



## ECJ: Resale of hotel contingents falls under the Tour Operator Margin Scheme

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### 1 Background

In the EU, there are special VAT schemes for supplies of travel services. In Germany, these can be found in sec. 25 of the German VAT Act which, since the introduction of the Annual Tax Act 2019, also includes B2B supplies of services. Accordingly, supplies of travel services are deemed to be provided in the place where the supplier is established. The Tour Operator Margin Scheme is applicable and the input VAT deduction from input supplies is excluded. In its judgment of 29 June 2023 (C-108/22), the ECJ had to decide on the question of whether this special scheme for supplies of travel services also applies to the mere resale of hotel contingents to companies in the absence of ancillary services.

### 2 Facts

The plaintiff is a so-called hotel services consolidator. It purchases accommodation services in hotels, and other establishments with a similar function, in its own name and for its own account and then resells these supplies to its customers. These customers are exclusively taxable persons. Depending upon the individual customer's needs and expectations, the plaintiff also provides advice on the choice of accommodation and assists with making travel arrangements. In most cases, however, it does not offer the customer any ancillary services in the form of travel information services or travel advice. The price of the resold supplies of accommodation services includes the purchase cost of the accommodation services, plus a transaction fee.



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### 3 ECJ decision

As the ECJ states, the special Tour Operator Margin Scheme requires that travel agents act in their own name vis-à-vis the traveller and use supplies of goods and services provided by other taxable persons, in the provision of the travel facilities. These requirements were fulfilled in the referral for a preliminary ruling. Thus, the plaintiff satisfied the substantive requirements for the application of the special scheme. According to the ECJ, the plaintiff's activities were identical or at least comparable to those of a travel agent or a tour operator.

However, the crucial question was whether the application of the special Tour Operator Margin Scheme requires that the plaintiff provides ancillary services, in addition to the resale of the hotel contingents. The ECJ answered in the negative with reference to its decision in the *Alpenchalets Resorts* case (ECJ, judgment of 19 December 2018, C-552/17). According to this ruling, the mere provision of holiday accommodation by travel agents is sufficient for the application of the special scheme, even if this supply of services only includes accommodation. The ECJ clarifies that although this jurisprudence was given in the context of the provision of holiday accommodation, it also applies in the case of the resale of hotel contingents.

### 4 Consequences for the practice

The ECJ only needed 31 paragraphs to come to the conclusion that the special scheme for the supply of travel services also applies to the resale of hotel contingents. The result is unsurprising and could already have been given the ECJ decision in the *Alpenchalets Resorts* case. The only difference is that the *Alpenchalets Resorts* case concerned the supply of a holiday residence, and the present case concerned the resale of hotel contingents. It is obvious that this minor difference could not lead to a different VAT treatment. Therefore, the Polish court must ask itself why it actually referred this case to the ECJ for a decision, when the legal situation, which has been clarified by jurisprudence, leaves no room for reasonable doubt ("acte éclairé").

The Tour Operator Margin Scheme is designed as a simplification rule and is intended to prevent travel agencies from having to comply with their VAT obligations in different Member States. In practice, however, sec. 25 of the German VAT Act does not always do justice to the simplification purpose. This is because the regulation not only affects traditional tour operators, but also, for example, intra-group allocation of costs. In particular, the correct calculation of the margin, as well as cases with third-country participation, regularly pose major challenges for the companies concerned.

The only way out is to switch to an intermediary business model. This is because insofar as those taxable persons concerned merely purchase the hotel contingents in the name of and for the account of the customer, the Tour Operator Margin Scheme does not apply. Since the intermediary of hotel contingents is regularly a digital platform, the Platform Tax Transparency Act's (PStTG) scope of application has been opened up since 1 January 2023. This is because the provision of hotel contingents is a reportable activity of the provider (see sec. 5 para. 1 sentence 1 no. 1 of the Platform Tax Transparency Act (PStTG)). In this case, the intermediary must comply with its reporting obligations under the PStTG vis-à-vis the Federal Central Tax Office (see KMLZ VAT Newsletter 08 | 2023).