



## Federal Fiscal Court on VAT Exemption for Private Clinics: Mixed results

### 1 Background

In the case of private clinics, statutory health insurance does not cover the costs of hospital treatment (due to a lack of authorisation under sec. 108 German Social Code V). For the VAT exemption of such private clinics, three periods must be distinguished. Up until 31 December 2008, private clinics had to meet the requirements of a hospital dedicated activity under sec. 67 para 1 or 2 of the German Fiscal Code in order to provide VAT-exempt services. As of 1 January 2009, private clinics were unable to provide VAT-exempt services according to the wording of the German VAT Act (UStG). However, they were able to claim the exemption directly under EU law. For services from 1 January 2021, the legislator adapted sec. 4 No. 14 lit. b UStG to the EU VAT Directive. Since then, the VAT-exemption for private clinics has essentially depended upon compliance with a 40% social quota.

### 2 Facts of the Case (Judgement of Federal Fiscal Court July 8, 2025 – XI R 36/23)

The case in question falls within the period between 2009 and 2021. The plaintiff operated a private clinic. In the clinic's premises, attending physicians, including anaesthetists, each with their own contract with the patients, performed operations. The plaintiff also concluded a contract with these doctors. Under this agreement, they were permitted to use the clinic's rooms, equipment, and nursing and assistant staff for their patients' operations. For this, the plaintiff received a remuneration from the doctors of 25% of the fees they invoiced in accordance with the German medical fee schedule.

For inpatient treatment, the plaintiff also concluded a contract with the patients. It provided all services except the operations (accommodation, nursing care, etc.). For these services, the plaintiff invoiced based on DRG flat rates with a base case value of up to EUR 4,998. The then relevant state base case value was EUR 3,188. The clinic had operating rooms and



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patient rooms (single and double rooms and suites) equipped with a desk, safe, refrigerator, air conditioning, and a multimedia system with internet, telephone, and TV. Patients were required to pay the clinic's fees themselves and subsequently received reimbursement from their private health insurance and/or the financial assistance available for public sector employees ('Beihilfe'), depending on their personal circumstances.

### 3 Decision of the Federal Fiscal Court

According to the Federal Fiscal Court, the plaintiff's services were not VAT-exempt under Art. 132 para 1 lit. b of the EU VAT Directive. It states that the plaintiff did not provide its services under conditions comparable, in social terms, to those of public hospitals. In line with previous Federal Fiscal Court case law, social comparability is dependent on the particular hospital guaranteeing efficient and cost-effective hospital care. The Federal Fiscal Court states that this is confirmed by the ECJ. However, other criteria mentioned by the ECJ may also be considered. The Federal Fiscal Court acknowledges that the clinic met the requirement of efficient hospital care. This requires personnel, spatial, and medical-technical equipment that enables hospital treatment. The presence of such equipment can be inferred from the fact that these features are part of the business license requirements.

However, the Federal Fiscal Court rejected the argument that the plaintiff provided cost-effective hospital care. It states that the clinic must not exceed what is medically necessary if it intends to match this prerequisite. Whether costs are reasonable, in relation to the service, is irrelevant. In this case, an increased nurse-to-patient ratio, the guaranteed chief doctor standard, and significantly better equipment than required by the care mandate are decisive for the Federal Fiscal Court. Prices charged to patients may be higher than those of a comparable university hospital, but not every cost overrun is permissible. This is also not justified by the absence of an investment cost subsidy. Finally, it must be considered whether social security institutions cover a large part of a clinic's costs. The Federal Fiscal Court explicitly leaves open, with reference to its contrary case law, whether the above mentioned financial assistance available to public sector employees qualifies as such a social security institution.

### 4 Practical Implications

In 2019, the Federal Fiscal Court identified the criteria of efficiency and cost-effective hospital care for assessing social comparability but did not define these terms in detail. The current judgment can now serve as a guideline, even if it does not answer all outstanding questions. On the negative side, a more generous interpretation would have been desirable regarding the provision of good healthcare in private clinics.

Nevertheless, there are some positive aspects. The Federal Fiscal Court recognizes that private clinics can provide VAT-exempt services, even if they charge higher fees than public hospitals. Apparently, a lack of investment cost subsidies can be considered, within certain limits. By explicitly referring to its contrary case law, the Federal Fiscal Court signals doubts about the tax court's view that financial assistance, available to public sector employees, does not constitute a social security institution. Despite the negative outcome in this specific case, other private clinics can still legitimately claim the VAT-exemption.

The German Ministry of Finance has already considered the 40% social quota, which the legislator only introduced from 1 January 2021, as necessary for social comparability for the years 2009 to 2020. Nevertheless, the Federal Fiscal Court does not apply this quota until the end of 2020. This quota creates complex new issues for tax periods commencing from 1 January 2021.