

# VAT Newsflash

Issue 2, September 2021

## German Federal Ministry of Finance issues decree on travel services

VAT treatment of travel services has always been rather complicated. After losing an infringement proceedings case in the European Court of Justice (ECJ) as far back as 8 February 2018, Germany was forced to alter its VAT rules for these services. This was achieved by amending the German VAT Act (Umsatzsteuergesetz, or UStG) with effect from 18 December 2019 to introduce the so-called “customer-based approach” on the Tour Operators Margin Scheme (TOMS). Since this date, the TOMS VAT regime has also covered travel services provided to a taxable person for the purpose of that person’s business. Calculation of total margins has also been abolished, although this will not take effect until 1 January 2022. Some 18 months after this amendment of the UStG, Germany’s Federal Ministry of Finance (Bundesministerium der Finanzen, or BMF) has now thoroughly overhauled the German VAT Application Guidelines (Umsatzsteuer-Anwendungserlass, or UStAE) with respect to travel services.

### General information

The overhaul of Section 25 of the UStAE is not restricted to the introduction of the customer-based approach; it also considers plenty of recent case law from both the ECJ and the German Federal Fiscal Court (Bundesfinanzhof, or BFH). Therefore, it is not possible to comment on the decree in its entirety, and this newsletter will focus on particularly important aspects for VAT practice.

First of all, the decree emphasises certain circumstances that do not limit the application of TOMS. For example, it does not matter whether providing travel services is the sole purpose of the provider’s business. The purpose of the journey and its duration are irrelevant, and it does not matter whether the customer is a taxable person, whether or not the journey is considered a package tour (e.g. under the Package Travel Directive), whether the provider (acting in their own name) is providing travel services on their own account or for the account of a third party, or whether the customer is the person actually making the journey.

It should be noted that, in general, services provided by a taxable person (employer) to employees in the course of their employment may qualify as travel services (i.e. services under TOMS). However, the decree emphasises that business trips are not subject to TOMS because they are provided to employees by their employer free of charge and for business purposes. Nonetheless, this exception does not apply to services such as travel services that are provided in chain transactions and are related to business trips (at least, not if the customer is charged for these services). For example, if a company in a group organises a business trip for employees of other companies in the group and fees are collected for the trip, it is possible that the

services procured by the first company will be considered travel services and that TOMS will apply on the sale of the services.

## Travel services

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### What is a travel service?

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For TOMS to be applicable, a taxable person must provide a travel service. For that purpose, the taxable person must buy in travel-related supplies for this purpose (i.e. supplies of goods or services performed by third parties for the immediate benefit of the traveller). Journey-connected expenditure which is of indirect benefit to the traveller (e.g. intermediation of travel services or coach repair services) does not constitute bought-in travel-related supplies.

The definition of a “travel service”, which had previously been quite vague, has now been substantially clarified using a concept which can best be described as “infection theory”. If a taxable person performs a bundle of individual supplies (which, in the first step, have been purchased as bought-in travel-related supplies) to a customer, any transport or accommodation service contained in the package is enough to “infect” the entire package, transforming it into a single travel service to be taxed under TOMS. Under certain circumstances, it is possible for accommodation to be considered a travel service even if it is the only service involved – which may impact the place of supply and the input VAT deduction involved when booking hotel rooms.

A travel service is considered to be a single service which is rendered at the place where the taxable person providing the service has their place of business. Where a travel service is provided by a fixed establishment, the fixed establishment will be deemed to be the place of supply of that service. However, it should be noted that, according to the opinion of the BMF, travel services performed by third-country taxable persons not established in the EU are not subject to TOMS (any fixed establishments that these taxable persons may have within the EU are only relevant for the applicability of TOMS if they are immediately involved in the sale of the journey). This means that, in the case of journeys taking place wholly or partly in Germany, the taxation of some or all components of the journey may be subject to general VAT treatment in Germany.

It should be noted that the taxation of a travel service under TOMS cannot be made subject to supply-related VAT exemptions or to the reduced VAT rate.

### Exceptions to the “infection theory”

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The decree contains a number of explicit exceptions to the “infection theory”:

- Tickets giving admission to trade fairs, seminars etc., which are provided by the tour operator as a package also covering transport, catering or accommodation are not considered to be travel services. However, this exception should not be taken as a general exception.
- Journeys which were intended as benefits in kind from the outset are not subject to TOMS. However, if the journey was initially procured for business purposes, but is subsequently made available free of charge to staff or for other non-business purposes, the journey is considered a taxable benefit in kind that is subject to TOMS.
- Certain journeys for business purposes also do not qualify as travel services under TOMS (e.g. business trips or journeys provided as customer giveaways). The reason for this appears to be that these journeys are provided free of charge but do not qualify as taxable benefits in kind. As mentioned above, this might not be applicable e. g. to services passed on within a group in a chain transaction.

It should also be noted that where travel services are passed through a chain of taxable persons, it is the individual components that are considered bought-in travel-related supplies, not the overall inbound travel service. This means that outbound and inbound travel services may be subject to different VAT treatment for the supplier and the customer. There are, however, some exceptions which restrict subsequent taxable persons in the supply chain to the same VAT treatment applied by the initial supplier.

In addition to the exceptions listed above, in-house services (i.e. use of a company’s own resources, such as its own coaches for passenger transport, its own hotels for accommodation etc.) and pure intermediation of travel services are not considered to be bought-in travel-related supplies, and therefore do not fall under the scope of TOMS. Where in-house services are used together with bought-in travel-related supplies, TOMS is only applicable to the extent that bought-in travel-related supplies are used. It should be noted that

the BMF places high demands on intermediary services – travel agents acting as intermediators are well advised to make it extremely clear that they are acting in the name and on account of another person.

It is also unclear whether all bought-in supplies of immediate benefit to the traveller will be considered a travel service regardless of their nature. While the BMF has provided a list of services typically provided during journeys, such as catering or tickets for admission (apart from cases of admission to fairs, seminars etc. mentioned above), the decree also states that any supply that a traveller would make use of on a self-organised journey may be considered a bought-in travel-related supply. It thus appears that the list of services cannot be treated as exhaustive. However, travel cancellation insurance, at least, will not normally be considered part of a travel service. It also appears that accommodation and/or catering services related to an event service (organisation of trade fairs, exhibitions and congresses, as defined by BMF) will be considered independent supplies, which could mean that the BMF is willing to keep these event services outside the scope of TOMS.

## Other matters

Travel services may be zero-rated in their entirety if the bought-in travel-related supplies involved are exclusively carried out in third countries. It should be noted that the UStG includes a use and enjoyment provision for travel-related inputs exclusively provided in a third country: in such cases, the third country in question becomes the place of supply.

If bought-in travel-related supplies are partly allotted to third countries, the travel service is only partly exempt from VAT, although the decree does include some simplifications; for example, for cruises or passenger air transport. The extent of any VAT-exempt travel services must be stated on the invoice.

The tax base for travel services under TOMS is the difference (margin) between the amount paid by the customer (the trip price) and the expenditure for bought-in travel-related supplies, exclusive of VAT. This means that the gross expenditure for bought-in travel-related supplies must be subtracted from the trip price, and that the difference is considered to be a gross amount from which the VAT must still be deducted.

In general, the tax base must be calculated for every individual journey and every individual traveller, except in cases where customers act on behalf of other travellers. Although it will not be possible to calculate total margins from 2022 onwards (as mentioned above), the decree does provide for some simplifications.

The decree also contains a large number of other detailed provisions. These cover cases such as journeys involving both bought-in and in-house services, journeys involving both taxable and VAT-exempt services, cancellation fees, instalments, cases where the tax base has to be estimated because it is not yet fixed, and taxable travel services that are provided free of charge. The BMF also devotes considerable attention to the VAT treatment of rebates and withdrawal from a travel agreement.

Input VAT on bought-in travel-related supplies is not deductible – an important consideration for VAT returns and input VAT refund applications. Input VAT on other expenditure (e.g. in-house services) is deductible under normal conditions. This is also the case for business journeys not subject to TOMS in the sense mentioned above. The possibility to deduct input VAT on travel-related services bought-in in third countries (corresponding trip supplied is subject to the above mentioned VAT exemption since effected outside the EU), depends on the VAT law of the third country. The decree also covers issues such as recording obligations.

## Transitional rules

The BMF requires the provisions of the decree to be applied in all open cases, except for the provisions on calculating individual margins. However, in the interest of protecting legitimate expectations, the BMF has stated that it will not object to suppliers applying the previous provisions of Section 25 UStAE to transactions completed up to 31 December 2021. The provisions on calculating individual margins (UStAE, Section 25.3) are required to be applied to transactions after 31 December 2021.

As it does not consider TOMS to be applicable to third-country taxable persons, the BMF introduced a transitional arrangement in the decree of 29 January 2021. This arrangement stated that no objection would be raised to third-country travel service providers applying TOMS for services provided up to 31 December 2020. In a further decree dated 29 March 2021, this transitional rule was extended to 31 December 2021. In the present decree of 24 June 2021, however, the BMF only refers to the January decree, stating that the

regulation “continues to apply”. This can be read as implicitly including the March extension, but it remains unclear whether or not the BMF will actually maintain this regulation until the end of 2021.

## Sources

BMF decrees of 24 June 2021, 29 January 2021 (taxation of travel services provided by third-country operators) and 29 March 2021 (extension of the transition period for third-country operators granted in the decree of 29 January 2021), all in German only;

ECJ C-380/16 (Commission v. Germany), decision of 8 February 2018, in German and French only.

## Contacts

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### Berlin

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**Götz Neuhahn**

Tel: +49 30 2636-5445  
goetz.neuhahn@pwc.com

**Nicole Stumm**

Tel: +49 30 2636-3733  
nicole.stumm@pwc.com

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### Frankfurt / Mannheim

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**Frank Gehring**

Tel: +49 69 9585-2771  
frank.gehring@pwc.com

**Gerald Hammerschmidt**

Tel: +49 69 9585-5290  
gerald.hammerschmidt@pwc.com

**Robert Clemens Prätzler**

Tel: +49 69 9585-6712  
robert.clemens.pratzler@pwc.com

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### Hamburg / Hannover

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**Markus Hüllmann**

Tel: +49 40 6378-8858  
markus.huellmann@pwc.com

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### Munich / Stuttgart / Nuremberg

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**Sandra Zölch**

Tel: +49 89 5790-6840  
sandra.zoelch@pwc.com

**Jens Müller-Lee**

Tel: +49 711 25034-1101  
jens.mueller-lee@pwc.com

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### Düsseldorf / Köln / Essen

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**Alexandra Hartenfels**

Tel.: +49 211 981-2598  
alexandra.hartenfels@pwc.com

**Sounia Kombert**

Tel.: +49 221 2084-384  
sounia.kombert@pwc.com

**David Kosiak**

Tel.: +49 221 2084-270  
david.kosiak@pwc.com

**Franz Kirch**

Tel.: +49 201 438-1120  
franz.kirch@pwc.com

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### ITX ERP and Data Analytics

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**Roberta Grottini**

Tel: +49 30 2636-5399  
roberta.grottini@pwc.com

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### ITX Financial Services

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**Imke Murchner**

Tel: +49 89 5790-6779  
imke.murchner@pwc.com

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### ITX Deals

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**Christian Schubert**

Tel: +49 89 5790-6726  
christian.schubert@pwc.com

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### ITX Business Recovery Services

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**Maria Milanovic**

Tel.: +49 89 5790-5979  
maria.milanovic@pwc.com

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