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VAT NEWSLETTER

VAT exemption for Private clinics: An old approach rediscovered?

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1 Background

Many doctors, and private clinics in particular, are familiar with the problem: 'With or without VAT?' Is it medical treatment or not? Are the conditions for VAT exemption met if a private clinic provides medical treatment? Private clinics are hospitals that are licensed under Sec. 30 of the German Trade Regulation Act (Gewerbeordnung), but are not approved by statutory health insurance funds to invoice them for their services.

2 Previous case law concerning tax exemption for private clinics

There has been a lot of activity in jurisprudence in recent years, particularly in the area of private clinics. The disputes in question relate to the years between 2009 and 2019. During this period, the German VAT Act did not provide VAT exemption for private clinics. However, according to the VAT Directive, this should have been mandatory. Private clinics were therefore entitled to invoke the VAT exemption directly under EU law. The prerequisite for this was, in particular, that the private clinic provided its supplies under conditions that were socially comparable to those under which public hospitals provided their services. What this precisely means remains unclear to this day. The interpretation found by the German Federal Fiscal Court has been questioned in particular in two cases before the Fiscal Courts of Lower Saxony and Munich (appeals are pending in both cases). The Lower Saxony Fiscal Court had even asked the ECJ for a preliminary ruling.

From 2020 onwards, there has been a provision in the German VAT Act regulating the VAT exemption for private clinics. However, the legal situation is still unclear. The open questions range from whether the regulation is in conformity with EU law at all, to the interpretation of the individual elements of the offence. The current ruling of the German Federal Fiscal Court addresses another facet of VAT law in the area of medical treatment in private clinics.

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3 Facts: German Federal Fiscal Court, judgment of 19 December 2024 – V R 10/22

In 2009, the plaintiff, a limited liability company (GmbH), provided its patients with aesthetic plastic surgery treatments during inpatient stays. The tax office and the plaintiff had agreed, by way of a mutual understanding, on the percentage of these treatments that constituted medical treatment. The plaintiff conducted its consultations and operations with its own doctor (its managing director) on the premises of one of three different hospitals. The plaintiff invoiced the patients for the 'hospital services' as a whole. However, the plaintiff had to pay consideration to the operator of the hospital for its supplies (stay, anaesthesia, medical on-call service, etc.).

4 Decision of the German Federal Fiscal Court

The Fiscal Court left open the question of whether the hospital treatment, as such, was VAT exempt. The German Federal Fiscal Court also did not address this issue, but the latter did confirm that a limited liability company can provide medical treatment services. This is in line with previous ECJ and German Federal Fiscal Court jurisprudence. The same applies to the statement that medical treatment can be VAT exempt, even if it is provided in a hospital operated by another taxable person as part of hospital treatment. But what applies if the provider of the medical treatment and other components of the hospital treatment (accommodation, care, etc.) is one and the same taxable person? The German Federal Fiscal Court's ruling revolves around this fundamental problem.

The German Federal Fiscal Court's decision takes us back to the roots of VAT law. The German Federal Fiscal Court has instructed the Fiscal Court to examine what the exact subject matter of the service is. In its ruling, the German Federal Fiscal Court criticises the Fiscal Court for failing to take into account one component of the service, namely the accommodation and meals. The Fiscal Court must therefore examine whether the plaintiff provides two elements (medical treatment + hospital stay) of a single service or whether the two elements constitute two separate services. If they are two separate services, the medical treatment would be VAT exempt. The second service, in the form of accommodation, would be taxable. This would mean that part of the consideration paid to the plaintiff would be VAT exempt. If, on the other hand, it is a single supply, it is either completely VAT exempt or completely taxable.

5 Consequences for the practice

The tax authorities often assume that private clinics do not meet the requirements for VAT exemption for hospital services. For private clinics, the considerations in this case may point to another way of obtaining (at least partial) VAT exemption for their services. Until 31 December 2008, such a division was even provided for by law. This former statutory regulation could therefore experience a renaissance or even be extended as a result of the jurisprudence. Whether a single supply exists and whether it is VAT exempt or subject to VAT must be decided on the basis of the circumstances of the individual case. If several services are involved, the follow-up question of what proportion of the consideration regularly invoiced, as a lump sum, is attributable to medical treatment must also be answered on a case-by-case basis.

Many private clinics are currently undergoing tax audits for filing periods that are far in the past. In many cases, there is disagreement as to whether the conditions for VAT exemption for private clinics have been met. Even the tax authorities are unsure how to deal with these cases. The criteria of the Federal Ministry of Finance and the jurisprudence are simply unclear and contradictory. Therefore, a solution involving two services, one of which is VAT exempt, may offer a compromise. However, caution should be exercised. The resulting significant VAT exempt services give rise to disadvantages in other areas (input VAT deduction, option when renting, civil law claims, etc.).

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