

German Federal Ministry decrees on joint VAT liability for online marketplace sales

Issue 02 / March 2019

In Brief

With effect from January 1st 2019 a new rule has been introduced into the German VAT Act: an operator of an online marketplace is jointly liable for German VAT not accounted for by online traders for their supply of goods via the operator's marketplace.

In its decree of January 28th 2019 (hereinafter referred to as "the decree"), the German Federal Ministry of Finance (Bundesministerium der Finanzen, or BMF) comments in detail on the amendment to the German VAT Act with respect to this joint liability for VAT. The decree sets out details of the recording obligations, requirements regarding the supplier's VAT registration certificate and the conditions of joint liability.

General information

As of January 1st 2019, a new joint liability provision was added to the German VAT Act. It provides that the operators of online marketplaces (hereinafter referred to as "operators") are jointly liable for unpaid German tax on supplies which have legally been initiated on their online marketplaces by other taxable persons (hereinafter referred to as "traders"). As the BMF expressly points out, marketplaces that have the function of a mere "bulletin board" – as defined in more detail by the BMF – are not covered by the new regulations. For more detailed information about the amendment, we refer to [issue 1](#) of our January 2019 VAT Newsflash.

The application rules now published by the BMF impose explicit and implicit inspection obligations on operators in order to comply with their recording obligations and to avoid joint liability. However, in many cases the application rules remain unclear as to whether and which obligations they impose. We have highlighted a number of them in this newsflash.

The quite extensive decree contains a large number of provisions and therefore we cannot describe every detail in this newsflash.

Rather, we aim to highlight some particularly noteworthy regulations. We strongly recommend that concerned operators (and traders) check the decree in its entirety and seek detailed advice tailored to their individual situation.

Recording obligations

The BMF points out that the new recording obligations have already been in place since January 1st 2019. However, for simplification reasons, the BMF has announced that it will not object if records are not kept until the joint liability of the relevant operators actually commences. Joint liability is being introduced in two phases: for traders who do not have their permanent address, usual residence, seat or place of management in Germany, the EU or an EEA state, the joint liability and reporting obligations are applicable as of March 1st 2019, and for all other traders the effective date is October 1st 2019.

The fact that a supply is not subject to joint liability under the terms of the new provision does not mean in itself that no recording obligations must be observed. As the amendment (and the decree) provide, recording obligations are already a requirement if a supply begins or ends in Germany (under all further conditions) – regardless whether

or not it is subject to VAT in Germany. The joint liability rules, however, require that a supply of goods is within the scope of German VAT.

The operator shall, inter alia, record the place where the transport or dispatch begins, as well as the place of destination. The same applies to the time of the supply – this is normally the time the transport of goods starts. However, if the operator does not arrange for shipment, the place and time of the supply will generally be unknown to him.

👁 This means that the trader must provide this information (at least) to the operator separately.

An additional obstacle in case of traders not registered with the electronic marketplace as taxable persons is the fact that the address to be recorded is the residential or registration address.

👁 Particularly in the case of traders domiciled abroad, in most cases it will be difficult to check the address provided by the traders. This puts the operator at risk since, generally speaking, non-liability requires the operator to fulfil his recording obligations. It remains unclear what applies if the trader provides false information.

Tax registration certificate

In the case of traders acting openly as taxable persons, the operators of electronic marketplaces comply with parts of their recording obligations already by obtaining a valid certificate of VAT registration from the traders, issued by their German tax office. As the BMF expressly points out, this certificate will not serve as proof that the trader is actually a compliant taxpayer. Evidence indicating that the applicant does not meet his VAT obligations or does not comply with them to a significant extent would not prevent the certificate from being issued.

Irrespective of the number of electronic marketplaces on which a trader sells his goods, he will only receive a single certificate from his local tax office. However, a scan

made available electronically to the operator, for example, will suffice. Note that in another decree, of February 21st 2019, the German tax authorities provide a concession: until April 15th 2019, it will not be objected if operators obtain, from traders who do not have their permanent address, usual residence, seat or place of management in Germany, the EU or an EEA state, instead of a certificate a scan or a copy of their application for a certificate submitted before February 28th 2019.

If the operator is in reasonable doubt as to the authenticity of the certificate, the tax office mentioned in the certificate must, upon request, provide information about the validity of the certificate. According to the BMF, if the operator of the electronic marketplace fails to make such enquiries in the event of suspicion, he may expose himself to joint liability for the corresponding supplies performed via his marketplace.

👁 This rule seems to imply that the operator should verify the correctness and plausibility of the certificate in terms of appearance and content.

According to the BMF, no certificate is required if no supplies within the scope of VAT are carried out and therefore no VAT registration is required. In this case, the recording obligations can be met in a different way, as outlined in the decree. According to the BMF, this applies inter alia to supplies from other EU countries to certain customers in Germany, provided that the place of supply has not shifted to Germany under distance selling rules (Article 33 et seq. of the VAT Directive 2006/112/EC). The same applies to suppliers directly supplying from third countries after concluding the sales contract under “duty unpaid and untaxed” shipment conditions (ie, without triggering Article 32(2) of the VAT Directive 2006/112/EC).

👁 It is unclear whether and to what extent the operator has to examine the VAT treatment of the trader’s supplies (the BMF has, however, established a specific obligation to examine VAT treatment in distance sales cases; see below).

According to the BMF letter of December 17th 2018, all certificates are valid until December 31st 2021 at the latest. However, the need for action may arise earlier: validity expires six months at the latest after publication of a further BMF decree on the introduction of an electronic certificate intended to replace paper certificates.

Joint liability

The possession of a valid certificate is in principle suitable (and required) to avoid joint liability for outstanding VAT where the trader acts openly as a taxable person. However, notwithstanding the presence of a valid certificate, joint liability shall arise if the operator was aware or should have been aware, after exercising the diligence of a prudent businessperson, that the supplier did not comply in part or in full with his tax obligations. According to the BMF, potential knowledge about such non-compliance is to be assumed if the operator of the electronic marketplace ignores obvious facts, or facts that have come to his attention, that indicate a breach of VAT obligations on the part of the trader selling goods on the operator's marketplace. This does not require active research. "Potential knowledge" merely relates to facts which come to the operator's knowledge in the course of his business and which allow the conclusion of a breach of VAT obligations.

Despite the fact that the BMF uses a word such as "merely", the facts learned during the course of the operator's business usually represent a wide field since the communication between trader and customer for initiating the supply is in most cases carried out entirely via the electronic marketplace. Joint liability could be triggered if any of the operator's departments – not necessarily the tax department – comes to know relevant information. In addition, the wording of the provision governing joint liability also covers unintentionally uncharged VAT and even insolvency claims by the tax office against the trader. As the BMF itself points out, there are particular indicators in certain scenarios giving rise to the operator's obligation to deal more closely with the trader. There is also the question of whether the supply threshold pursuant to Article 33(1) of the VAT Directive 2006/112/EC is exceeded

in the case of distance sales from other EU countries to Germany, and whether the supply is taxable under the scope of German VAT.

👁 Therefore, a plausibility check of distance sales and other supplies could also be important for the operator.

In terms of the above the BMF makes the following statement. If the trader has notified the operator of the electronic marketplace that he makes use of the special regime for distance sales in accordance with Article 33 of the VAT Directive 2006/112/EC and that no supplies within the scope of German VAT are carried out, yet the total turnover generated by sales on the marketplace exceeds the German supply threshold of (currently) €100,000, this would be considered "a clear indication" that this notification is incorrect or invalid.

👁 This implies a corresponding obligation on the part of the operator to audit such traders.

The fact that joint liability, as explained above, presupposes VATable supplies within the scope of German VAT and therefore does not include tax-free supplies, is generally of little practical significance: under normal conditions, it will be difficult or even impossible for an operator to prove that the conditions for exemption were actually met.

An operator having a reason to assume a breach of VAT obligations etc. by the trader does not necessarily have to block this trader immediately: the BMF allows the operator to set certain deadlines in order to give the trader the opportunity to meet his obligations before the trader's account is blocked. As the decree provides, the marketplace operator "should inform the tax authorities" of such a block. If, however, the tax authorities approach the operator with a request to block the trader and set a deadline, things are different. The decree does not specify that deadline, nor does it give any recommendations, so the deadline could be very tight in individual cases.

As regards liability for traders who are not registered as taxable persons with the marketplace, joint liability is avoided in the first place if the operator fully complies with his

recording obligations. This does not apply in cases where the operator, on the basis of the type or quantity of goods or the turnover, and exercising the due diligence of a prudent businessperson, was demonstrably aware (or should have been aware) that registration as a non-taxable person was unjustified. This provision is targeted at cases where a person, although registered as, for example, a private individual, actually deals like a taxable person in terms of VAT.

👁 In this context, the BMF considers it a clear indication if the turnover achieved on the marketplace reaches €17,500 within a calendar year. This would seem to correspond with another obligation of the operator to inspect that matter in more detail.

The same shall apply if the operator has knowledge that, contrary to the information provided by the trader when registering on his marketplace, supplies within the scope of German VAT have been performed in Germany, and the relevant tax office has not registered the trader for VAT purposes and thus no VAT is being paid on the revenues generated.

Outlook

The operators of electronic marketplaces will soon be subject to further far-reaching VAT changes. As things stand at present, implementation of the second stage of the so-called “digital package” in national law will be in place by January 1st 2021. Among other things, this will fundamentally reform distance selling to non-taxable consumers, for example with regard to the place of supply and the applicable taxation procedure. Operators of electronic marketplaces are particularly reminded of the new Article 14a of the Directive, which provides that, in certain cases with third country references, they are to be treated in principle as if they had received and supplied the goods traded through themselves.

Sources

BMF decrees dated **December 17th 2018** (sample application and form for the certificate), **January 28th 2019** and **February 21st 2019** (all in German only); Act on the Avoidance of VAT Losses in Trade

with Goods on the Internet and on the Amendment of Further Tax Regulations, Federal Law Gazette I 2018, p. 2338, available at www.bgbl.de (in German only); for the so-called Digital Package, see **Council Directive (EU) 2017/2455** of December 5th 2017

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