



KMLZ VAT NEWSLETTER

Revision of public sector taxation

1. Revision background

Over the past few years, the courts have repeatedly found that the taxation of public bodies does not comply with EU directives. The failure to incorporate the competition criteria, as contained in art. 13 of the VAT Directive, into national law, has been criticized. Furthermore, it was found that taking action based on private contractual law always leads to the assumption of entrepreneurial capacity. However, if public bodies exercise their activities on the basis of public law, they are to be treated as entrepreneurs if the treatment as non-entrepreneurs would cause greater distortions to competition. Even so-called assistance operations, namely supplies by public bodies, were found to be subject to VAT. Thus, the cooperation of public bodies on an administrative and economical basis was at stake, as there was now a risk of increasing costs due to VAT. Although the Federal Fiscal Court regards the interpretation to be in conformity with sec. 2 of the German VAT Act, to which the tax authorities are also tied, the government and the federal states have decided that the judgments will not be officially published. The governing parties have agreed, in the coalition agreement, that no tax shall be imposed on intercommunal cooperation.

2. Planned revision

Taxation of public bodies is to be regulated in a new sec. 2b of the German VAT Act. This revision will attempt to intro-

Favouring of intercommunal cooperation

There is now a new proposal for amending public sector taxation. Section 2b of the German VAT Act is being revised with a twofold intention, firstly to comply with the guidelines of the high court legislation and secondly, in an attempt to exclude cooperation between legal entities under public law from VAT.

duce taxation of the public sector in conformity with European law. The German legislator will aim to continue not to impose taxes on acts of cooperation between various public law bodies. The legislator intends to follow EU public procurement law. According to this law, competition is not to be assumed if there are long-term agreements and the supplies serve the purpose of protecting public infrastructure. Reference is made to the ECJ's judgment regarding the *Hamburger Stadtreinigung* case (see judgment of 9 June 2009, C- 480/06). The decisive question will be whether supplies have been carried out on the basis of private or public law. Actions taken in the exercise of public authority are only possible in the latter case. However, it remains unclear what is exactly meant by the phrase "acts in accordance with the provisions of the regulatory arrangements". There is no detailed definition, as the phrase is merely used in terms of the explanation that such acts are only existent if, for example, public-law contracts, public law agreements or actions by administrative measure are involved. In the circumstances, disputes can already be foreseen.

With all the difficulties envisaged as a result of this revision, the attempt by the legislator to exclude the cooperation of public bodies from taxation under certain circumstances is to be acknowledged. The key question as to when this revision is to become effective remains unanswered. From what we hear, the application of this revision will not be mandatory until 2018.