KMLZ

VAT'S UP

VAT NEWSLETTER

Federal Ministry of Finance: Special regulations for travel services no longer apply to businesses from non-EU countries

04 I 2021

1 Background

Special VAT regulations exist in the EU for travel services. In Germany, these can be found in sec. 25 of the German VAT Act (UStG). According to this, travel services are deemed to be rendered where the supplier is established, the margin scheme is applicable and the input VAT deduction from purchases is excluded. In recent years, there has been some controversy about this regulation because some Member States had excluded travel services to other businesses (B2B) from the special regulation. Therefore, the ECJ had condemned Germany (KMLZ Newsletter 05/2018) and recently also Austria (judgment of 27.01.2021, C-787/19) in infringement proceedings.

2 Decree of the Federal Ministry of Finance

Now, by a decree of the Federal Ministry of Finance, published on 29.01.2021, there is renewed movement on the issue. The following sentence 12 has been added to sec. 25.1. para. 1 of the Administrative VAT Circular: "Sec. 25 UStG does not apply to travel services provided by businesses established in a non-EU country and without a fixed establishment in the EU". According to the Ministry, it should not be objected to if non-EU companies still apply sec. 25 UStG to travel services performed up until 31 December 2020. However, there is a retroactive effect of this to the beginning of 2021.

3 Affected businesses

This change in the administrative interpretation affects businesses that provide travel services in Germany but are based outside the EU and also do not have a fixed establishment in an EU Member State. This includes not only businesses from non-EU countries outside Europe, but also companies from non-EU countries within Europe, such as Switzerland and Norway and, since 01.01.2021, also the United Kingdom.

Ronny Langer
Certified Tax Consultant,
Dipl.-FW (FH)

+49 (0) 89 217 50 12-50
ronny.langer@kmlz.de

4 European law aspects / optional application

The Tour Operator Margin Scheme is regulated by Art. 306 - 310 VAT Directive. Art. 307, which specifically states: "The single service shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has carried out the supply of services". From this, the BMF presumably deduces that the special regulations for travel services are only applicable to businesses established or having a fixed establishment in the EU. It will be interesting to observe the position that other EU member states take on this.

In any case, the wording of sec. 25 UStG does not support the view of the Federal Ministry of Finance. Unlike Art. 307 VAT Directive, sec. 25 para. 1 sentence 4 UStG only refers to sec. 3a para. 1 UStG, which determines the place of supply. And there is no restriction on companies based in the EU. In this respect, the question arises as to whether affected businesses can apply sec. 25 UStG with reference to the wording of the law, contrary to the opinion of the Federal Ministry of Finance (until a possible change in the law), if this is more favourable for them.

5 Consequences / questions

If sec. 25 UStG no longer applies, the following questions of material law, among other things, must be clarified:

- Are the travel services still to be treated as a single bundle of services? If so, would the bundle in B2C cases be deemed to have been provided where the supplier is established in accordance with sec. 3a para. 1 UStG? And in B2B cases according to sec. 3a para. 2 UStG, where the recipient of the service is established?
- Or are the individual services to be assessed individually? This could result in different places of taxation, e.g.
    - for accommodation, where the property is located (sec. 3a para. 3 no. 1 sentence 2 letter a UStG)
    - for catering services, where the catering takes place (sec. 3a para. 3 no. 3 letter b UStG)
    - for passenger transport services where the transport takes place (section 3b subsection 1 UStG)
    - for tour guide services where supplier or recipient is established (sec. 3a para. 1 or 2 UStG)
- Which VAT rate is applicable? Does the reduced VAT rate apply, e.g. temporarily for catering services?
- In B2B cases, is the VAT liability shifted to the customer in the country of travel (Germany)?
- For which input services rendered by subcontractors not resident in Germany may the VAT liability be shifted to the recipient according to sec. 13b UStG? In this instance there would be a corresponding input VAT deduction, i.e. no loss of liquidity, but a registration obligation in Germany.

In addition, it must be weighed up which adjustments in the processes are possible in order to avoid disadvantages associated with the change or to make use of advantages. The following considerations, must be taken into account:

- Could double taxation of the services rendered occur due to taxation in both the country of residence and the country of travel (Germany)?
- Could an advantage arise because the services are deemed to have been rendered in the country of residence according to sec. 3a para. 1 UStG, but no taxation takes place there according to local regulations (double non-taxation), while an input VAT refund is possible from services purchased in Germany (e.g. hotels)?
- Can the One-Stop Shop procedure be used for the declaration? Then input VAT would have to be applied for reimbursement in the 13th Directive refund procedure, with processing times usually exceeding one year. Would the regular submission of VAT returns therefore be more advantageous?
- Or are services received for which the VAT liability is shifted, in which case the One-Stop Shop procedure would not be applicable? Input VAT could then only be claimed by filing VAT returns after a VAT registration.

KMLZ Rechtsanwaltsgesellschaft mbH | www.kmlz.de | office@kmlz.de
D-80331 München | Unterer Anger 3 | Tel.: +49 89 217501220 | Fax: +49 89 217501299
D-40221 Düsseldorf | Speditionstraße 21 | Tel.: +49 211 54095320 | Fax: +49 211 54095399