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KMLZ VAT NEWSLETTER

Travel services: Federal Fiscal Court confirms non-conformity of German law with EC law

1. Background

The claimant supplied travel services containing accommodation and meals to tour operators running packaged bus trips. Accommodation and meals were purchased from foreign hotels. The German tax authorities, as well as the claimant, treated the accommodation as supplies connected with immovable property according to sec. 3a para. 2 no. 1 of the old version of the German VAT Act (now sec. 3a para. 3 no. 1). Such supplies are deemed to be rendered where the immovable property is located. Hence, this part of the travel services was considered to be subject to VAT in the holiday destination country but not subject to German VAT. The claimant treated the supplies of the meals as ancillary to the accommodation. Consequently, the meals were also considered to be subject to VAT in the country where the hotel was located. The German tax authorities, however, claimed that the supply of meals was not an ancillary service and therefore was subject to VAT in Germany where the supplier was established, according to sec. 3a para. 1 of the old version of the German VAT Act.

Double or non-taxation of travel services

Once again, the German Federal Fiscal Court has confirmed that the German provision regarding the tour operator margin scheme is contradictory with respect to the provisions of the EC-VAT-Directive. As long as the legislator does not adjust section 25 of the German VAT Act, there are possible scenarios of non- or double-taxation in the case of cross-border supplies of travel services. Therefore, it is not only tour operators who should determine how to avoid double-taxation or whether the applicable laws allow for non-taxation. Event agencies and other industrial sector businesses recharging travel services may also be affected. Even intra-group cost transfers across the border should be monitored.

2. Decision by the Federal Fiscal Court

The decision of the Federal Fiscal Court of 20 March 2014 (V R 25/11) appears, at first sight, to have an impact on accommodation services. The decision is not particularly surprising. It rather repeats the principles of the decisions of 15 January 2009 (V R 9/06) and of 21 November 2013 (V R 33/10).

2.1. Ancillary services / place of supply

The Federal Fiscal Court confirms that the supply of meals is deemed to be ancillary to the supply of accommodation. Consequently, the supply of meals is subject to VAT in the country where the hotels are located. In any event, since 2010 the treatment would not be different. According to sec. 3a para. 3 no. 2 lit. b of the German VAT Act, the place of supply of meals is now deemed to be where the supply actually takes place.

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2.2. Reduced VAT rate

In its judgment of 24 April 2013, the Federal Fiscal Court already decided that the reduced VAT rate only applies to the accommodation but not to the supply of meals. This decision is not contradictory to the principle that any ancillary supply and the "main" supply it is related to share the same fate in terms of VAT. There is one exception to this principle. According to sec. 12 para 2 no. 11 of the German VAT Act, accommodation services are subject to the reduced VAT rate but not those parts that are only ancillary and not directly connected to the accommodation. The EU member states are authorized to implement such regulation based on Art. 98 of the EU-VAT-Directive.

2.3. Travel services

The Federal Fiscal Court also states, that the services supplied by the claimant are not eligible for the application of the travel operator margin scheme. Sec. 25 of the German VAT Act, according to its wording, is only applicable to the supply of travel services to non-taxable persons. Travel services supplied to other taxable persons cannot be subject to sec. 25 of the German VAT Act. Although on 26 September 2013 the European Court of Justice decided (C-189/11, see also Newsletter 28/2013) that the margin scheme according to Art. 306 of the EU-VAT-Directive is also applicable to taxable persons. The claimant, however, did not refer to this specific provision and the supplies had to be judged based on general principles.

3. Practical aspects

According to the clear decision of the Federal Fiscal Court, entrepreneurs have the option to apply sec. 25 of the German VAT Act or to refer to the broader provisions of the EU-VAT-Directive. This grants greater freedom to the entrepreneurs. For example, if a company established in Germany supplies accommodation, meals and airport-transfer-services in Spain to another taxable person, the supplies are not subject to VAT at all. The supplies are subject to the tour operator margin scheme in Spain and, from a Spanish perspective, are deemed to be rendered in Germany, where the supplier is established. Hence, Spain refers the right for taxation to Germany. However, sec. 25 of the German VAT Act limits the taxation to supplies to non-taxable persons, which means that only supplies to non-taxable persons may be deemed to be rendered in Germany, where the supplier is established. Supplies to taxable persons are deemed to be rendered in Spain, according to sec. 3a para. 3 and sec. 3b of the German VAT Act. Consequently, Germany refers the right for taxation to Spain.

For example, if German event agencies do not charge any VAT to their customers, this can be a great advantage for customers who are not entitled to a full input VAT deduction, such as banks or insurance companies. Their costs are then reduced by the amount of the VAT not charged. In many countries, input VAT deduction is not possible when applying the margin scheme and the event agencies cannot deduct input VAT in the country where the event takes place, which naturally leads to higher costs. Such costs would also be charged to the customers, which means that the VAT advantage would be reduced for the customers. However, to date, many event agencies have already charged the gross amounts to their clients. Hence, at the end of the day, the VAT advantage remains.

The same applies to supplies rendered in Germany by entrepreneurs established in another country to other taxable persons. In this scenario a double taxation situation may occur. The only way to avoid this situation is for the customer to refer to the broader provision of the EU-VAT-Directive which means that no VAT liability is shifted to him.