



VAT NEWSLETTER

Federal Fiscal Court: VAT exempt supply of tuition services for professional purposes – in contradiction of the ECJ?

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1 Background – tightening by the ECJ

With its recent judgment of 14.03.2019, in the case *A & G Fahrschul-Akademie* (C-449/17) (see KMLZ Newsletter 16 | 2019), the ECJ restricted the VAT exemption of supplies of educational services. The concept of “school and university education”, upon which the Union law VAT exemptions pursuant to Article 132 para. 1 letter i and j of the VAT Directive are based, has now been restricted such that it now only applies to the very core of education in general schools. According to this, only general, i.e. accessible to all - and even compulsory at lower school levels – supplies of educational services covering a very broad range of knowledge and carried out within the framework of a school and higher education system, as exists in each Member State, can be VAT exempt. To date, the Federal Fiscal Court has interpreted the VAT exemptions pursuant to Union law more broadly and concluded that all forms of education are covered unless they can be categorized as mere leisure activities. Therefore, the Federal Fiscal Court’s ruling in the now decided case of a tango dance teacher was much anticipated (V R 66/17).

2 Federal Fiscal Court decision

The Federal Fiscal Court denied the VAT exemption due to a lack of professional relation. Conversely, it follows, however, that the supplies would have had been VAT exempt if the plaintiff had been able to furnish respective proof. It is therefore left open to question whether the decision is contrary to the recent ECJ case law. The Federal Fiscal Court decision is thus important for the entire field of supplies of commercial education services.



Markus Müller, LL.M.
Certified Tax Consultant,
Dipl.-Finanzwirt (FH)

+49 (0) 211 54 095-387
markus.mueller@kmlz.de

In its decision, the Federal Fiscal Court refers to the ECJ case law according to which the exemption norms under Union law comprise tuition which relate to school and university education, provided that these activities do not have the character of mere leisure activities. From this, the Court concludes that any teaching that does not serve purely recreational purposes may be exempted. This finding is consistent with the other Federal Fiscal Court case law in this area. For example, ballet, music, language and martial arts lessons as well as swimming courses were ruled VAT exempt.

However, in its further reasons, the Federal Fiscal Court goes on to limit its previously expressed broad understanding. In the previous instance, the Tax Court Berlin-Brandenburg (5 K 5108/15) had rejected the argument that tango lessons should be characterised as a leisure activity, the abstract general reason given was that these lessons constituted an integral part of the curricula of general schools, as well as university sports. The Federal Fiscal Court is, however, of the opinion that the issue should be examined on a case-by-case basis. Whether or not an activity is to be characterised as a mere leisure activity must be determined after first taking into account the group of participants and the thematic objective of the respective course. There must be a realistic possibility that the acquired knowledge can be used for professional purposes. This condition can be met even where only a few participants are involved. A merely theoretical possibility of professional use, on the other hand, is not sufficient.

The Federal Fiscal Court's approach differs from that of the ECJ. The ECJ gives preference to the examination of whether the "new" definition of tuition is fulfilled, rather than the question of whether mere leisure purposes are being pursued. This is much narrower view than the Federal Fiscal Court's interpretation according to which VAT exemption can potentially apply to any tuition given. In the ECJ's view, it is decisive whether the tuition is equivalent to the teaching, deepening and development of knowledge and skills in relation to a broad and varied spectrum of materials, which is typical for school and university teaching. The ECJ denied this with respect to driving lessons conducted in a driving school due to the element of a too pronounced specialisation. In the now published decision, the Federal Fiscal Court does not comment on whether the plaintiff's tango lessons fall within the scope of the "new" definition of teaching or whether they are too specific. This may be due to the fact that the judgement was published in January 2019 and therefore before the ECJ's change of case law.

3 Conclusion and recommendation

Providers of commercial tuition should treat the Federal Fiscal Court statements with caution. It is to be expected that the Federal Fiscal Court will shortly adopt the stricter standards for VAT exemption stated by the ECJ in its subsequent decision in the driving school case. Then, by way of derogation from this decision, the following shall apply: Even if, due to the professional use of the tuition, no mere leisure purposes are pursued, the supplies of services can only be VAT exempt if they fall within the scope of the "new" definition of teaching. VAT exemption is not granted for specialised tuition. As a result, there could be a reassessment of, for example, musical, sports and language tuition. According to reports, the German Ministry of Finance will comment on the new jurisdiction shortly.

Suppliers of educational services that go beyond the "ordinary" school subject matter should check whether their supplies can also be VAT exempted in accordance with the stricter ECJ standards. It may be possible for suppliers or their supplied services to be recognised by the regional authority and therefore be permitted to apply the national VAT exemption. In the case of recently commenced tuition courses, the question of VAT exemption should be clarified, in advance, by seeking a binding ruling.