



VAT exemption of private hospitals: 40% quota in accordance with Union law?

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1 Background

The legal situation regarding VAT exemption for hospitals that cannot invoice their supplies to public health insurance funds (private hospitals) has, over the past 15 years, changed several times. Up until the end of 2008, private hospitals could provide VAT exempt supplies, on condition that they met the necessary requirements of dedicated activities pursuant to sec. 67 of the German Fiscal Code. As from 2009, private hospitals were no longer eligible for VAT exemption in accordance with the German VAT Act. However, in 2014, the German Federal Fiscal Court (BFH) ruled, for the first time, that private hospitals could directly invoke a VAT exemption provision for hospital and medical care under Union law (see KMLZ VAT Newsletter 09 | 2015). As a result, supplies provided by a private hospital, at least since 1 January 2009, have been VAT exempt in circumstances where the private hospital meets the requirements of the VAT exemption under Union law and invokes Union law. In its letter of 6 October 2016, the German Federal Ministry of Finance confirmed the option for private hospitals to invoke the VAT exemption under Union law and explained, from its perspective, the interpretation of the requirements to be met. Subsequently, the legislator, once again, amended the German VAT Act (see KMLZ VAT Newsletter 47 | 2019). Since 1 January 2020, the conditions, under which private hospitals are regarded as providing VAT exempt hospital and medical care, have appeared in sec. 4 no. 14 lit. b of the German VAT Act.

2 BFH judgment of 17 November 2022 – V R 23/20

The BFH had to decide on an “old case” regarding the year 2006. In order to meet the requirements for VAT exemption, the plaintiff private hospital was required, according to the previous jurisprudence, to have made a pre-calculation of the cost price. However, the hospital had made no such calculation. The Fiscal Court therefore dismissed the private hospital’s legal action regarding its claim that its supplies of hospital services should be treated as being VAT exempt.



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In the opinion of the BFH, private hospitals were not required to prepare this pre-calculation in every case, even in periods prior to 2009. If they provided supplies that authorized hospitals, according to sec. 108 of the Fifth Book of the Social Security Code (licenced hospitals), invoiced for pursuant to the (at that time new) DRG remuneration system, the pre-calculation was not required. It was only necessary if the private hospital provided supplies of services in the psychiatry sector. The XI. Senate, i.e. the other Senate of the BFH responsible for VAT, had already taken a similar view in 2019. This clarification, namely that both BFH Senates are in agreement in this respect, is important as regards old cases – which remain pending today.

3 Consequences for the practice

The BFH's decision is also crucial for the VAT exemption of private hospitals in filing periods as from 2009 and 2020. A (further) requirement for the VAT exemption in the year in dispute was (simplified) that 40% of the days of occupancy were attributable to patients for whom the private hospital did not charge a higher consideration than licenced hospitals (40% quota). According to the BFH in its current judgment, when examining this 40% quota, it can be important whether comparable conditions are given with regard to the financing of investment costs.

This 40% quota has continued to apply in a similar way to date. This is supposed to demonstrate socially comparable conditions in the provision of services with licenced hospitals. However, private hospitals often base their invoices on a higher base rate and therefore charge higher prices than licenced hospitals. Tax offices regularly argue that the requirements for VAT exemption are not fulfilled because the 40% quota has not been met. A licenced hospital that issues invoices in accordance with the German Hospital Fees Act (*Krankenhausentgeltgesetz*) receives investment costs separately, in addition to the hospital fees. Private hospitals, on the other hand, must cover investment costs from the revenues for hospital and medical care. The BFH and at least the Cologne Fiscal Court have already made it clear in earlier judgments that the resulting differences in the level of consideration do not lead to the rejection of VAT exemption. By addressing the issue again, the BFH provides further support for private hospitals in their argumentation against the contrary opinions of the tax authorities.

Furthermore, the BFH addresses very general doubts to be found in the literature based on an ECJ judgment from 2020 (IDEALMED III) concerning the 40% quota. The BFH's statement refers to 2006. However, due to the corresponding regulation in the Federal Ministry of Finance's letter of 2016 and, since 2020, in the law, these doubts continue to be relevant for taxation today. If the 40% quota, as a statutory requirement, is contrary to Union law, private hospitals could still directly invoke the requirements of Union law. In this context, the regulations from the Federal Ministry of Finance's letter of 2016 could probably not be used for interpretation, as the regulation provided for there (40% quota), would then also be contrary to Union law. Only the ECJ, within the framework of a corresponding referral, will be in a position to clarify as to whether such a prerequisite quota is contrary to Union law. There are arguments for both sides.

At present, in audits and court proceedings in which private hospitals have invoked Union law, the concrete criteria on the basis of which VAT exemption is to be determined, is repeatedly being disputed. If the tax office refuses to grant a private hospital VAT exemption with a view to the 40% quota or generally because of it charging higher prices than a licenced hospital, the present judgment also provides arguments to defend against this view, also for periods beyond the year in dispute. However, the problem that the exact criteria, on the basis of which the VAT exemption is determined, remain unclear also exists in court proceedings (see KMLZ VAT Newsletter 15 | 2022). As a rule, many details of the individual case must be presented and are decisive regarding the outcome of the dispute.