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When is a service considered an "electronic service"?

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If a foreign supplier provides so-called electronic services to consumers (b2c) in Switzerland, this quickly leads to the foreigner having to register for VAT in Switzerland and charge VAT on his services to Swiss customers. Services that are not considered electronic services, on the other hand, generally do not trigger a registration obligation, as the recipient of the service may be liable for the purchase tax (even if he is a consumer and not an entrepreneur). The question remains: When does a service actually qualify as an "electronic service"?

BACKGROUND

Electronic services follow the general rules for determining the place of supply for VAT purposes. This means that, as a rule, they are taxable where the recipient of the service is resident or domiciled ("recipient location principle"). What distinguishes electronic services from other services is primarily that they lead to a registration obligation for the foreign service provider if customers are domestic consumers (b2c). If a foreign supplier who is not VAT-registered in Switzerland provides a "normal" service to a domestic recipient and this service is subject to the recipient location principle, the domestic recipient is liable for acquisition tax if he is either liable for tax (b2b) or receives such services for more than CHF 10,000 per year (b2c). Due to this situation, the foreign supplier is not liable for VAT in Switzerland.

The situation is different if the foreign supplier provides a so-called electronic service. In this case, the foreign supplier remains liable for tax and must register in Switzerland for VAT purposes in order to settle the VAT with the FTA.

According to FTA practice, a service is deemed to be an electronic service if the following conditions are cumulatively met:

- It is provided via the Internet or another electronic network
- it is provided automatically and human involvement on the part of the service provider is minimal
- the provision of services is not possible without information technology.

In individual cases, questions of demarcation arise as to whether a service qualifies as an electronic service in a specific case. The Federal Supreme Court recently had to deal with such a demarcation question (judgement of 25 October 2024, 9C_482/2024). The main focus was on the question of "minimal human involvement on the part of the service provider".

FACTS OF THE CASE

9C_482/2024 BG

A is domiciled abroad and operates online sports betting. The FTA retroactively entered A in the VAT register and assessed an additional tax claim, as A provides electronic services to non-taxable persons in Switzerland, reaches the turnover limit and is therefore liable to pay tax. A disputed both the provision of electronic services and the tax liability.

DECISION

The disputed question in this case was whether the service provided by A was automated and only performed with a minimum of human involvement.

The FTA and the Federal Administrative Court assumed that the disputed service consisted of the granting of a conditional opportunity to realise an agreed profit. The human influence in A's offer was limited to the determination of the betting odds and other preparatory acts aimed at the conclusion of future bets, but was not itself part of the service relevant for VAT purposes. A countered this by arguing that significant activities of the employees took place as part of the provision of the service: In the case of live betting, the betting odds had to be constantly processed manually. Customers also have access to a support team that they can contact if they have any questions or problems.

In its decision, the Federal Supreme Court referred to the essential core of the service relationship and followed the reasoning of the lower court. Although the human interventions claimed by A were of considerable importance, they were limited to the design of a product that was the subject of the offer (and not the service itself). According to the administrative practice of the FTA, human intervention in the context of preparation, development and maintenance work is not taken into account

In the context of the provision of the service itself, human intervention is always to be considered "minimal" if it does not serve to respond to individual customer requests. The court refers to the human croupier in an online casino or the lecturer in an online course who does not offer participants the opportunity to interact before, during or after the seminar. Although service and support are indispensable for A's offering, they are not an integral part of the actual electronic service. Rather, they are services that merely fulfil an assigned function. This distinguishes them from activities with more than minimal human involvement, such as counselling, evaluating, providing individual feedback or answering questions.

CONCLUSION

The judgement makes it clear that, from a Swiss perspective, services can be assessed as electronic services more quickly than some entrepreneurs may realise. The fact that a real person is involved before, during or after the provision of the service is sometimes of little help here. It should also be noted that electronic services in the b2c sector are also subject to special regulations in other (European) countries, which may make it necessary for Swiss companies to charge foreign VAT. Anyone who no longer makes their services available to foreign customers only by letter is therefore well advised to have their services qualified by a VAT expert. Failure to do so may result in considerable VAT risks.