KÜFFNER MAUNZ LANGER ZUGMAIER

19 | 2018

KMLZ VAT NEWSLETTER

Taxation of travel services can be avoided

Companies receiving travel services have a choice as to whether to apply sec. 25 of the German VAT Act (which violates EU law) or art. 306 ff. of the EU VAT Directive. The German Federal Fiscal Court confirmed this in its judgment of 13.12.2017, which was published on 02.05.2018 (XI R 4/16). This allows companies to choose the most preferable taxation scheme, for themselves and for their customers, who ultimately have to bear the VAT burden. As a result, companies have a maximum degree of flexibility and can theoretically generate non-taxed turnover. This remains applicable until the legislator reacts and adapts sec. 25 of the German VAT Act.

German Federal Fiscal Court confirms right to choose applicable law on taxation of travel services

1. Facts

A German tour operator (DE) offered bicycle tours in Germany. DE applied the margin scheme pursuant to sec. 25 of the German VAT Act and, therefore, only paid VAT on the difference between the travel price and the expenses for travel services received. These travel services, such as accommodation, restaurant services and passenger transport were rendered by an Austrian subcontractor (AT). The invoices AT issued to DE did not include VAT.

The tax authority was of the opinion that DE was liable to pay German VAT on the travel services received from AT. This was based on sec. 13b of the German VAT Act, according to which the VAT liability for services rendered in Germany by the foreign subcontractor AT, was shifted to DE. Due to the fact that input VAT deduction is not permitted when applying the margin scheme in accordance with sec. 25 of the German VAT Act, DE would therefore have been required to remit the VAT to the tax authority.

DE, however, invoked art. 306 ff. EU VAT Directive, according to which the margin scheme was also applicable to the services rendered by AT. This meant that the place of supply was deemed to be in Austria, where AT resides..

2. EU VAT Directive overrules German VAT Act

According to the German Federal Fiscal Court, the Lower Saxony Fiscal Court (Tax Court) had ruled correctly in the preceding instance, namely that DE was entitled to invoke, with direct effect, the EU law regulations of art. 306 ff. EU VAT Directive. As a result, these services were not taxable in Germany and DE did not owe German VAT, as would normally be due under national law. Insofar, the German Federal Fiscal Court follows the findings of the ECJ in its judgments of 26.09.2013 in infringement proceedings against eight Member States. There the ECJ decided that art. 306 ff. EU VAT Directive does not provide for a limitation of the margin scheme on B2C sales (see KMLZ-Newsletter 28/2013).

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

3. Different treatment of the same supply allowed

According to the German Federal Fiscal Court, DE was also not required to orient itself based on how the subcontractor, AT, treated its sales. A different treatment and thus a double non-taxation is permissible. The legal consequences of the primacy of EU law, asserted by DE, were limited to DE alone and therefore did not affect the taxation of AT. In this respect, there was also no violation of the principle of neutrality. The difference in treatment resulted from the fact that DE could rely on the more favourable EU law, while at the same time it was possible for AT to adhere to the more favourable national rules. A directive, such as the EU VAT Directive, cannot, of itself, justify an individual's obligation. It must first be transposed into national law by the Member States, after which time it can then become an obligation. In Austria, the correct implementation of art. 306 ff. EU VAT Directive will, however, not enter into force until 01.05.2019.

4. Different treatment of similar supplies allowed

According to the German Federal Fiscal Court, DE could also refer to Union law without having to uniformly apply the margin scheme to all travel services received. DE was free to choose between the application of the national law and the EU law in any given instance. Direct appeal to EU law cannot be denied merely because a taxable person has applied national law with regard to other similar transactions.

5. Conclusion

With the judgement of 11.06.2015 (16 K 53/15) and thus already before the ECJ decision in the infringement proceedings against Germany (see KMLZ-Newsletter 05/2018), the Tax Court had come to the conclusion that sec. 25 of the German VAT Act is not compatible with EU law and therefore taxable persons have a choice as to whether to invoke the direct effect of art. 306 ff EU VAT Directive. The Tax Court was very certain of its cause and did not even see a reason to admit the revision whereas the tax authority had striven for the revision through a non-admission appeal and ultimately achieved it. However, this backfired. The German Federal Fiscal Court not only confirmed the judgement of the Tax Court, it also explicitly pointed out that taxable persons have complete flexibility when it comes to the application of EU law and national law.

Taxable persons receiving travel services for Germany from foreign subcontractors can, in the future, continue to invoke the more favourable EU law and thus avoid German VAT. This also applies for the past. For periods which are not yet definite and time-barred, an amendment of the relevant tax assessments and the repayment of VAT can be requested, provided that the VAT has previously been declared and paid in accordance with the application of the German regulations..

In view of the impending loss of tax, it can be expected that the tax administration may close the taxation gap soon, at least for the future and amend sec. 25 German VAT Act accordingly.