

stb andrea adis · elisabeth-kranz-str. 1/6 · 71640 ludwigsburg

Marosa Ltd.  
Pedro Pestana da Silva

pps@marosavat.com

**Memo:**

**Passenger transport services - application of VAT in Germany to so-called empty kilometers**

**Background (see e-Mail dated 13 June 2017):**

The client is active in the coach transport (transport of persons by auto car). They are the Belgian representing body for the sector of companies performing trips by autobus throughout Europe (for leisure).

*Original wording:*

**“General VAT rules**

As you know according to the VAT rules, the transport services are located where the car effectively drives the tourists on a proportion of the kilometers driven in the country in question. The kilometers is the only way to determine the taxable basis of their services (Reibüro Binder, C-116/96).

In some countries a zero rate applies to international transport of persons by bus (eg. France, Luxembourg...) (according to part B, 10) of annex X of directive 2006/112/EC).

**Application in Germany**

In Germany this service is in principle taxable at the VAT rate of 19% and due according to the kilometers driven in Germany. In order to calculate the VAT due, the net amount of the transport remuneration must be multiplied by the following proportion:

kilometer driven in Germany  
total kilometer of the trip

This in principle includes the so called “empty kilometers”. However the empty kilometers that are not part of the remuneration do not fall in the calculation (see the following link for the guidance in Germany: <http://www.steuerlinks.de/richtlinie/ustae/abs3b.1.html> and see annex fascicule in French).

## Query

According to certain administrative guidance, certain empty kilometers could be disregarded (see enclosed). Could you please provide with more guidance how this is interpreted by the German VAT authorities? How would the situations below be interpreted by the German VAT authorities. What would be the risk if the company has disregarded the empty kilometers in the calculation based on the guidance?

In the following two illustration:

### Situation 1

An autobus company has a depot in Liège (Belgium) and picks up a group in Frankfurt (empty). From Frankfurt a trip is organized throughout Europe. At the end of the trip, the bus drops the passengers back in Frankfurt and then returns to the depot in Belgium:

Total transport price: € 10 000  
Km in Germany 500 empty, 1000 loaded  
Km in Belgium: 200 empty, 800 loaded  
Km in France: 4000 loaded

Calculation of the VAT in Germany:  
- % of the turnover on which VAT is due:  $1000 / (1000 + 800 + 4000) = 17.2\%$   
- VAT due:  $€ 10\,000 * 0.172 * 0.19 = 326.8$

Can the empty kilometers be disregarded in this situation?

### Situation 2

Road trip from Genk Belgium (depot) to Graz (Austria)  
The bus drops the passengers to Graz and goes back to the depot empty (or the other way around)

Can the empty kilometers be disregarded in Germany?"

## VAT Statement from the German VAT point of view:

### **Legal regulation**

Legal basis is § 3b (1) sentence 1 and 2 UStG (German VAT Act, Umsatzsteuergesetz, short: UStG):

*A passenger transport service is supplied at the place where the transport takes place. If this kind of transport service does not only involve Germany, only that part of the service supplied in Germany falls within the scope of this Act.*

There is no legal specification regarding the calculation scheme.

Comment:

According to Article 48 2006/112/EC, the place of supply of passenger transport shall be the place where the transport takes place, proportionate to the distances covered.

ECJ has confirmed that the place of supply of international passenger transport services is to assess according to the proportion of domestic and external covered distance (C—116/96)

**Administrative guidance**

The official federal VAT Application Decree (Umsatzsteuer-Anwendungserlass, short: UStAE) implies specific rulings for determining the domestic taxable amount if a total remuneration was agreed for international passenger transport services.

(Please note: In general, the VAT Application Decree is seen as an administrative guidance by the Federal German government. It is not a rule of law, but an interpretation instruction for the tax administrative authorities. The Application Decree binds tax authorities, but not the courts. Taxpayers are free to go to court if they do not agree with the rulings. On the other hand, taxpayers can claim the application of the Decree to their benefit.)

The relevant part of the guidance is UStAE 3b.1 (6):

*If a **total remuneration was agreed or received** for passenger transport services, whereby not only domestic transport services are provided, the portion allocated to the domestic route section of the international passenger transport is to calculate on base of this total remuneration. The following applies:*

*Unless specific circumstances (like contractual agreements in the international railway transport ) do not justify a different dividing, the net price for each transport service is to calculate in a ratio considering the domestic route section and the external route section, including so called "empty kilometers" (Federal Fiscal Court decision 12.3.1998, V R 17/93). The term "**empty kilometers**" shall be understood as **parts of the route covered without passengers during** the transport service. The way from the depot respectively back to the depot – without passengers to be transported – is not part of the transport service, and therefore not to be taken into account when dividing the portions of the route. The part of the remuneration for the domestic route section can be calculated as follows:*

$$\frac{\text{net amount for the transport remuneration} \times \text{domestic (German) kilometers}}{\text{total kilometers of the trip during the transport service}}$$

Comment:

The Administration makes a relatively clear statement about their understanding of "empty kilometers": **Mere "position movements" (position driving to the agreed passengers' starting point of the trip and back from passengers' endpoint of the trip) are out of the scope of the calculation;** whereas empty kilometers from the moment passengers are picked up, until they are finally dropped ("let's call them **empty kilometers during the trip in the scope of § 3b UStG**"), are to be taken into account in the calculation of the tax base for the domestic transport services.

This interpretation instruction was published by the Federal Ministry of Finance (BMF) with decree dated 4.9.2009, and finally implemented in the VAT Application Decree.

Before, the Oberfinanzdirektion Frankfurt (responsible tax administration head for the region Hessen) published this interpretation for the first time by decree 13.11.2007. With reference to a discussion within all regional tax administration heads, also the OFD Chemnitz published the same ruling by decree 20.05.2008. The Oberfinanzdirektion Frankfurt replicated their former decree by decree 17.11.2015 (the latter was not necessary in my opinion, as the same wording was already implemented in the federal VAT Application Decree in the meantime).

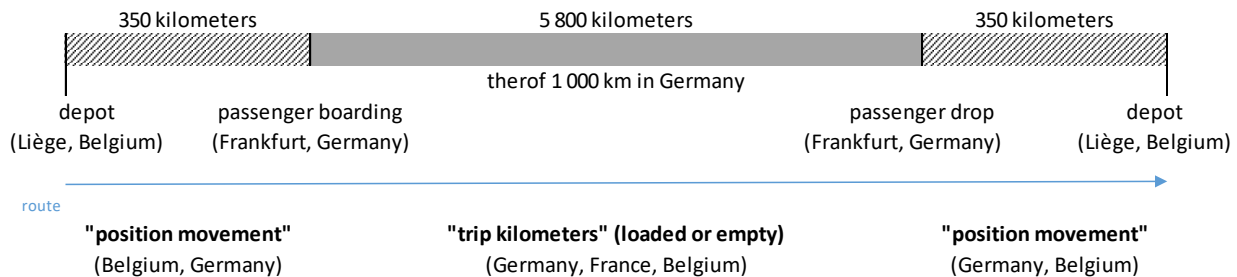
The attached "Fact sheet VAT on international passenger transport services, 4.2.2014 – French version – does not make references to "empty kilometers" (maybe a victim of the shortened summary).

As far as it can be seen, other or further official interpretations regarding "empty kilometers" are not in circulation. There is also no indication that the German Administration distinguish between domestic and external "position movements", or domestic and external "empty kilometers during the trip in the scope of § 3b UStG". Therefore, it can be assumed that Tax Authorities apply the above principles for the determination of both numerator (German kilometers) and denominator (total kilometers of the passenger trip). In my opinion, the wording in 3b.1 (6) relating to empty kilometers to be included ("*...during the transport service...*") and relating to position movements not to be included ("*...not to be taken into account when dividing the portions of the route ...*") does not offer room for a different interpretation.

Regarding the described situations, this means:

### Situation 1

According to the administrative guidance, the calculation can disregard position movement kilometers. If the listed empty kilometers in situation 1 (700 Km in total) imply only "position movements", the calculation result is therefore in line with the view of the German tax authorities.



### Calculation

Domestic German kilometers in the scope of § 3b UStG:	1 000
Total kilometers in the scope of § 3b UStG:	5 800
German tax base: $10\,000\text{ EUR} \times 1\,000 / 5\,800 =$	1 724.13 EUR
VAT 19%	327.58 EUR ✓

**Situation 1 (modified)**

Please note: In case that the listed empty kilometers in the example (700 Km in total) imply both "position movements" and "empty kilometers during the trip in the scope of § 3b UStG", the calculation changes. Example: The effective driven distance between Liège and Frankfurt a/M. boarding point shall be just around 300 Kilometers (single and return 600 Km); during the trip, passengers passed a distance of 100 kilometers by train and boat in Germany. The bus has had to follow them empty (100 km driven empty during the trip).

Calculation 1.1

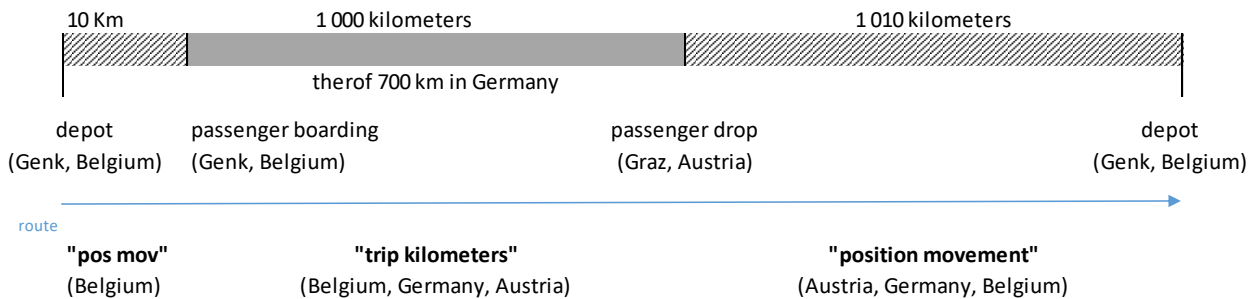
Domestic German kilometers in the scope of § 3b UStG: 1 100 (full 1 000 + empty 100)  
 Total kilometers in the scope of § 3b UStG: 5 900 (full 5 800+ empty 100)

German tax base:  $10.000 \text{ EUR} \times 1,100 / 5,900 =$  1 864.40 EUR  
 VAT 19% 354.23 EUR

**Situation 2**

Single journey agreed.

Position movements (e.g. from the depot in Genk to the meeting place in Genk, and back from Graz to depot in Genk) can be disregarded.



Calculation (example)

Domestic German kilometers in the scope of § 3b UStG: 700  
 Total kilometers in the scope of § 3b UStG: 1.000

German tax base: e.g.  $2 000 \text{ EUR} \times 700 / 1 000 =$  1 400.00 EUR  
 VAT 19% 266.00 EUR

## German tax literature

The issue receives no publicity at all. Most of the leading tax commentaries just replicate the wording of the relevant VAT Application Decree. Neither the definition of empty kilometers, nor the calculation scheme is discussed or questioned. All go in line that position movement is out of the scope of § 3b UStG, because transport services begin in principal with passenger's boarding, and end with passenger's drop.

### What is the risk if the empty kilometers are not taken into account?

(understood in the sense of "empty kilometers" are eliminated in the calculation)

#### "Position movements" are not taken into account:

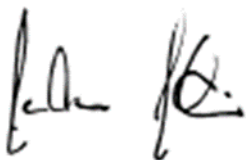
In the view of the German tax authorities, it is correct to disregard position movements in the calculation of the German tax base. To determine the right proportion, position movements shall not be taken into account in the numerator (domestic kilometers) and denominator (total kilometers of the trip). This handling is corresponding to the administrative guidance, which should develop a protection of confidence for the company.

#### "Empty kilometers during the trip in the scope of § 3b UStG" are not taken into account:

In the view of the German tax authorities, "empty kilometers during the trip" are to respect in the calculation scheme. Ignoring this, it depends on the situation (ratio of domestic and external empty kilometers); the calculated German VAT can be higher or lower than owed by law (respectively owed according to the calculation scheme of tax authorities).

If company's German VAT calculation is lower - compared with the VAT according to the Tax authorities calculation scheme, the responsible tax office may claim the self-assessment (e.g. in a VAT audit), increases the owed VAT and charges 0.5% interests per month. False submission of VAT returns, and in subsequence insufficient self-assessments and insufficient VAT payments, also allow high penalties. Penalties depend on the degree of blame, which is to asses by the tax office, and can be seen different in each case.

Ludwigsburg, June 19<sup>th</sup> 2017



Andrea Adis  
Steuerberaterin