

By PwC Deutschland | 23 December 2021

VAT rate for provision of food and beverage services in a shopping center

When using a food-court in a shopping mall the services of a fast-food provider may not be a delivery of food (for which the reduced VAT rate is applicable) but rather a service subject to the standard VAT rate if - as the Supreme Tax Court points out in a most current decision - it is evident from the perspective of an average consumer that the provider of the food has a facility at his disposal on the nearby premises. This, e.g., may be the case if a tray is provided for transporting the purchased food to a consumption facility located in the food-court.

Background

The plaintiff operates a chain of fast-food restaurants. It opened a new branch in a shopping center. There, it sold prepared (readymade) meals in disposable packaging. The food was served to customers from a sales counter. There was no direct separate seating or eating area. The food store was in the premises of a shopping mall, where a general consumption area with seats (food court) was available that could be used jointly by tenants and customers of the mall. Surrounding the food court were a total of 15 food service establishments, including the plaintiff's store. The tax office saw the plaintiff's sales as services subject to the standard tax rate as it was possible for the customers of the plaintiff to use the seating arrangements in the joint seating and consumption area. The appeal before the regional tax court of Düsseldorf was not successful.

Decision

The current judgment is of practical relevance because it adds a further group of cases to the extremely diverse case law on the question of assessing restaurant sales as supplies or other services. According to the Supreme Tax Court it must be clear from the *perspective of the average consumer* whether the service of the contractual partner (here the restaurant in the shopping mall) is limited to merely providing the food or whether it includes the provision of consumption facilities. The Supreme Tax Court granted the appeal of the plaintiff but referred the case back to the regional tax court for further and a more detailed review.

In the view of the Supreme Tax Court, it is sufficient that the average consumer can expect and that - based on various other circumstances - he is entitled to use the food court as a customer of the plaintiff. For this purpose, the distribution of food trays, as referred to by the tax office, is sufficient, since this typically enables the customer to take the food purchased by him to a place of consumption in the vicinity (here the food-court) and to consume it there at a table with seating.

The Supreme Tax Court went on to say, that the regional tax court did not consider the view of an average consumer. The average consumer is not aware of the contractual arrangements between the plaintiff and the operator of the shopping center, as he initially would regard the food-court facilities as those of the mall operator. For an average consumer, it could also be apparent from other circumstances that the services provided by the plaintiff were not limited to the mere ordering, payment and take away of food at the sales counter, but also included the consumption of food in the immediate vicinity of the serving point. An indication would be whether a tray was provided, by which the purchased food could be brought to the available seats in the food court.

If the restaurant - in this case the plaintiff - delivers the food without tray normally used in the food-court (in the case of dispute all participating restaurants in the mall use identical trays), this would indicate that the restaurant does not participate in the food-court of the shopping center. It is further irrelevant if the customers of the plaintiff nevertheless use the seating area. In this context the Supreme Tax Court also refers to a judgment of the ECJ from 22 April 2021 ([C-703/19](#) - *Dyrektor Izby Administracji Skarbowej w*

Katowicach) where the court held that “the concept of ‘restaurant and catering services’ includes the supply of food accompanied by sufficient support services intended to enable the immediate consumption of that food by the end customer, which is a matter for the national court to determine. Where the end customer chooses not to benefit from the material and human resources made available by the taxable person to accompany the consumption of the food supplied, it must be concluded that no support services accompany the supply of that food.”

The case has been referred to the regional tax court for a different hearing and final decision based on the suggestions and comments provided by the Supreme Tax Court.

Source:

Supreme Tax Court decision of 26 August 2021 (case ref.: V R 42/20), published on 2 December 2021.

Keywords

delivery of food, fastfood, reduced rate VAT, shopping center