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VAT NEWSLETTER

ECJ: Tour Operator’s Margin Scheme applies in case of negative margins

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1 Background

In Case C-565/24, the ECJ has ruled on a question concerning the Tour Operator’s Margin Scheme that has been the subject of debate for years: Are bus excursions known as ‘coffee trips’ subject to the Tour Operator’s Margin Scheme even if the transport service is continuously provided at a loss and the sales of goods made on the same occasion offset those losses? The ECJ answers this question with a clear ‘yes’.

2 Facts

The plaintiff organized so-called ‘coffee trips’: It transported participants to tourist destinations by coach for a small amount of consideration and, in some cases, even free of charge. During the trips, it offered participants various goods for sale. However, the purchase of the goods was voluntary. The plaintiff purchased the transportation services from third parties in order to offer them to participants in its own name. However, the consideration paid by the participants did not or not fully cover the transport costs. The plaintiff financed the difference through the proceeds from the sale of goods.

The German tax authorities subjected the plaintiff’s transport services to the Tour Operator’s Margin Scheme pursuant to sec. 25 of the German VAT Act. Consequently, the tax office denied the plaintiff the right to make a deduction of input VAT on the transport services purchased (sec. 25 para. 4 sentence 1 German VAT Act). The plaintiff appealed this decision, seeking in particular the deduction of input VAT on the transport services purchased.

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3 Decision

Following a request of a preliminary ruling from the German Federal Fiscal Court, the ECJ confirmed the position of the German tax authorities. Firstly, the ECJ found that the coach journey did not merely constitute the supply of an ancillary service to the sale of goods. The participants had an independent interest in the excursion trips. In particular, customers could take the trip without purchasing any goods. The ECJ therefore dismissed the notion that the coach journey was merely a means of facilitating the sale of goods under optimal conditions. It rather deemed the transportation service to constitute an independent supply of services.

Further, the ECJ clarifies that a negative margin does not preclude the Tour Operator's Margin Scheme. The decisive factor is that the plaintiff purchased travel services from third parties and passed them on to consumers in its own name. In doing so, it provided supplies comparable to those of a tour operator. In contrast, the economic profitability is irrelevant. This is because the regulations on Tour Operator's Margin Scheme do not provide any corresponding restriction on the scope of application.

Moreover, the ECJ ruled out the right to an input VAT refund. The special rules on Tour Operator's Margin Scheme expressly exclude deduction of input VAT for travel-related inputs. This applies even where the margin is negative. In the ECJ's view, a refund of VAT would undermine the structure of the special rule and the intended distribution of VAT revenue amongst the Member States.

4 Consequences for the practice

The ruling provides legal certainty for a narrowly defined use case. Essentially, the ECJ has confirmed that a travel service may be subject to margin taxation even if it is provided continuously at a loss. In this respect, it is noteworthy that the ECJ voices no doubt as to the existence of an economic activity (in scope of VAT), even if the supplies are arranged structurally loss-making. Apparently, the ECJ bases its assessment in this respect on the overall economic concept rather than on the travel service in isolation.

From a practical perspective, it is welcome that the ECJ continues to determine the subject matter of the supply consistently on the basis of general principles (principal and ancillary supply / unity of the supply). Specifically, the ECJ first examines which independent supplies are given, using the established criteria for the unity of the supply. Only then does the question arise as to whether any of these supplies are subject to margin taxation. The ruling thus reaffirms that the special scheme does not override these VAT principles.

However, this decision does not resolve the question of how supplies must be characterized in borderline cases. In particular, the ECJ did not have to answer the question of practical relevance as to in which cases purchased supplies 'directly benefit' (cf. sec. 25 para 1 sentence 5 German VAT Act) the traveller. This question arises particularly if the company's own supplies (e.g. education, event-related or other supplies) and purchased travel supplies are closely linked.

Fundamental questions regarding the scope of margin taxation therefore remain unresolved. However, it is a positive sign that the ECJ is adhering to the established principles of VAT law in the context of the Tour Operator's Margin Scheme well. This suggests that outstanding questions of demarcation will also be resolved in future on the basis of these well-established criteria.

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