



ECJ allows for different VAT treatment of amusement parks and fun fairs

31 | 2021

1 Background

Under German law, carnival services at fun fairs and similar temporary, location-independent events are subject to the reduced VAT rate of 7% (sec. 12 para. 2 no. 7 lit. d of the German VAT Act). Carnival services in location-dependent amusement or leisure parks, on the other hand, are taxed at the standard VAT rate of 19%.

The Fiscal Court Cologne raised doubt as to whether this different VAT treatment - confirmed by the Federal Fiscal Court - of location-based carnival services in amusement parks on the one hand and location-independent carnival services, for example in fun fairs, on the other hand, is compatible with EU law. In its order of referral dated 25 August 2020, the Fiscal Court Cologne referred the question to the ECJ for a preliminary ruling as to whether this practice of German VAT treatment of amusement parks violates Union law. The amusement park operator argued that, from the perspective of an average consumer, the offers of amusement parks and location-based fun fairs carnivals are similar and satisfy the same entertainment needs.

2 Decision of the ECJ

In its judgment of 9 September 2021 (Case C-406/20), the ECJ confirms that a Member State may, in principle, apply a reduced VAT rate to the services of location-independent carnivals (e.g. at fun fairs), while applying the standard VAT rate to the services of location-dependent carnivals (e.g. in amusement parks). However, the principle of fiscal neutrality must



Dr. Matthias Oldiges
Lawyer

+49 (0) 211 54 095-366
matthias.oldiges@kmlz.de

be respected. According to this, two similar services, which are in competition with each other, may not be treated differently regarding VAT.

For the assessment of whether the services are similar, the perspective of the average consumer must be taken into account. With regard to the disputed location-dependent and location-independent carnival services, the ECJ states, on the one hand, that both services have similar characteristics and serve the same consumer needs. On the other hand, the ECJ emphasizes the differences between the two services from the consumer's perspective, such as availability, the cultural and regional character of the services, as well as divergent national legal frameworks (e.g. permit requirements and market privileges). It is now for the referring court to determine whether these differences actually exist and are significant enough to negate any similarity between the two services. In doing so, the court is free to determine the view of the average consumer in accordance with the requirements of national law, based on an expert opinion or on the basis of its own expertise.

3 Consequences for the practice

Now it is once again the turn of the Fiscal Court Cologne to decide on the question of whether, from the point of view of the average consumer, there is a similarity between location-dependent and location-independent carnival services. The differences between the two services, listed by way of example by the ECJ in the reasons for its decision, indicate a certain preference on the part of the ECJ. Against this background, in our view, it will be difficult for the Fiscal Court Cologne to justify the similarity of location-dependent and location-independent carnival services and thus a violation of the principle of neutrality.

However, the reasons for the ECJ's decision also allow the Fiscal Court Cologne to come to a different conclusion and, if necessary, based on expert opinion, to affirm a similarity between location-dependent and location-independent carnival services. This would result in the existence of two divergent decisions of German tax courts that are directly related in time. This is because, almost at the same time as the order of referral was issued by the Fiscal Court Cologne on 25 August 2021, the Fiscal Court Munster, in its ruling of 13 August 2020, rejected the application of the reduced VAT rate for the turnover from the sale of admission tickets to an amusement park. In doing so, the Fiscal Court Munster followed the established case law of the Federal Fiscal Court, according to which only location-independent carnivals can benefit from the reduced VAT rate. The appeal proceedings against the first-instance judgment of the Fiscal Court Munster are pending before the Federal Fiscal Court under file no. XI R 4/21, after having been suspended until the present ruling of the ECJ.

Practitioners can therefore soon look forward to a supreme court ruling in the wake of the ECJ decision and thus to legal certainty on the question of whether turnover from the sale of admission tickets to an amusement park is also subject to the reduced VAT rate. Until then, affected operators of amusement or theme parks should continue to file an appeal against their VAT returns in order to be able to benefit from the reduced tax rate under sec. 12 para 2 no. 7 lit. d of the German VAT Act in the event of a change in case law.