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By PwC Deutschland | 13 September 2016

Electronically supplied services for VAT purposes: the provision of a database (“search engine”) in the internet

The Supreme Tax Court held that services provided by a US-resident online-dating agency to German resident private users constituted electronically supplied services, with their place of supply in Germany.

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The appellant was a US-resident corporation which carried on its business from the USA and which did not have any presence in the EU. In the year in question (2003) this corporation carried on networking services, which allowed its paying users to obtain personal information on other paying users and to make contact with them (i.e. an online dating agency).

The services included a search function so that the users could search according to certain criteria, various options to make direct contact with other users, a newsletter, as well as a chat room. In addition to these platforms, the appellant provided a complaints' hotline, as well as a department, which monitored user activities and assisted in cases of breaches of privacy or other abuse.

As all these activities were carried out in the USA, the appellant assumed that it would not be necessary to file a VAT return in Germany in relation to the services provided to German users. A VAT assessment was issued for 2003, but the administrative appeal and the appeal before the tax court lodged by the appellant were unsuccessful.

The Supreme Tax Court confirmed the decision of the lower court stating that, by providing its paying users with access to its online community, the appellant had supplied services for a consideration. With effect from 1 July 2003, these services were "electronically supplied" within the meaning of the old Section 3a (4) No. 14 VAT Act (now Section 3a (5) 2nd Sentence No. 3 VAT Act) and, therefore, the place of supply was - under old Section 3a (3a) No. 14 VAT Act (now Section 3a (5) 1st Sentence VAT Act) - Germany.

The term "electronically supplied services" in VAT law includes services, which are provided through the internet or a similar electronic network, which are by their nature automatized, which occur with minimal human intervention and which would not be possible without information technology.

When considering whether human intervention is involved, the actual services supplied themselves should be examined. Thus, any human intervention in the original start-up of the electronic system or in its maintenance or the input of the users themselves are not considered to be essential to the services supplied and do not therefore affect the assessment of whether there is only minimal human intervention.

The conditions for an electronically supplied service are generally met, where, through an internet platform, an entrepreneur provides - for a consideration - his members with a database with automatic search and filter functions in order to make contact with other members (in this case, online dating agencies).

A database is a collection of works, data and other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.

Where an entrepreneur resident in a third country supplies these types of services to a German resident consumer (i.e. not an entrepreneur), the place of supply is Germany.

The provision of the chat room and the newsletter in this case were to considered ancillary services, which had no impact on the place of supply.

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