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German Tax and Legal News

CJEU: Tour Operators Margin Scheme applies to B2B-transactions; Simplified margin calculation methods not allowed

The CJEU has ruled that Germany is in breach of EU law with respect to VAT on travel services. The ruling concerns the application of TOMS to business transactions and the application of simplified methods to calculate the margin. This decision is set to have significant implications for the entire travel industry.

Background

Yesterday the Court of Justice of the European Union (CJEU) released its judgement in the case C-380/16, *Commission v. Germany*, relating to the infringement proceedings initiated by the European Commission against Germany with respect to its implementation of the Tour Operators Margin Scheme (TOMS). The infringement procedure concerned the issue whether the TOMS is applicable to travel services provided to business customers. German VAT law specifically excludes B2B travel services from the TOMS. Such services still fall within the scope of the general VAT provisions. Furthermore, the court decided on whether the margin can be calculated by using simplified methods or whether it must be calculated on a transaction-by-transaction basis. The Commission considers that the German rules are incompatible with European law.

Decision

The CJEU decided in favour of the Commission. The exclusion of supplies of travel services to business customers from the TOMS infringes Germany's obligations under the VAT Directive. In addition, the fact that German law allows tour operators to use simplified methods to calculate the margin is also an infringement against EU law.

Germany argued that the application of profit margin taxation in the B2B sector would create significant practical difficulties, undermine the principle of VAT neutrality for business operators, distort competition and violate the Charter of Fundamental Rights, since business customers would be obliged to disclose their margins. These arguments were dismissed by the CJEU. Practical complications also arise in the B2C sector - solving these issues is the purpose of the provision, and the task of the EU legislator. The right to deduct input VAT and the neutrality of VAT is an integral part of the VAT system. However, the special scheme constitutes special rules expressly provided for by the EU legislator, in order to take account of the specific characteristics of travel operators' activities. The alleged exception to the principle of neutrality is the consequence of the application of special rules. Similarly, the CJEU held that the rules do not result in a distortion of competition. It is not the rules on margin taxation, but the exclusion of supplies to business customers from the scheme that leads to a difference in VAT treatment between business operators. Even a violation of the Charter of Fundamental Rights was not evident. It is not possible to determine a travel operator's financials from the mere disclosure of the margin for each individual travel service provided. In addition, fundamental rights are likely to be restricted by law. In any case, this occurred legitimately.

With respect to the profit margin calculation, the CJEU points out that the TOMS does not provide simplification rules that allow a deviation from the principle of individual taxation as set out in Article 73 of the VAT Directive. While Article 308 of the VAT Directive foresees the application of the flat-rate scheme for certain services, travel services are not mentioned in this provision. Thus, Article 73 of the Directive is applicable, and the margin must be determined individually for each travel service provided.

Comments

It will be interesting to see how the German legislator will react to the judgment of the CJEU. The implementation of the CJEU's decision into national law would have far-reaching consequences for the travel industry. The application of the TOMS to supplies of travel services to businesses is likely to have an impact on companies that organize meetings, incentives, conferences and events (MICE business). Consolidators, which purchases contingents of airline tickets, hotel capacities etc. and sell them to travel agencies, will also

be affected. The TOMS can have positive impacts: The VAT treatment of travel packages provided by tour operators as a single service and the taxation thereof at the tour operator's headquarters reduces compliance costs by avoiding VAT registration in various jurisdictions. The relief of the burden of input taxation for the travel operator is not achieved via an input VAT recoverability, but through a reduction in the tour operator's margin, i.e. the difference between the price of the travel package and the VAT-inclusive cost of the supplies forming part of the package. In contrast with the general taxation rules, the foreign input VAT is considered when calculating the margin. Thus in principle the VAT taxation according to general rules and VAT taxation under the TOMS do not produce different tax burdens. However, this only applies if the TOMS applies uniformly in the EU. This is not the case at the moment, which may give rise to a competitive disadvantage for German tour operators. One will have to wait and see how the national legislator will balance an EU-compliant implementation of the TOMS and the avoidance of competitive disadvantages. The exclusion of the possibility to calculate the margin for travel services by using simplified methods will affect all tour operators, including those in the B2C sector. As a result, tour operators will be required to allocate all input supplies to the corresponding output service. The treatment of negative margins resulting from non-resale of travel services will also be a problem. Currently, German law allows negative margins to be offset against positive margins when applying simplified methods to calculate the margin. If tour operators cannot apply simplified methods to calculate the margin but must calculate the margin on a case-by-case basis, purchased supplies must be directly (proportionately) allocated to the output service provided to a traveler to avoid VAT burden.

Legal Norms

§ 25 UStG, Art. 306 ff. VAT Directive

Reference

CJEU decision of 08.02.2018, [C-380/16](#)

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