



KMLZ VAT NEWSLETTER

Price reduction for supply of medicine

In Germany, people with private health insurance are treated differently from those with statutory (public) health insurance. Even the tax authorities receive higher VAT income with regard to people who are privately insured. The ECJ's judgement of 20.12.2017 (*Boehringer Ingelheim – C-462/16*) has now eliminated this inequality.

1. Facts

Pharmaceutical companies supply medicinal products, subject to VAT, to pharmacies and wholesalers. In the case of the statutory (public) health insurance system, the pharmacies provide medicines to the insured person. However, from a VAT perspective, a supply of goods between the pharmacy and the public health insurance company is given. As regards the private health insurance system, the medicine is supplied to the insured persons, based on individual contracts. The private health insurance company reimburses those insured by it. In both cases, the pharmaceutical companies are obliged to grant a discount of 6% on the sales prices of the supplied medicines. The Pharmacies grant this discount to the public health insurance companies. The pharmaceutical companies are required to reimburse the pharmacies for the discount. In this case, the discount is regarded as a reduction of the taxable base. With respect to the supply

ECJ judgement regarding discounts

In the case *C-462/16 – Boehringer Ingelheim* the ECJ has decided that a reduction of the taxable base is given although the person who benefits from the granted discount is not a recipient of the goods. The ECJ case was regarding discounts for the supply of medicine granted by pharmaceutical companies to private health insurance companies. The pharmaceutical companies can now expect a VAT refund. Other companies may also benefit from this judgement, in cases where they grant discounts to persons who are not part of the supply chain.

of medicine to private health insurance members, the pharmaceutical companies are obliged to grant the discount to the private health insurance companies. In such cases, the pharmaceutical companies were not permitted to reduce their VAT liability.

2. Judgement

The ECJ has now ruled that a discount granted to private insurance companies must also result in a reduction of the taxable base for the supplies of medicinal products to wholesalers or pharmacies. After all, *Boehringer Ingelheim* could only dispose of the sum corresponding to the sales price reduced by that discount. Thus, in accordance with art. 73 of the VAT Directive, the taxable base can only be made based on the amount, which results when the discount is subtracted. Otherwise, the requirements of the neutrality of VAT would not be complied with. Against this background, the ECJ has extended its principles as laid down in its judgement *Elida Gibbs (C-317/94)*.

2.1 ECJ judgement *Elida Gibbs*

In its fundamental judgement *C-317/94* dated 24.10.1996, the ECJ commented on discounts granted within supply



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chains. According to this decision, the taxable base also has to be amended in cases where discounts are granted to customers with whom the supplier does not have a direct contractual relationship. In fact, it is not required that the supplier who grants the discount has a direct contractual relationship with the customer who benefits from the discount. However, a precondition for a reduction of the taxable base is that the supplier is the first link in a chain of transactions, which concludes with the final consumer. Thus, the person who benefits from the discount is required to be the recipient of the goods supplied by the supplier who granted the discount.

2.2 Beneficiary not recipient in a supply chain

The ECJ has now stated that a reduction of the taxable base cannot be denied due to the fact that the private health insurance members (and not the private insurance companies) are the recipients of the supply of medicine. Nevertheless, a direct link between the supply of the medicine and the granted discount is given. Based on the fact that the private health insurance companies reimburse the private health insurance members for the cost of the medicine, the private health insurance companies are regarded as the final consumers and not the private health insurance members. The payments made by private health insurance members to pharmacies are regarded as consideration paid by a third party. The VAT amount payable to the tax authorities may not exceed the amount paid by the final consumer (private health insurance company). Consequently, only the amount less the discount can be subject to VAT.

2.3 Discount fixed by law

Moreover, the ECJ states that, as regards the main proceedings, the discount is fixed by law. The pharmaceutical

companies are obliged to grant the discounts to the private insurance companies. Thus, the pharmaceutical companies cannot freely dispose of the full amount received from the pharmacies or the wholesalers. Therefore, the discounts, which are fixed in advance and mandatory, result in a reduction of the taxable base.

3. Consequences for the practice

The outcome of the ECJ judgement is correct. Based on the aspects of equal treatment, it was incomprehensible as to why pharmaceutical companies were only entitled to reduce the taxable base when supplying medicine to public health insurance members. After all, the legal obligation to grant a discount also applied with regard to the provision of medicine to private health insurance members. With regard to the discounts paid to the private health insurance companies, the pharmaceutical companies can now apply for a VAT refund for all years not yet time barred.

However, the judgement raises a few questions. According to the opinion of the ECJ, any person obliged to make payments in connection with the supply of goods is also regarded as a final consumer and is included in the supply chain in order to allow a reduction of the taxable base. The ECJ has not commented on whether this would only apply in the case where the discounts are fixed by law or also when a contractual obligation is given. Also, in such cases, the supplier who grants the discounts cannot freely dispose of the full consideration.

Taxable persons, who grant discounts to customers with whom they do not have a direct contractual relationship, should review whether they are obliged by law or contract to do so. It might be the case that companies outside the pharma sector can also benefit from this EJC judgement.