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KMLZ VAT NEWSLETTER

Subsidies paid to canteens: Federal Fiscal Court disagrees with view of tax authorities

1. Background

The tax authorities consider subsidies for canteens operated by a caterer not to constitute remuneration for the operation of the canteen (sec. 1.8 para. 12 no. 3 example 3 of the German Administrative Guidelines). Rather, they are deemed to be remunerations paid by a third party to the caterer for the supply of meals to the employees. Consequently, the companies paying subsidies are not entitled to an input VAT deduction due to the fact that the companies are not deemed to be recipients of a service. Therefore, caterers do not show VAT in their invoices requesting payment of the subsidies or mention therein that input VAT deduction is not possible. Were they to do otherwise, a VAT liability according to Art. 203 of Directive 2006/112/EC may arise for the caterers.

2. Courts disagree with view of the tax authorities

The Federal Fiscal Court disagreed with the view of the tax authorities in its decision of 29 January 2014 (XI R 4/12) and confirmed the decision of the Tax Court Nuremberg in the first instance, at least regarding the question of whether the caterer performed a service to the company which paid a subsidy. The Tax Court Nuremberg, in its decision of 22 November 2011 (2 K 1408/08), classified the subsidy as being remuneration for the operation of the canteen by the caterer. The company was able to offer a canteen with a wide range of food and beverages to its employees under favourable conditions. The Tax Court considered the operation of the canteen to be a separate direct economic benefit to the company as such a canteen could prove to provide a company with a competitive advantage when seeking to locate and hire qualified employees. Consequently, the tax

Service rendered to the taxable person - but not sufficient to obtain input VAT deduction?

The Federal Fiscal Court has confirmed that subsidies for a canteen operated by a caterer, under certain circumstances - and contrary to the position of the tax authorities - are not deemed to constitute remuneration paid by a third party to the caterer for the supply of meals to employees. Rather, the companies paying subsidies are regarded as directly purchasing canteen operating services. However, in the particular case at hand, the Court denied an input VAT deduction by arguing that the services purchased were intended to be used for services provided free of charge to the employees. Therefore, companies paying subsidies to canteens are still not entitled to input VAT deduction in this regard but should check whether specific circumstances exist which allow for input VAT deduction due to the fact that the personal advantage of the employees is merely an accessory to the requirements of the business.

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authorities should surrender their earlier position and proceed with the appropriate amendment of the Administrative Circular.

3. No input VAT deduction due to supplies free of charge to employees

However, the Federal Fiscal Court ultimately denied the right to an input VAT deduction after finding that the caterer's services were used by the company to provide services free of charge to its employees. The operation of the canteen was intended for the private needs of the employees and not integral to the specific circumstances of the business. The personal advantage which employees derived from the provision of the canteen services appears not to have been an accessory to the requirements of the business. Hence, an input VAT deduction, as in the decision *Danfoss and AstraZeneca* of the ECJ of 11 December 2008 (C-371/07), is not possible.

4. Conclusion

Firstly, it can be concluded that caterers working in a constellation comparable to the circumstances of the court case will not face any risk of being found liable for VAT according to Art. 203 of Directive 2006/112/EC. Hence, it will no longer be a problem if the invoices for the subsidies show VAT separately.

Doubts as to whether the provision of rooms and equipment made available free of charge to caterers are subject to VAT according to Art. 26 of Directive 2006/112/EC, are also now dispelled. The provision of these said facilities should not be subject to VAT. Under certain conditions however, such provision may be qualified as a barter transaction, which would then be subject to VAT. In order to make an input VAT deduction possible, caterer and company will then have to exchange invoices with VAT shown separately.

Furthermore, the question for the companies paying subsidies is whether the canteens, in the particular circumstances, are operated for the purposes of the business only, with the personal advantages for the employees merely amounting to an accessory to the requirements of the business. According to the jurisprudence of the ECJ and the Federal Fiscal Court, as well as sec. 1.8 para. 2 sentence 7 in conjunction with para. 4 sentence 1 of the German Administrative Guidelines, such operation is not subject to VAT. This applies, for example, if any of the following benefits are supplied to employees free of charge:

- parking space (sec. 1.8 para. 4 sentence 3 no. 5 of the Administrative Guidelines);
- kindergardens (sec. 1.8 para. 4 sentence 3 no. 7 of the Administrative Guidelines); or
- transport provided to those who have no public transport available which would deliver them to the workplace within an acceptable time (sec. 1.8 para. 15 sentence 2 no. 1 of the Administrative Guidelines).

Why should a canteen at a location without proper catering possibilities within acceptable proximity not be operated for business purposes only? If the personal advantages of passenger transportation to the workplace under unfavourable circumstances are deemed to be accessory to the requirements of the business, this should also apply to catering under unfavourable circumstances (distance, prices, quality). Therefore, an input VAT deduction from subsidies paid to caterers – which can be a remarkable amount – may be possible in certain cases.