



KMLZ VAT NEWSLETTER

Taxation of travel services in Germany is contrary to European law

On 08.02.2018, the ECJ published its decision concerning the infringement proceedings initiated by the EU Commission against Germany (C-380/16). Unsurprisingly, the ECJ confirmed that sec 25 German VAT Act is contrary to Union law. Following on from the ECJ decision of 26.09.2013 in the legal case *Commission/Spain* (C-189/11), this outcome was to be expected (KMLZ Newsletter 28/2013).

1. Customer-based approach (B2B) vs. travelers-based approach (B2C)

In its decision of 26.09.2013, the ECJ stated, in detail, that the special scheme for travel services, in accordance with Art 306 to 310 of the VAT Directive, cannot be restricted to supplies rendered to non-taxable persons or for the non-taxable purposes of a taxable-person (B2C). In other words, the ECJ rejected the so-called "travelers-based approach". In the Court's view, the objectives of the special scheme concerning travel services could be better achieved by the so-called "customer-based approach" (B2B). Therefore, margin taxation is to be applied, also with respect to the supplies of travel services to taxable-persons. The ECJ confirmed this in the present case.

Germany must adjust sec 25 VAT Act

According to the ECJ decision of 08.02.2018, the taxation of travel service, in accordance with sec 25 of the German VAT Act, is contrary to the VAT Directive. Hence, Germany will have to amend sec 25 of the German VAT Act. On the one hand, the scope of the margin taxation will have to be expanded to cover the supply of B2B services. On the other hand, the possibility of taxing the travel services, based on an overall margin will have to be denied. Until then, it should be borne in mind that double taxation or double nontaxation might apply to cross-border supplies. A positive outcome could be reached by referring directly to ECJ case law. For calculations and offers, as well as contracts, which relate to future projects, the planned tax changes should, as a precaution, be taken into consideration. However, there are also other outstanding issues.

2. Single margin vs. overall profit margin

In its decision of 26.09.2013, the ECJ denied the flat-rate determination of the profit margin. In accordance with the VAT Directive, such determination was simply not permitted. In the present case, the ECJ has repeated this reasoning.

3. Individual service vs. bundle of service

The question as to whether the margin taxation is to be applied only to a bundle of services or also to individual services has not been finally decided yet. The Federal Fiscal Court had doubts and on 03.08.2017 (V R 60/16) referred the question to the ECJ as to whether the provision of a holiday apartment, where additional service elements are ancillary services, is subject to margin taxation.



Contact: Ronny Langer
Certified Tax Consultant, Dipl.-FW (FH)
Phone: +49 89 217501250
ronny.langer@kmlz.de

4. Regular VAT rate vs. reduced VAT rate

In its decision of 03.08.2017, the Federal Fiscal Court referred the question to the ECJ of whether, in the case of supplies of travel services, the reduced VAT rate could be applied to the accommodation. This question does not arise in the case of a bundle of different services, although it would be relevant if the ECJ confirmed that individual services qualified as supplies of travel services.

5. Double taxation and nontaxation

Some of the EU Member States have always applied margin taxation to supplies of travel services in the B2B area, while others amended their tax laws following the ECJ decision of 26.09.2013. There are, however, further Member States, which continue to limit margin taxation to the supply of B2C services. Further, opinions differ regarding the question whether individual supplies of services are to be considered supplies of travel services and further interpretational differences also exist. Therefore, both, double taxations and double nontaxations may apply where cross-border supplies are rendered. Undesirable outcomes should be avoided by referring directly to ECJ case law.

6. Travel agent / tour operator

Additionally, it should be borne in mind that any business might be affected, even if it is not obviously a "travel agent" or a "tour operator", pursuant to the wording of the VAT Directive. Therefore, also e. g. supplies within a group might be subject to margin taxation and input VAT deduction could then be excluded.

7. A Look at Austria

Austria also realized that the limitation of the special scheme for travel services for supplies of B2C services is contrary to Union law. At the end of 2015 it consequently amended sec 23 of the Austrian VAT Act. The entry into force of the amendment has, however, been postponed until 01.05.2019. At that time, margin taxation will then also be applicable to supplies of travel services, which are rendered to a taxable-person (B2B). A further requirement in this regard, will be that a non-taxable traveler will finally benefit from the travel service supplied. However, it is envisaged that this situation will cause practical difficulties for businesses because the status of the end-customer must be known at every stage of the supply chain. It is left open to question whether this restriction complies with EU law.

8. Consequences for the practice

The main impact will be limited input VAT deduction from incoming supplies for the supply of B2B travel services. Further, in cases of supplies of B2B travel services, VAT will be payable on margin rather than on the total remuneration. Foreign tour operators will no longer be required to register for VAT purposes in Germany due to the reverse charge mechanism, where a bundle of services, which was rendered in Germany, was purchased from a foreign subcontractor.

For calculations and offers, as well as contracts, which relate to future projects, the planned tax changes should, as a precaution, now be taken into consideration. Compensation of additional or less tax burden, in accordance with sec 29 of the German VAT Act, is only possible where the contract was concluded within the 4 month period.