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VAT'S UP

VAT NEWSLETTER

ECJ identifies further criteria for examining the VAT exemption of private hospitals

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1 Facts

Private hospitals cannot invoice their hospital services to public health insurance funds. Prior to 1 January 2020, private hospitals had no possibility to provide hospital treatment free of VAT under the German VAT Act. In 2014, the German Federal Fiscal Court ruled, for the first time, that private hospitals may directly invoke a VAT exemption provision for hospital treatment under Union law (cf. KMLZ Newsletter 09 | 2015). As a result, services provided by a private hospital are exempt from VAT until 31 December 2019, in circumstances where the private hospital meets the requirements of the VAT exemption norm under Union law and invokes Union law. The Federal Ministry of Finance confirmed with its circular dated 6 October 2016 the option for private hospitals to invoke the tax exemption under Union law.

As of 1 January 2020, the legislator amended sec. 4 no. 14 lit. b lig. aa of the German VAT Act (cf. KMLZ Newsletter 47 | 2019). According to the new regulation, private hospitals can also provide hospital treatment free of VAT under German law. To do so, they must operate under socially comparable conditions to hospitals with public health insurance licences. This is to be checked based on a comparison of prices with the German Hospital Fees Act (*KHEntgG*) and the German National Hospital Rate Ordinance (*BPflV*).

2 Submission of the Finance Court of Lower Saxony and decision of the ECJ

The Fiscal Court of Lower Saxony is required to decide on the VAT exemption of hospital treatment provided by a private clinic. The years in dispute predated the year 2020. In its order referring the matter to the ECJ, the Fiscal Court noted that the services in question were not VAT exempt under national law and that a VAT exemption could only be considered pursuant to Union law.

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The Fiscal Court's first question to the ECJ was whether the Federal Fiscal Court had been correct in 2014 when it declared Union law in Germany to be directly applicable regarding the VAT exemption for private hospitals. The ECJ came to the conclusion, in particular with reference to tax neutrality, that German VAT law had indeed been contrary to Union law in not allowing private hospitals to provide VAT-exempt services.

To the extent that a private hospital invokes the VAT exemption under Union law, it is always disputed, time and again, as to whether the private hospital operates under conditions that are socially comparable to those of a hospital established under public law. In this regard, the Fiscal Court requested the ECJ to specify assessment criteria. In previous decisions, the ECJ had already mentioned the public benefit aspect of the service and the absorption of costs by a social security system (cf. KMLZ Newsletter 07 | 2020). In its current decision of 7 April 2022 (C-228/20), however, the ECJ adds the following additional criteria:

- Consideration of conditions applicable to public hospitals with the aim of reducing the costs of curative treatment and making high-quality treatment more accessible to individuals.

- Comparing the calculation of the daily rates of the private hospital in question and public hospitals.

- The absorption of costs by the social security system or absorption based on agreements with other authorities, resulting in similar costs for patients in the private hospital in question and public institutions.

- The economic performance in terms of staff, premises and equipment, as well as cost-efficiency of management, in so far as public hospitals are subject to comparable management indicators and these serve to reduce costs and provide high-quality curative treatment.

3 Consequences for the practice

With its answer to the first question, the ECJ confirms the previous practical handling by the German Federal Fiscal Court and the tax authorities. Private clinics can refer to Union law for services provided until the end of 2019. If they fulfil the conditions stated therein, they provide VAT-exempt services. In this respect, the current ECJ ruling does not result in any practical relevant changes.

However, what is interesting are the criteria mentioned in response to the second question regarding examining the social comparability of the conditions of hospital treatment. The ECJ apparently wants to adopt an overall view based on various criteria. In contrast, the Federal Fiscal Court has most recently focused exclusively on the criterion of economic performance and cost-efficiency of hospital treatment, which is derived from Volume V of the Social Insurance Code (*SGB V*). The 2016 Federal Ministry of Finance letter also adheres to one criterion alone, namely the comparability of the price for patients in private hospitals and public institutions. The problem, in practice, is that it is often not possible for private hospitals and the tax office to determine one price for a specific hospital treatment in a public hospital. This often leads to the use of various criteria which, in the future, may also include the criteria mentioned by the ECJ. This is likely to be similar in court cases concerning the years prior to 2020. Courts will also have to consider whether they will apply further criteria in addition to those mentioned by the Federal Fiscal Court. The question as to how the individual criteria mentioned by the ECJ are to be specified will be exciting. However, the ECJ ruling does not provide any clarity as regards individual cases.

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