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KMLZ VAT NEWSLETTER

ECJ: No different VAT rates for a single supply

VAT rate for single supplies

In its decision of 18.01.2018 in the case *Stadium Amsterdam CV* – C-463/16, the ECJ decided, that the same VAT rate must be applied to a single supply. A single supply may not be divided, for the purpose of applying both the standard VAT rate and the reduced VAT rate. Accordingly, the obligations to split the VAT rate, which are standardized in the national VAT law, violate Union law. This affects the obligations of splitting e.g. regarding accommodation services with breakfast/parking spaces, letting of immovable property with operating facilities and letting of sports facilities to another taxable person.

The Supreme Court of the Netherlands referred to the ECJ the question as to whether a single supply can be comprised of several elements, which are subject to different VAT rates.

1. Facts

The Plaintiff operated the Amsterdam Arena, which it leased out, for the purposes of sporting competitions and other events. Further, the Plaintiff offered sightseeing tours of the Amsterdam Arena. These tours consisted of a guided stadium tour as well as a visit to the AFC Ajax football club's museum. The participants paid a uniform remuneration for the tour. The Plaintiff was able to determine separate price elements for the guided stadium tour and the museum visit.

The referring court was of the opinion, that the entire tour constituted a single supply of service. The question was whether the single supply was subject to the standard VAT rate or rather was to be divided, to the extent that only the guided stadium tour was to be subject to the standard VAT rate and the museum visit subject to the reduced tax rate. The referring court sought clarification from the ECJ as to whether a single supply may be divided with the consequence that both the standard tax rate and the reduced tax rate could be applied.

2. Reasons for the decision

According to the ECJ, a single supply cannot be subject to different VAT rates. The ECJ requires a single supply to be subject to a uniform VAT rate, which is determined according to the principal element. This applies even if the price for each element of the single supply can be identified.

In its judgment, the ECJ first refers to the general principles for distinguishing between two or more separate supplies and a single supply. In particular, a supply of service must be regarded as ancillary to a principal supply if it does not

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constitute, for consumers, an end in itself but rather a means of enhancing the use of the principal supply of service. The ECJ confirmed a single supply, which consisted of the guided stadium tour being the principal component and the museum visit being the ancillary component.

The ECJ held that it followed, from the characterization as a single supply, "that that operation will be subject to one and the same rate of VAT". This was to prevent the situation arising where a supply is artificially split and the functioning of the VAT system affected.

3. Consequences

The ECJ decision is convincing, in terms of content, and has far-reaching implications for the national VAT law. The ECJ confirmed the principle that, from a VAT perspective, the ancillary supply of service is treated the same as the principal supply of service. In particular, this also applies to the VAT rate.

According to this, the obligations of splitting, which are standardized in the national VAT law, according to which a single supply is to be split with regard to the applicable VAT rate, violates Union law. To date, both, the tax authorities and the Federal Tax Court have assumed that an obligation to split VAT rates is applicable to single supplies and that this obligation prevails over the general principles for the distinction between the principal and ancillary supply of service (sec 12.16 para 8 sentence 3 of the German VAT Circular; Federal Tax Court, decision of 24.04.2013 – XI R 3/11). The following obligations to split VAT rates are, as a result of the ECJ decision, directly affected:

- sec 12 para 2 no. 11 sentence 2 of the German VAT Act: the reduced VAT rate is to be applied only to the supply of accommodation services and not to ancillary services such as breakfast or the letting of parking spaces

- sec 4 no. 12 sentences 2 of the German VAT Act: VAT exemption for the letting of immovable property does not apply to the letting of operating facilities, even if the letting of such facilities is an ancillary supply of service

- sec 4.12.11 para 2 of the German VAT Circular: VAT exempt letting of immovable property and a taxable rental of operating facilities when letting a whole sports facility

Cases where the service elements of a transaction do not form a single supply, and might therefore be subject to different VAT rates, are to be differentiated. This applies e.g. to the sale of food with drink (see Federal Ministry of Finance, letter of 28.11.2013) or to books with e-books (see Federal Ministry of Finance, letter of 02.06.2014).

It is now up to the national legislator to adjust the obligations to split the VAT rate, which are standardized in the national VAT law. Taxpayers can rely on the ECJ decision. They could therefore consider making adjustments, as regards future VAT treatment, in line with the ECJ decision, even if the VAT Act has not been adjusted yet. Adjustment for the past might be precluded due to the VAT liability according to sec 14c para 1 of the German VAT Act, which can only be rectified by an invoice correction and a repayment of the overcharged VAT amount to the customer.