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Online platforms and value added tax

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The so-called "platform economy" refers to a popular business model that is based on an (online) platform bringing together providers of certain goods and services with customers. This business model is so popular and so "special" from a VAT perspective that legislators in Switzerland and abroad feel compelled to address the special features by amending their respective VAT law. In the EU, for example, specific regulations have applied to online marketplaces and platforms since 2021. In Switzerland, a corresponding new regulation will be introduced to the VAT Act on 1 January 2025. However, this will only affect supplies of goods that are brokered via online platforms. Services will (initially) not fall within the scope of the regulation. Against this background (and because the legal situation applicable until 1 January 2025 also applies to all supplies), administrative practice and case law from this area are still of interest - such as the interesting Federal Administrative Court ruling of 7 December 2023 (A-1573/2022).

BACKGROUND

In the case of supplies via online platforms, the question regularly arises from a VAT perspective as to whether the platform itself is deemed to be the VATable provider of the brokered supply (case 1) or whether, from a VAT perspective, it merely provides a brokerage service that is decoupled from the brokered supply (case 2).

In case 1, the brokered supply and its recipient are decisive for the VAT qualification of the supply provided by the platform. The remuneration of the recipient of the supply constitutes the basis of assessment for VAT. In this constellation, consumers are often deemed to be the recipient of the service (b2c), which leads to extended tax obligations for the platform, particularly abroad.

In case 2, only the brokerage service itself forms the content of the broker’s supply; the commission charged to the supplier and/or the recipient of the brokered supply forms the basis for calculating the platform's turnover. If a fee is only charged to the supplier, the brokerage service of the platform is often provided to an entrepreneur (b2b).

In the opinion of the administration, the constellation in which the parties find themselves is largely determined by the external appearance and whether it is objectively clear from the circumstances as a whole that the platform merely acts as an intermediary and does not provide the supply itself.

JUDGEMENT OF THE FEDERAL ADMINISTRATIVE COURT OF 7 DECEMBER (A-1573/2022)

The case in question concerned an intermediary platform for food deliveries. The platform was of the opinion that it qualified as a "food supplier" due to its public appearance. This was contested

by the FTA, which considered the platform to be merely an intermediary that provided intermediary and delivery services taxable at the standard rate. The FTA based its qualification on, among other things, the general terms and conditions, which clearly stated that there was a direct service relationship between the restaurant and the customer for the meals themselves. In the view of the administration, this position was strengthened by the fact that the customer could not only select the dishes during the ordering process, but also the specific restaurant from which he wished to order.

As a result, the court ruled in favour of the platform and based its judgement largely on the customer's perception of the ordering process and afterwards ("user experience"). The platform had acted as a point of contact or counterparty for customers throughout the entire ordering process as well as during delivery and in the event of complaints and payment. Any ambiguities as to whether there was an intermediary relationship or a direct service relationship with the platform were "at the expense" of an intermediary service. If it is not clear from the circumstances that the platform is acting as an intermediary, it should be assumed in case of doubt that the platform itself is acting as the supplier.

CONCLUSION

It is remarkable how much importance the court attaches to the supposed "user experience", even if this - in the court's view - contradicts the explicit written documentation. It is not at all unusual for consumers not to take any in-depth knowledge of general terms and conditions, in the eyes of the court. It follows from this that the websites and order processing of corresponding platforms could be of great importance and must be included in a VAT assessment.

The judgement was appealed to the Federal Supreme Court. It therefore remains to be seen whether the decision will be upheld. For platforms that broker supplies of goods, the new regulation will create a certain degree of legal certainty from 1 January 2025. Platforms that broker services are required to keep an eye on developments - and to thoroughly review their current public perception.