



Spa communities can hope for input VAT deduction again

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1 Background

You will recall that it was only in July 2023 that the ECJ ruled (decision of 13 July 2023, C-344/22, *Gemeinde A*, KMLZ VAT Newsletter 33 | 2023) that a municipality is not acting in the context of a taxable supply of goods and services for consideration when levying a spa tax, if the spa facilities are freely accessible to everyone, free of charge. Many spa communities faced financial ruin because of this jurisprudence. This is because they often benefited from input VAT surpluses from the purchase and manufacture of spa facilities. The future non-taxability of spa tax therefore offered little consolation for most of them.

Previously, the tax authorities had already severely restricted the input VAT deduction: it was only granted if the spa guest was able to use the spa facilities exclusively, i.e. general use was excluded. The Federal Ministry of Finance's letter of 25 May 2022 granted a kind of transitional arrangement, but most municipalities saw this pass them by.

2 Judgements of the German Federal Fiscal Court of 18 October 2023 and 6 December 2023

As is so often the case, things turn out differently than initially feared. This is because the German Federal Fiscal Court not only made a particular decision in the subsequent "*Gemeinde A*" proceedings (XI R 21/23), but also took the opportunity to completely realign its jurisprudence on input VAT deduction for spa communities based on another pending case from Schleswig-Holstein (XI R 33/21). Both judgements were published together on 28 March 2024.



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There was a major difference in the facts of the case from Schleswig-Holstein: In the ECJ case of *Gemeinde A*, everyone had free access to the spa facilities. However, in the case from Schleswig-Holstein, it was the other way round: spa guests received a guest card upon payment of the spa tax, which had to be produced upon request by supervisory staff. Day guests, on the other hand, did not have to pay a spa tax. However, according to the local statutes, they were required to pay an increased daily visitor's tax, which had to be paid directly to the spa administration inspectors in the event of an inspection.

In this context, the German Federal Fiscal Court did not accept the tax office's objection that the spa tax was levied per day of stay in accordance with the statutes and was not linked to the actual use of the spa facilities. Rather, the decisive point was the fact that, according to national tax law, the provision of the spa facilities provided the spa guest with a specific benefit. According to the German Federal Fiscal Court, this benefit is, in principle, also consumable from a VAT perspective. Whether the guest actually makes use of the spa facilities is irrelevant. Ultimately, the willingness to provide supplies of goods and services for consideration and not the extent to which the specific service is utilised, is sufficient for VAT purposes.

3 Consequences for the practice

It is good that the German Federal Fiscal Court has published the two judgements together, thus, once again, providing clarity. In the future, spa communities can continue to benefit from input VAT deduction. Contrary to the requirements of the tax authorities in sec. 15.19 para. 2 of the German Administrative VAT Guidelines, the input VAT deduction does not primarily depend on whether the facilities are to be regarded as accessible for public use under state law, due to dedication by public law, or whether the facilities are expressly or impliedly made available for public use. Rather, it is crucial that the spa facilities are not freely accessible to everyone, free of charge. It is sufficient for the municipality to issue guest cards upon payment of the spa or visitor's tax, which are then also checked. How often and how intensively checks must be carried out is apparently, from the perspective of the German Federal Fiscal Court, not important. It is even unproblematic that the daily visitor's tax is only due for payment for day visitors upon inspection. This pragmatic approach by the German Federal Fiscal Court is to be welcomed.

Therefore, if the spa tax statutes are structured correctly, input VAT deduction is still possible. On a positive note, the German Federal Fiscal Court does not place too high a demand when it comes to the question of whether the spa facilities are freely accessible and free of charge to everyone. In particular, no admission control is required for the use of spa facilities. Rather, simple controls are sufficient.

The problem with the use of spa facilities by residents remains unresolved. The German Federal Fiscal Court denied input VAT deduction in this respect, as the local population could use the spa facilities for free. Therefore, in future, if a municipality wants to obtain the full input VAT deduction from the purchase and manufacture of spa facilities, its own residents will also have to pay the spa tax. However, it is doubtful whether local politicians will go that far. Their re-election would then, by no means, be assured.