry of Finance's statements re 16 examples

In addition to these general statements, the German Ministry

of Finance's circular also contains 16 examples covering different areas: snack bars, catering and party-service businesses, school lunches, catering in hospitals, meal-delivery services (= meals-on-wheels) and “food courts” (= several entrepreneurs provide tables and chairs in shopping centers). What is striking about these examples is the fact that the German Ministry of Finance is endeavoring to impose a wide application of the reduced VAT rate, especially for the distribution of food and drinks in social sectors. Here, the service elements that would have been considered to be harmful in other sectors are considered harmless: the provision and cleaning of reusable dishes for meals-on-wheels (example 14) as well as the cleaning of dishes by entrepreneurs in hospitals (example 8) are harmless to the reduced VAT rate.

4. Practical tip

The latest German Ministry of Finance's circular will replace the previous circular with retroactive effect as of 1 July 2011. That way, the German Ministry of Finance follows the effective date of art. 6 of the Council Implementing Regulation. The fiscal authority does not object to entrepreneurs referring to the old, more favorable, circular for supplies taking place before 1 October 2013.

Entrepreneurs who sell food should check if they provide services that are harmful to the reduced VAT rate in terms of the latest German Ministry of Finance's circular. Entrepreneurs that provide take-away-food should document this separately. In some cases, entrepreneurs could make use of the existing loophole for a more favorable shaping of the law.