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Lower Saxony Finance Court
Decree v. November 17, 2022, Ref.: 5 V 97/22

third country entrepreneurs; Travel agency; travel services; travel packages; tour operator; On the application of § 25 UStG for entrepreneurs resident in the third country

Official motto

The legality of the non-application of the special regulation for the taxation of travel services (§ 25 UStG) for entrepreneurs resident in the third country is seriously doubtful (contrary to paragraph 25.1 paragraph 1 sentence 5 UStAE).

reasons

The parties involved are mainly arguing about the taxation of travel services (...) of a tour operator based outside the Community area according to § 25 of the Value Added Tax Act (UStG).

I.

The applicant is a corporation under the law A, located outside the community area in A and operates in the community area without a permanent establishment.

The applicant is a tour operator that offers travel packages in its own name for a fee. The applicant obtained (purchased) these travel packages from X, which has its registered office outside the Community area, and for this purpose bundled several different travel services *[details to maintain tax secrecy not intended for publication]* . This also includes trips with benefits in Germany. The travel packages distributed by the applicant are sold to customers in A.

In the past, the applicant applied the special regulation of § 25 UStG to its travel packages and only sent zero reports to the respondent due to the company's headquarters in A.

In a letter dated December 1, 2021, III C2 - S7419/19/10002:004, the Federal Ministry of Finance (BMF) took the legal view that this provision was not applicable to travel services provided by entrepreneurs based in a third country and without a permanent establishment in the community. For reasons of protection of confidence, however, there is no objection if the special regulation continues to be applied to travel services carried out or to be carried out up to December 31, 2022. As a precautionary measure, the applicant therefore submitted a sales tax advance return for the first quarter of 2022 on June 7, 2022, explaining the advance payments received from customers in A for the trips to be made from 2023 onwards during this period without applying differential taxation in accordance with Section 25 UStG .

After the applicant had filed an objection to this with the respondent on June 17, 2022, the respondent issued an amended notice on June 30, 2022 due to a calculation error on the determination of the sales tax advance payment for the first calendar quarter of 2022 and set the sales tax to ... € fixed. The respondent has not yet decided on the objection. On July 22, 2022, the respondent rejected an application made to him for the suspension of execution.

On July 28, 2022, the applicant applied for the judicial suspension of enforcement. There are serious doubts as to the legality of the corrected advance sales tax return submitted by the applicant as a precautionary measure, because the legal assessment is unclear and relevant questions have not yet been decided by the Federal Fiscal Court (BFH).

Contrary to the opinion of the respondent, the differential taxation according to § 25 UStG should also be applied to tour operators based in a third country. On the basis of § 25 UStG, the travel services provided by the applicant are not subject to German sales tax. The applicant is a tour operator within the meaning of Section 25 (1) sentence 1 UStG, since as an entrepreneur she acts in her own name vis-à-vis the service recipients and makes use of advance travel services. The travel services provided by the applicant in connection with the travel packages therefore represent a uniform (other) service within the meaning of Section 25 (1) sentence 3 UStG. According to Section 25 (1) sentence 4 UStG, the place of such a uniform service is determined § 3a paragraph 1 UStG, i.e. according to the place from which the entrepreneur operates his company. In the applicant's case, this location is not in Germany, so that the applicant's travel services in dispute are not subject to German sales tax. Likewise, the down payments that the applicant made for the travel packages that are (partly) carried out domestically in 2023, on the basis of Section 25 (1) UStG in conjunction with Section 13 (1) no. 1 letter a sentence 4 UStG are not in the Domestic taxable.

The BFH had already assumed in its judgment of October 7, 1999 (VR 79, 80/98, BStBl. II 2004, 308) that Section 25 UStG was applicable to a tour operator based in a third country.

The serious doubts about the non-applicability would also result from an interpretation of § 25 UStG. The wording of § 25 UStG is clear and refers to "entrepreneur", regardless of the registered office or place of management of the entrepreneur.
For the application of Section 25 (1) UStG it is only necessary that the entrepreneur is a tour operator within the meaning of Section 25 (1) UStG. The wording of Section 25 (1) UStG is therefore not limited to entrepreneurs resident in the Community or in Germany. Section 25 UStG itself makes such a distinction in this respect, because Section 25 (2) UStG distinguishes between the territory of the Community and the territory of a third country. Section 25 (1) UStG does not contain any corresponding distinction.
Due to the encroachment character of tax law, the wording of the law specified by the legislature represents the limit of the encroachment. The unambiguous wording of the law in Section 25 (1) UStG may not be unilaterally restricted by the tax authorities without a legal basis.

An application beyond the limit of the wording by way of legal development is only possible in the case of a regulatory gap. The wording of Section 25 (1) UStG does not contain any loopholes, as this is clear and refers to the "entrepreneur" without restriction.

The explanatory memorandum to the draft of the law amending the Value Added Tax Act and amending other laws of November 26, 1979 (Bundestag printed paper 8/1779, 49) also shows that the provision, in accordance with its wording, applies to all entrepreneurs, regardless of their place of residence be.

Section 25 of the UStG was also introduced on the basis of Art. 26 of Directive 77/388/EEC (now Art. 306 of Directive 2006/112/EC (MwStSystRL)). The basis of EU law does not contain any limitation of the scope of application either.

In addition, the national legislature does not have the broad scope of Section 25 UStG, especially with the amendment of Section 25 UStG through the law on further tax incentives for electromobility and amending other tax regulations of December 12, 2019 (Federal Law Gazette I 2019, 2451). limited, although the EU Commission has already published a proposal for a directive to amend Directive 77/388/EEC because of the special provisions for travel agencies, which introduces a new sentence in Art. 26 Para. 2 of the Sixth Directive 77/388/ EEC, according to which, in the case of travel agencies or tour operators based in third countries, the place of performance should be the place of business or the place of residence of the recipient if the actual use of the services takes place within the EU.

After the EU Commission officially withdrew the proposed change on May 21, 2014, it came to the conclusion in its evaluation of the special regulation for travel agencies that the services provided by tour operators from third countries are not subject to sales tax in accordance with Art. 306 et seq. of the VAT Directive, and have therefore announced to the European Parliament and the Council that they intend to revise the rules in the period 2022/2023.

According to the applicant, this means that the scope of application of the special regulation for travel agencies under the relevant Union law is not limited to tour operators based in the EU.

Serious doubts as to the legality of the contested assessment also followed from an interpretation based on the spirit and purpose of Section 25 UStG. The purpose of the special regulation is to simplify and standardize the sales tax regulations applicable to tour operators. These regulatory goals also apply to tour operators in third countries. The purpose of the regulation is also in line with a fair distribution of taxation rights, because the destination country of the trip is entitled to the sales tax on the sales taxable advance travel services anyway, without the tour operator having a claim for an input tax refund with regard to the travel advance services.

After all, there is no room for a teleological reduction of § 25 Para. 1 UStG, because the wording of the law is not too extensive compared to its purpose, contrary to the plan.

The applicant requests

> to suspend the execution of the sales tax advance payment for the 1st calendar quarter of 2022 in the amount of EUR ... up to one month after the end of the procedure for objecting to the sales tax advance payment for the 1st calendar quarter of 2022 without security.

The respondent requests

> to reject the application.

The interpretation of § 25 UStG has to be carried out in accordance with the directive on the basis of the interpretation of Art. 306 et seq. of the VAT Directive. The principles of interpretation of Union law apply here, according to which, in addition to the wording and the purpose of the directive, the context in which the provision of the directive stands and the history of its origin must also be taken into account. Of the several possible interpretations, preference should be given to the one that alone is suitable for ensuring the practical effectiveness of the regulation in question and thus for realizing the objectives of Union law.

Neither Art. 306 et seq.

According to Art. 307 sentence 2 VAT Directive, however, the uniform service is taxed in the Member State in which the travel agency has its registered office or a permanent establishment. In doing so, the legislator has clearly expressed that - also against the background of equal competitive conditions between travel companies in third countries and those in the Community area - taxation should take place in the Community area. An application of § 25 UStG to situations in which the entrepreneur is resident in a third country would rule out margin taxation in the Community area. The travel services of a non-EU travel agency remained untaxed when applying the special regulation. It follows from Article 309 (1) of the VAT Directive that the legislator only wanted to refrain from levying a tax if consumption occurs outside the Community, but not if the travel agency is based outside the Community. A possible simplification of the procedure has to be withdrawn in these cases. In addition, neutrality problems would be avoided, since an exclusion would ensure the taxation of identical services, at least in principle.

In addition, the application of the special regulation is opposed to the purpose of the directive. Because according to the case law of the ECJ, this not only simplifies the VAT regulations for travel agencies but also serves to ensure a balanced distribution of income between the Member States. The VAT revenue from each individual service is to accrue to the Member State of final consumption of the service, while the VAT revenue related to the travel agent's margin is to accrue to the Member State in which the agent is established. However, this purpose cannot be fulfilled if the margin is not taxed in the Community area.

Furthermore, the special regime for travel agents is an exception to the general regime of taxable base and can only be applied to the extent necessary to achieve the objective of the directive.

II.

The application for suspension of enforcement is justified.

After the summary examination required in the proceedings for the suspension of enforcement, serious doubts arose as to the legality of the contested VAT assessment.

1. The suspension of enforcement should take place in accordance with Section 69 (2) sentence 2 in conjunction with paragraph 3 sentence 1 second half-sentence FGO if there are serious doubts as to the legality of the contested administrative act or if the enforcement is unreasonable for the person concerned and not by overriding public would result in the hardship required by interests.

There are serious doubts about the legality of an administrative act if, in addition to the

Circumstances that speak of legality come to light, which cause indecisiveness or uncertainty in the assessment of legal questions or ambiguity in the assessment of factual questions relevant to the decision (cf.

BFH resolutions of March 19, 2014 VB 14/14, BFH/NV 2014, 999, and of March 19, 2014 III S 22/13, BFH/NV 2014, 856, each with additional evidence). Serious doubts can also exist if the legal situation is unclear, the disputed legal issue has not been clarified by the highest court and doubts are raised in the literature about the legal opinion of the tax authorities (cf. BFH resolutions of August 19, 1987 VB 56/85, BStBl. II 1987 , 830, and of November 28, 1974 VB 52/73, BStBl. II 1975, 239).

For the justification of such doubts within the meaning of § 69 para. 2 sentence 2 FGO it is sufficient that the file situation not remote - serious - possibility exists that the applicant prevails in the main proceedings with her request (

BFH decision of June 26, 2003, XS 4/03, BFH/NV 2003, 1217, with further references). It is therefore not necessary for a suspension of enforcement that the reasons for the illegality of the administrative act prevail. Rather, it is sufficient that the success of the legal remedy cannot be ruled out any more than its failure (cf. eg BFH decision of August 23, 2007, VI B 42/07, BStBl. II 2007, 799). On the other hand, a vague prospect of success of the appeal does not justify any serious doubts as to the legality of the contested administrative act (BFH, decision of June 11, 1968 VI B 94/67, BStBl. II 1968, 657).
The examination of whether there are serious doubts as to the legality of the contested administrative act is carried out as part of a merely summary examination. Due to the urgency of the proceedings, the process material is limited to the documents available to the court, in particular the files of the tax authorities and other available evidence. The court does not have to take any further measures to determine the facts (

BFH, decision of February 14, 1989, IV B 33/88, BStBl. II 1989, 516).
2. According to the summary assessment of the facts required in the suspension procedure and also sufficient, serious doubts as to the legality of the contested VAT assessment are to be affirmed in the case of a dispute.

The advance payments received for the trips to be made in 2023 are not subject to German sales tax as travel services within the meaning of Section 25 (1) sentence 1 UStG. Contrary to the opinion of the respondent, neither the wording of § 25 Para. 1 UStG nor Art. 306 VAT Directive, on which the national regulation is based, contain a limitation of the applicability only to entrepreneurs resident in the Community area.

a) Pursuant to Section 1 (1) No. 1 UStG, the deliveries and other services that an entrepreneur within the meaning of Section 2 UStG carries out for payment within the framework of his company are subject to sales tax. According to Section 13 (1) No. 1 Letter a Sentence 1 UStG, the tax for deliveries and other services in the event that the applicant calculates the tax according to agreed fees within the meaning of Section 16 (1) Sentence 1 UStG only arises with Expiry of the pre-registration period in which the services were performed. However, if the fee or part of the fee is received before the service has been performed (so-called down payment), the tax pursuant to Section 13 (1) no. 1 letter a sentence 4 UStG is already incurred at the end of the pre-registration period in the fee or part of the fee has been collected. However, the taxation of the payment before the service is rendered presupposes that all relevant elements of the taxable event, i.e. the future delivery or the future service, are already known, in particular the goods or services are precisely determined at the time of the down payment - as in the case at hand (cf .

BFH judgment of November 14, 2018 XI R 27/16, BFH/NV 2019, 423, with further case law evidence). It must therefore be a down payment for a delivery or other service that has already been specifically determined. Because of this decisiveness of the specific service, it must also be taken into account in the context of tax generation according to Section 13 (1) no. 1 letter a sentence 4 UStG whether it is a consideration for a non-taxable service due to the lack of a domestic place of performance or for a fee according to Section 4 UStG is a tax-free service or a service subject to reduced taxation under Section 12 (2) UStG. According to the administrative opinion, a down payment for a future service that is not taxable is not subject to sales tax (cf. Section 13.5 Para. 4 Sentence 1 of the Sales Tax Application Decree). b) According to Section 25 (1) sentence 1 UStG, the provisions for the taxation of travel services apply to travel services provided by an entrepreneur, insofar as the entrepreneur acts in his own name vis-à-vis the service recipient and makes use of advance travel services. The service provided by the entrepreneur is to be regarded as an other service (Section 25 (1) sentence 2 UStG). If the entrepreneur provides several services of this type to a service recipient as part of a trip, they are regarded as a uniform other service (§ 25 Para. 1 Clause 3 UStG). The services that are usually incurred in connection with a trip are regarded as travel services. Advance travel services are deliveries and other services provided by third parties that directly benefit the traveler.

c) According to Section 25 (1) sentence 4 UStG, the place of such a uniform (other) service is determined according to Section 3a (1) UStG and is therefore carried out at the place from which the entrepreneur operates his company. If the other service is performed by a permanent establishment, the permanent establishment is deemed to be the place of the other performance (Section 3a (1) sentence 2 UStG). The term permanent establishment used in this provision corresponds to the term permanent establishment used from 1 January 2007 to 31 December 2009 in Art. 43 VAT Directive old version and now in Art. 45 VAT Directive. With regard to the previous provision in Article 9 (1) of Directive 77/388/EEC, the ECJ has already ruled that the primary point of reference for determining the place of service is the place where the service provider has its registered office. Another)

Establishment is only to be taken into account if the link to the registered office does not lead to a solution that makes sense from a tax point of view or if it results in a conflict with another Member State. A permanent establishment or permanent establishment therefore only exists if the establishment of a taxpayer has a sufficient degree of stability and a structure that allows the relevant services to be provided autonomously in terms of personnel and technical equipment. This now corresponds to Art. 11 (2) of the Council Implementing Regulation (EU) No. 282/2011 of March 15, 2011 laying down implementing provisions for Directive 2006/112/EEC on the common VAT system (cf.

BFH judgment of April 29, 2020 XI R 3/18, BFH/NV 2020, 1204, with further case law evidence). d)
According to this, the down payments received by the applicant in the first calendar quarter of 2022 for trips to be made from 2023 are not taxable as uniform travel services in Germany.

aa) The fees received before the service is provided are specifically related to future travel services.
Because the applicant is a tour operator who, as an entrepreneur within the meaning of § 2 UStG, makes use of advance travel services in the form of those bundled by X into a uniform travel service (travel packages) and to be provided by third parties *[details to maintain tax secrecy not intended for publication]* . and has to provide this as a uniform travel service to its customers, the service recipients, in its own name (cf. also

ECJ judgments of February 8, 2018 C-380/16, Commission/Germany, DStR 2018, 346 and of September 26, 2013 C-189/11, Commission/Spain, DStR 2013, 2106). bb) According to Section 25 (1) sentence 4 in conjunction with Section 3a (1) UStG, the location of these uniform travel services is not in Germany because the applicant has its registered office in third country A and does not have a permanent establishment in the community. *[Details on maintaining tax secrecy not intended for publication]*

cc) According to its clear and unambiguous wording, Section 25 (1) sentence 1 UStG is also applicable to all entrepreneurs within the meaning of Section 2 UStG - regardless of their place of residence. The national regulation does not contain a restriction of the personal scope of application of the special regulation for the taxation of travel services to those entrepreneurs who are based in Germany or in the community area, comparable to the small business regulation according to § 19 Para. 1 Sentence 1 UStG.

dd) A restriction of the personal scope of application does not result in particular on the basis of Union law.

(1) Union legal basis of the national regulation of § 25 Abs. 1 UStG is Art. 306 Abs. Accordingly, the Member States apply the special VAT regulation of this chapter to sales by travel agencies or tour operators, insofar as the travel agencies act in their own name towards the traveler and use supplies of goods and services from other taxpayers to carry out the trip. This special regulation does not apply to travel agencies that only act as intermediaries and to whom Art. 79 letter c of the VAT Directive applies to the calculation of the tax base.

According to Art. 307 sentence 2 VAT Directive, the uniform travel service should be taxed in the Member State in which the tour operator has its registered office or a permanent establishment from where the travel services are provided. The Value Added Tax Committee (VAT Committee) concludes that sales made by tour operators acting in their own name only fall under the special regulation if the tour operator has its registered office in the European Union or in the European Union via a has a fixed establishment from where it provided the relevant services (Guidelines from the 101st meeting of 20 October 2014,

UVR 2015, 97). Accordingly, the tax authorities are of the opinion that the special regulation for the taxation of travel services does not apply to tour operators who are based in third countries and also do not have a permanent establishment in the Community area that is involved in the sale of travel services (BMF letter dated 29. January 2021 III C 2 - S 7419/19/10002:004, BStBl. BStBl. I 2021, 250, and section 25.1 paragraph 1 sentences 5 and 6 of the sales tax application decree (UStAE) in the version of the BMF letter dated 24 June 2021 III C 2 - S 7419/19/10001:006, Federal Tax Gazette I 2021, 857; also Huschens, in Küffner/Zugmaier, UStG, § 25 margin no. 16).
However, it cannot be deduced from the regulation for the determination of the place of performance according to Art. 307 sentence 2 VAT Directive that the special regulation should not apply to tour operators based in a third country. Such a significant restriction would have required an express regulation on the personal scope of application. The regulation in Art. 307 sentence 2 of the VAT Directive is only due to the territorial scope of the VAT Directive.

In this respect, the ECJ has also interpreted Art. 26 of the Sixth Directive 77/388/EEC (now Art. 306 VAT Directive) in such a way that the scope of application is not limited to travel services provided by tour operators or travel agencies, but rather applies to all entrepreneurs who provide one or more travel services as a single service in their own name and use advance travel services provided by other companies (cf.

ECJ judgments of October 13, 2005 C-200/04, IST, DStRE 2005, 1481 [FG Cologne 24.08.2005 - 2 K 3126/04], and of October 22, 1998 C-308/96 and C-94/ 97, Madgett and Baldwin, DStRE 1998, 843 [BFH 25.08.1998 - II B 25/98]). In particular, the only relevant criterion for the application of this article is the main or auxiliary character of the travel service in the case of the transactions of an economic operator to be taxed according to Art. 26 of the Sixth Directive 77/388/EEC (now Art. 306 VAT Directive) (ECJ judgment of 13 . October 2005 C-200/04, IST, loc.cit.). The special regulation for the taxation of travel services is therefore sales-related and not business-related. The unambiguous wording of Art. 306 VAT Directive and the equally unambiguous wording of Section 25 UStG speak against the inapplicability of the special regulation to third-country entrepreneurs. A corresponding restriction of the special regulations for the taxation of travel services is not recognizable, contrary to the opinion of the respondent.

Accordingly, the EU Commission proposed on February 8, 2002 to change the VAT Directive so that in the case of the provision of travel services by an entrepreneur operating exclusively from the third country and their actual use or claim within the community area, the place of the travel service on country of domicile or domicile of the service recipient (proposal for a Council Directive amending Directive 77/388/EEC with regard to the special rules for travel agencies, COM(2002) 64 final, OJ C 126 E, 390).

(2) In addition to the wording, however, the aim of the special regulation must also be taken into account when interpreting it. Because the regulations of Art. 306 et seq.

ECJ judgment of October 22, 1998 C-308/96 and C-94/97, Madgett and Baldwin, loc.
According to this, the objective of the special regulation for the taxation of travel services according to Art. 306 et seq , has in the common area, do not justify.

(a) With regard to the purpose of the special regulation, the ECJ has repeatedly stated that the difficulties that would arise for economic operators if the general principles of the VAT Directive were to be applied to transactions that require the provision of services purchased from third parties should be remedied. The application of the general provisions on the place of taxation, the tax base and the deduction of input tax would lead to practical difficulties for these companies due to the large number and localization of the services provided, which would hamper the exercise of their activity. The special regulation thus serves to simplify the VAT regulations for tour operators. It is also intended to distribute the revenue from the levying of this tax in a balanced manner between the Member States, firstly giving the VAT revenue for each individual service to the Member State of final consumption of the service and secondly giving the VAT revenue related to the travel agent's margin to the Member State in which this is domiciled (on all this ECJ judgments of September 26, 2013 C-189/11, Commission/Spain, loc

25 October 2012 C-557/11, Kozak, DStRE 2013, 807).
(b) According to this, a restrictive interpretation of the personal scope of application is not necessary because the purpose of simplification applies equally to third-country entrepreneurs who provide travel services in their own name using advance travel services in the Community area. The distribution of the revenue from the collection of the tax is also not affected. Because in the regulatory area of margin taxation according to Art. 306 ff. VAT Directive, the tour operator pays tax on the travel service where he has the seat of his economic activity or a permanent establishment from where he provides the service (Art. 307 sentence 2 VAT Directive). This first ensures that the margin is taxed in the country of residence of the tour operator. If the country of residence does not subject the travel service or the margin to sales tax, it remains untaxed. However, the non-taxation of tour operators based outside the Community area is not objectionable as a mere consequence of the territorial principle and does not run counter to the regulatory purpose of Art. 306 et seq. of the VAT Directive. The taxation of the preliminary travel services is ensured in accordance with the general provisions by the fact that the individual preliminary travel services are finally taxed in accordance with the general regulations for determining the place of performance due to the refusal of input tax deduction according to Art tax revenue remains.

(3) After all this, it can be left open whether, on the one hand, an interpretation of the national regulations in conformity with the directive would be possible at all contrary to the unambiguous and clear wording of Section 25 (1) sentence 1 UStG and, on the other hand, a restriction of the personal scope of application of this provision constitutes a violation of the principle of equality (Art. 3 of the Basic Law).

3. There was no reason for ordering a security deposit because the submissions of the parties involved and the file do not indicate any reasons for jeopardizing the tax claim (cf. BFH decision of March 20, 2022 IX S 27/00, BFH/NV 2002 , 809).

4. The decision on costs is based on Section 135 (1) FGO.

5. The complaint is admitted in accordance with Section 128 (3) in conjunction with Section 115 (2) No. 1 FGO due to its fundamental importance.