



Will the ECJ overturn the apportionment requirement for supplies of accommodation services?

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1 Background

Section 12 para. 2 no. 11 sentence 2 of the German VAT Act contains an apportionment requirement for the supply of accommodation services. Accordingly, only the supply of accommodation services is subject to the reduced VAT rate in accordance with sec. 12 para. 2 no. 11 sentence 1 of the German VAT Act. In contrast, the standard VAT rate applies to the supply of ancillary services that do not directly serve the purpose of accommodation in accordance with sec. 12 para. 2 no. 11 sentence 2 of the German VAT Act. In the past, the German Federal Fiscal Court (judgement of 24 April 2013 – XI R 3/11 – breakfast; judgement of 1 March 2016 – XI R 11/14 – car park) took the view that the apportionment requirement is in line with Union law and takes precedence over the principle of uniformity of the supply, according to which a (dependent) supply of ancillary services shares the fate of the main supply.

2 Doubts about the lawfulness of the apportionment requirement

The lawfulness of the national apportionment requirement has been the subject of intense debate in recent years. The discussion was triggered by the ECJ judgment of 18 January 2018 in the case *Stadion Amsterdam CV* (C-463/16). Here, the ECJ ruled that a single supply may not be split up, with the result being that both the standard VAT rate and the reduced VAT rate apply (see KMLZ VAT Newsletter 04 | 2018). As a consequence, the German Federal Fiscal Court granted the suspension of execution of VAT for supplies of services to which the national apportionment requirement under sec. 12 para. 2 no. 11 sentence 2 of the German VAT Act applies (XI B 2/21). The supplies in dispute concerned hotel accommodation, which included breakfast and access to the particular hotel's spa facilities (see KMLZ VAT Newsletter 23 | 2022).



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Critics of national apportionment requirements were recently given a boost by the ECJ's judgment of 4 May 2023 in the case *Finanzamt X* (C-516/21). In this case, the ECJ confirmed, in connection with the apportionment requirement for operating equipment in sec. 4 no. 12 sentence 2 of the German VAT Act, that an economically single supply may not be artificially split up in order to maintain a functioning VAT system – not even by legal measures of the Member States (see KMLZ VAT Newsletter 23 | 2023).

3 ECJ referrals on the apportionment requirement

In three decisions published on 13 June 2024, the German Federal Fiscal Court addressed the ECJ in the context of requests for preliminary rulings (German Federal Fiscal Court, decisions of 10 January 2024 – XI R 11/23; XI R 13/23; XI R 14/23). In each case, the question is whether the apportionment requirement for supplies of accommodation services in sec. 12 para. 2 no. 11 sentence 2 of the German VAT Act complies with Union law.

In all three cases, the hotels and guesthouses offered their customers, in addition to overnight accommodation, the free use of other additional services, such as the use of car parks, breakfast, fitness and wellness facilities and the hotel's own WLAN. They interpreted the additional services as dependent supplies of ancillary services to the supplies of accommodation services and subjected all supplies of services to the reduced VAT rate of 7%. Both the tax authorities and the Fiscal Courts of first instance disagreed with this approach. They considered the above-mentioned additional services to be independent supplies. These were to be taxed at the regular VAT rate of 19%. Because, even if the supplies rendered were to be treated as dependent supplies of ancillary services to the supply of accommodation services, the apportionment requirement in sec. 12 para. 2 no. 11 sentence 2 of the German VAT Act would apply, according to which ancillary services that do not directly serve the purpose of accommodation are not subject to the reduced VAT rate.

Unlike in the past, however, the German Federal Fiscal Court now doubts whether the apportionment requirement is in line with Union law. The German Federal Fiscal Court assumes that the Fiscal Courts of first instance have interpreted the above-mentioned additional services, in a manner that was not objectionable according to the principles of appeal proceedings, as dependent supplies of ancillary services. It then referred the question to the ECJ as to whether the apportionment requirement of sec. 12 para. 2 no. 11 sentence 2 of the German VAT Act is contrary to Union law if it excludes these dependent ancillary services from the reduced VAT rate for supplies of accommodation services in accordance with sec. 12 para. 2 no. 11 sentence 1 of the German VAT Act.

4 Conclusion

There is finally light at the end of the tunnel. Following the ECJ judgment in the *Stadion Amsterdam* case and the subsequent developments in national jurisprudence, it was only a matter of time before the apportionment requirement for the supply of accommodation services was put to the test by the ECJ. The patience of the hotel industry may hopefully pay off. Taxable persons who fall within the scope of the apportionment requirement, in accordance with sec. 12 para. 2 no. 11 sentence 2 of the German VAT Act, should now at the latest file an appeal against their VAT assessments and, if necessary, apply for suspension/cancellation of execution and, with reference to the ECJ referrals, request a suspension of proceedings.

Experience has shown that VAT refunds for the past regularly fail because invoices showing VAT had already been issued. However, well informed hotel industry businesses previously ceased issuing invoices to private individuals (see sec. 14 para. 2 sentence 1 no. 2 of the German VAT Act) or did not show the VAT amount in the invoices in order to benefit retroactively from legislative changes.