



German Federal Fiscal Court rules in favour of ECJ: No VAT exemption for swimming lessons

09 | 2022

1 Background

For many years, both the ECJ and the German Fiscal Courts interpreted the VAT exemptions for educational services very broadly. However, the pendulum swung back with the ECJ's decision in *A & G Fahrschul-Akademie* (C-449/17). In this decision, the ECJ applied a much stricter definition of the term "school and university education" within the meaning of Art. 132 para 1 (i) of the VAT Directive. As a result, the German Federal Fiscal Court asked the ECJ for a preliminary ruling on whether swimming lessons should, as previously assumed by the German Federal Fiscal Court, remain exempt from VAT.

In *Dubrovin & Tröger GbR - Aquatics* (C-373/19), the ECJ denied the VAT exemption could be applied to swimming lessons (see KMLZ VAT Newsletter 33 | 2021), which it considered to be specialized and selective. Therefore, such lessons are not, of themselves, equivalent to the teaching, deepening and development of knowledge and skills in relation to a wide and varied range of subjects, which is characteristic of "school and university education".

2 German Federal Fiscal Court's decision of 16 December 2021 (V R 31/21)

The German Federal Fiscal Court agrees with the opinion of the ECJ and has therefore denied the application of the VAT exemptions for swimming lessons under EU law. Direct invocation of Article 132 para 1 (i) and (j) VAT Directive has been ruled out and the German Federal Fiscal Court has thus changed its previous case law (ruling V R 19/13).

The court has also clarified that, in the case of the ruling, the VAT exemption could not be derived in any other way:



Dr. Markus Müller, LL.M.
Dipl.-Finanzwirt (FH),
Certified Tax Consultant

+49 (0) 211 54 095-387
markus.mueller@kmlz.de

- For the application of sec. 4 no. 21 letter a double letter bb German VAT Act, the certificate of the regional authority to the effect that the swimming courses properly prepared participants for an examination to be taken before a public legal person was missing. However, this was possible in the case of swimming courses.
- The swimming school lacked the necessary entrepreneur-related prerequisite for the application of sec. 4 no. 22 letter a German VAT Act.
- Article 132 para 1 (i) VAT Directive covers not only school and university education, but also initial and further training and vocational retraining. Against this background, the German Federal Fiscal Court ruled that courses offered by ballet and dance studios are VAT-exempt, even though only two percent of the participants were aiming for a corresponding vocational training. In the case in dispute, however, there was a complete lack of such course participants.

3 Consequences for the practice

The German Federal Fiscal Court has previously strenuously attempted to maintain the VAT exemption for swimming lessons. Unfortunately, the ECJ did not agree and, as a result, the German Court had no choice but to reject its previous favourable case law. This reversal leads to far-reaching changes in the VAT exemptions for educational services.

Swimming schools can no longer directly invoke Art. 132 para 1 (i) and (j) VAT Directive, at least not based on the "school and university education" exemption. The protection of legitimate expectations according to sec 176 German Fiscal Code ends with the publication of the ruling. However, a lifeline may lie in the professional reference. If the courses are used for professional purposes by even a fraction of the participants, the exemption could continue to apply.

Other educational institutions within the meaning of sec. 4 no. 21 German VAT Act are not directly affected by the ruling. However, the ruling could lead to the fiscal court rulings on language schools, dance and music schools, etc. tipping towards the VAT liability of such services. Here, too, a professional usage could constitute a way out of the VAT burden.

The decision also directly affects the education providers named in sec. 4 no. 22 German VAT Act (legal entities under public law, adult education centres, non-profit institutions, etc). The "lectures, courses and other events of a scientific or instructional nature" are to be interpreted in conformity with the Directive as "school and university education". The narrow understanding of the ECJ and the German Federal Fiscal Court therefore has a direct effect on and restricts the national exemption. In some cases, protection of legitimate expectations must be granted due to section 4.22.1 paragraph 4 German VAT Circular. A certificate, within the meaning of sec 4 no. 21 German VAT Act, could protect against the direct effect of EU law. Up to now, the providers named in sec. 4 no. 22 German VAT Act have not needed this certificate.

Lecturers at educational institutions are also affected. If the VAT exemption for the institution according to sec. 4 no. 21 of the German VAT Act ceases to apply, the services of freelance lecturers will also be subject to VAT. Self-employed lecturers at institutions listed in sec. 4 no. 22 German VAT Act previously had to directly invoke Art. 132 para 1 (j) VAT Directive, due to the lack of exemption under national law. As a result of the ruling, this will rarely be possible anymore.

The ruling and its consequences show that the national VAT exemptions in the education sector are in need of reform. Politics is now called upon to act. The current coalition agreement states: "We want to maintain the VAT exemption for education services of general interest in conformity with European law. Now the time has come. Berlin, please take over!"