

vat's important

Direct application of the European VAT directive

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Under certain conditions, EU directives can also take direct effect, as happened in a legal case in Germany with regard to Art. 307 of the EU VAT directive (Separate regulation for travel agents). The question was if recipients of travel services also qualified as companies according to the EU VAT directive or if these could only be end-consumers in accordance with German VAT law.



The facts

The claimant, a corporation according to the law of the Cayman Islands, organises river cruises on European rivers for predominantly American tourists. These trips are also offered in Germany. The claimant has neither ships nor personnel and rather has to purchase all of these services (e.g. renting the ships, hospitality, events on board, cleaning, acquiring permits) from a third-party company. This third-party company itself purchases all the services described in order to fulfil its contractual obligations.

The German tax office qualified all of these services based on the current national laws as transport services, which were taxable and liable to tax in Germany. Moreover, travel services can only be provided to end-consumers from a German point of view. The claimant, conversely, was of the opinion that travel services should be taxable according to the EU VAT directive as the provision of bundled services by the travel agent in the place where the travel agent (in our case, the third-party company) carries out its economic activities. Since this third-party company has its registered office outside Germany, no German VAT would apply.

So, can the directive be directly applicable?

In principle, an EU directive must be implemented within national law. However, if the relevant national laws are inadequately implemented (i.e. do not conform with the directive, including compliance with implementation deadlines), a citizen can invoke this provision vis-à-vis his/her state. The EU directive would then apply directly. In this, the fulfilment of the following requirements is mandatory:

- Formulation is clear and unambiguous
- Independent of conditions
- To allow the development of suitable and direct effect by its very nature
- No further legal provisions are required to carry it out.

Legal assessment by the German Federal Fiscal Court

Already in the past, the European Commission has called on Germany to apply the requirements or the principles set down in the EU VAT directive to travel services. The reason for this is that the corresponding Section 25 paragraph 1 sentence 1 of the German VAT Law defines «travel services» more narrowly than the EU's VAT directive. Namely, this paragraph of the German VAT law might only apply to such services that are not intended for the company of the recipient of the services.

The German Federal Fiscal Court on the other hand decided as far back as 2014 that, pursuant to the interpretation of the European Court of Justice, it doesn't matter whether the recipient of the performed services is to be seen as the end-consumer or a company.

The claimant invoked this and sought the direct application of the EU VAT directive. The Federal Fiscal Court confirmed this view in a decision. The third-party company provides the claimant with a travel service in accordance with Art. 306ff of the EU VAT directive. According to Art. 307 of the EU VAT directive, the place of performance is the registered office of the performing third-party company. This means that there are no taxable services within Germany.

This case has demonstrated even more clearly how important it is to analyze services performed by a company in terms of VAT according to the currently applicable provisions and to clarify the specific VAT implications. This involves not only the question of whether performance is taxable as such but also the determination of the place of performance. The latter might also lead to registration obligations under VAT law.

We're happy to assist you in the analysis and VAT-optimal configuration of your services.

With best regards from your VAT team

