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Scheme for travel agents requires reinterpretation after ECJ decision

Special scheme for travel agents: ECJ eliminates possible double or non-taxation

Within the EU two different interpretations of the special scheme for travel agents exist, the traveler-based approach and the customer-based approach. In cross-border transactions this could result in double-taxation or non-taxation. In its decisions of 26 September 2013, the ECJ came to the conclusion that the EC-VAT-Directive must be interpreted uniformly by following the customer-based approach. Consequently, the national regulations following the traveler-based approach, like Art. 25 of the German VAT Act, have to be put to the test.

1. Background

Articles 306-310 of the EU-VAT-Directive contain a special scheme for travel agents' services. VAT is only due with respect to the difference between the total amount paid by the customer and the costs of supplies provided by other taxable persons where those transactions are for the direct benefit of the traveler. If several services are performed in relation to one journey, these are considered to be one single supply. Furthermore, the single service is always deemed to be supplied where the supplier is established, irrespective of the qualification of the service.

The special scheme aims to facilitate the regulations for travel agents and to fairly apportion the tax revenue between the member states. In general, the travel services consist of several supplies, particularly passenger transport and accommodation, which are deemed to be rendered in different countries but are sold for one total amount. Therefore, the application of the general rules, in terms of place of supply and taxable basis, may result in practical problems.

2. Traveler-based vs. Customer based approach

The EU member states have transposed the EU-VAT-Directive in different ways. Some member states limit the special scheme only to supplies to travelers in terms of a final consumer (traveler-based approach). Poland, the Czech Republic, Italy, Greece, France, Finland, Portugal and Spain, however, apply the special scheme without restrictions, also with respect to supplies to taxable persons (customer-based approach), such as other travel agents.

Germany is one of the countries that has implemented the traveler-based approach. According to Art. 25 of the German VAT Act, the special scheme only applies to travel services not intended to be supplied to taxable persons acting as such. The Federal Fiscal Court confirmed this approach in its decision of 15 January 2009 (V R 9/06). See also Sec. 25.1 para 2 sentence 1 of the German Administrative Circular. Therefore, chain transactions between travel agents and Incentive-journeys, in the respective pre-stages, are not subject to Art. 25 of the German VAT Act.

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The member states mentioned above have correctly argued that the traveler-based approach causes problems in practice. It may be difficult to determine whether the customer intends to travel himself (end customer) or whether he intends to sell the travel (taxable person). Such a test can be omitted in the customer-based approach. For this reason, Art. 53 and 54 of the EU-VAT-Directive regarding admission to events were implemented. The status of the customer is also not decisive for these services.

3. Double or non-taxation possible

Under certain conditions, the different transposition of the EU-VAT-Directive into national law could result in double or non-taxation.

Example:
A German company (D1) organized a round trip in Italy (accommodation and transport) with costs of 2,000 € plus 400 € VAT and sold it to another German company (D2) for a price of 3,000 €. D2 then, in turn, sold it to an end customer for a price of 4,000 €.

According to German law, accommodation and transport are deemed to have been supplied by D1 in Italy. According to Italian law, however, the supply is qualified as a travel agents' service which is deemed to have been carried out in Germany where D1 is established. Hence, both countries consider the supply to be taxed outside their territory.

D1 will not be entitled to have the Italian input VAT of 400 € refunded but, on the other hand, will not be required to pay VAT on either the total amount nor on the margin. D2 has to pay 19% VAT from its margin of 1,000 € to the German tax authorities. However, the margin of D1 (600 €) finally remains untaxed.

4. ECJ confirms customer-based approach

Obviously, the decisions of the ECJ were necessary as the wording of the EU-VAT-Directive has become inconsistent. The term "customer" has crept in to the different language versions and replaced the term "traveler". Actually, there is a need for the EU-VAT-Directive that originated from 1977 to be amended. Any such amendment should take into consideration the economic realities of the 21st century. There is no doubt for the parties involved, that the aims of the special scheme for travel agents can be better achieved by means of the customer-based approach. Travel services are not only rendered by travel agents to end customers but also between service providers. Some thought has already been given to amending the EU-VAT-Directive to this effect. However, this effort failed due to a lack of consensus on the part of the member states. The outcome caused the General Advocate to remark that the ECJ would need to play some type of legislative role in this respect: "*It is hard to avoid the impression that the Court is being called upon to decide a matter of VAT policy (and of legislative drafting) which has proved beyond the capabilities or the willingness of the Member States and the legislature*." The ECJ circumnavigated this problem by arguing that the regulation has to be interpreted by considering the intended effects.

5. Conclusions

Some member states, including Germany, will have to amend their national legislation, or at least interpret it in a different way. Furthermore, the question is whether companies, depending on the concrete constellation, may meanwhile refer to the limiting national law or to the more favorable EU law in order to apply to the most favorable VAT treatment.