



VAT NEWSLETTER

ECJ referral: The reduced VAT rate heading to new shores

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1 Background

The reduced VAT rate is an exception to the standard VAT rate. As such, to date, the provisions on the reduced VAT rate have had to be interpreted narrowly. EU Member States may only apply a reduced VAT rate to supplies, which have been expressly designated by the Union legislator as supplies attracting the reduced rate (Article 98 para 2 in conjunction with Annex III of the VAT Directive). However, this could change in the future as a result of a recently published referral to the ECJ by the German Federal Fiscal Court (decision of 02.08.2018 – V R 33/17). The Federal Fiscal Court raised the question as to what extent, on the basis of the general principle of equal treatment, pursuant to Article 20 of the Charter of Fundamental Rights of the European Union (the Charter), the reduced rate can also be applied to supplies which are (merely) comparable to those listed in Annex III of the VAT Directive.

2 Facts

The case concerned the reduced rate provided for in No. 12 of Annex III of the VAT Directive. According to this provision, a reduced VAT rate may be applied to the “letting of places on camping or caravan sites”. The German legislator implemented this provision with the wording “short-term letting of camping sites” (sec 12 para 2 No. 11 sentence 1 of the German VAT Act).

The Plaintiff was a registered non-profit sailing and motor water sports association which operated a marina. It applied the reduced VAT rate for the fees it charged guests for the provision of boat moorings (sec 12 para 2 No. 11 of the German



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VAT Act). The tax office however, considered the standard VAT rate to be applicable. The finance court confirmed the tax office's opinion to be correct. The finance court justified its opinion by stating that a boat was primarily a means of transport and therefore could not be subject to the wording "short-term rental of camping sites" in accordance with sec 12 para 2 No 11 of the German VAT Act.

3 Question referred by the Federal Fiscal Court

The Federal Fiscal Court has now requested the ECJ to decide whether or not regulations pursuant to Union law authorize the Member States to apply the reduced VAT rate to the letting of boat moorings. As the Federal Fiscal Court points out in its referral, Annex III No 12 of the VAT Directive contains only the wording "letting of places on camping or caravan sites". However, on the basis of the general principle of equal treatment (Art. 20 of the Charter), this provision could also be applied to the letting of boat moorings. According to this principle, comparable situations should not be treated differently and different situations should not be treated equally. Moreover, the principle of fiscal neutrality must be taken into account, according to which economic operators carrying out similar transactions may not be treated differently for the purposes of charging VAT. In the present case, the Federal Fiscal Court considers it conceivable that the reduced VAT rate, pursuant to Union law, might be applicable due to the functional and economic identity of campsite letting and boat mooring letting activities.

4 Possible consequences for the practice

If the ECJ included the letting of boat moorings, pursuant to Annex III No. 12 of the VAT Directive, on the basis of the principle of equal treatment, this would have a serious impact on the scope of other VAT rate reductions. In future, the decisive factor would no longer necessarily be the wording of the VAT reduction but rather the comparability and similarity of the transactions. This could also result in the increased importance of the principal of equal treatment in (European) VAT law, in general. This would mean that, in the future, this principle would be required to be taken into account to a much greater extent, in the interpretation of standards.

Whether this is going to happen, however, is a different question. For laymen (and sailors) the comparison of a boat mooring with a camping site may sound paradoxical. In actual fact, marina and campsite operators render almost identical supplies of services (sanitary facilities, electricity supply, etc.). In particular, it is not clear why, in terms of VAT, the provision of a parking space for a caravan should be treated differently from the provision of a mooring for a boat with a cabin. However, it is exactly here, that a decisive differentiation criterion could exist. If the boat has no overnight accommodation facilities, the marina operator's supply might have to be considered as the mere provision of a storage position, which can be compared to the provision of a parking space. The question then would be: When does a boat's onboard facilities equate to overnight stay accommodation facilities?

Where taxable persons render supplies which are comparable to expressly stipulated VAT rate reductions, the ECJ proceedings should be closely monitored. In many cases, it may now already be necessary to examine whether a reduced rate is applicable. In the decision it referred to the ECJ, the Federal Fiscal Court demonstrated that it adheres to a wide interpretation of the VAT rate reductions, from a pure national law perspective: It assumes the letting of boat moorings to be a letting of camping sites, within the meaning of sec 12 para 2 No 11 of the German VAT Act.