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VAT'S UP

VAT NEWSLETTER

# Federal Fiscal Court changes jurisprudence on VAT exemption for sport

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## 1 Background

If non-profit-making sports clubs are in dispute with the tax office concerning VAT, this is often caused by one of the three perennial issues in the sports sector:

- the club wants to benefit from input VAT deduction via the taxability of membership fees;
- the club wants to have its supplies treated as VAT exempt under Union law, or
- the club wants to at least benefit from the reduced VAT rate.

Depending upon the amount of their input and output supplies, sports clubs attempt to achieve the best possible solution for themselves in order to facilitate an optimal charitable effect.

In the present dispute before the Federal Fiscal Court, a golf club was exclusively concerned with the VAT exemption of its supplies (green fees, loan of golf balls, etc.). The VAT exemption was denied by the local tax office because, under German law, the VAT exemption provision in accordance with sec. 4 no. 22 lit. b of the German VAT Act for "sporting events" can only be taken into consideration if these are carried out by "institutions serving non-profit purposes". In the dispute in question, the problem for the golf club was that it was not recognised as a non-profit organisation within the meaning of secs. 51 ff. of the German Fiscal Code and the supplies in question did not result from sporting events. The golf club therefore tried its luck at directly invoking Union law. According to Article 132 para. 1 lit. m of the EU VAT Directive, Union law exempts "the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education".

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The V. Senate of the Federal Fiscal Court was initially unsure about the scope of the VAT exemption under Union law and referred the question to the ECJ. In its judgment of 10 December 2020 (C-488/18, *Golfclub Igling*), the ECJ ruled that taxable persons cannot directly invoke Article 132 para. 1 lit. m of the EU VAT Directive, as the adjective "certain" allows the Member States to exercise their own discretion. Furthermore, the ECJ shed light on the concept of a "non-profit-making organisation": such an organisation only exists if it is ensured that, "in the event that the organisation is dissolved, the organisation cannot distribute to its members any surpluses it has made exceeding the capital shares paid up by those members and the market value of any contributions in kind made by them".

## 2 Follow-up decision by the Federal Fiscal Court

It has now taken more than a year for the Federal Fiscal Court to issue its follow-up decision in its judgment of 21 April 2022 (V R 48/20). The judgment contains no surprises given that the previous ECJ decision of 10 December 2020 on the *Igling Golf Club* has been implemented almost in its entirety:

- Germany has correctly made use of its scope of discretion, as not every supply in connection with sport is VAT exempt, but only supplies in connection with "sporting events";
- for the rest, the golf club's invocation of the VAT exemption under Union law already fails because its statutes were too vaguely worded for the event of a dissolution of the club and therefore individual members could also have benefited.

## 3 Consequences for the practice

What is interesting is the Federal Fiscal Court's reference to its change in jurisprudence: in the future, the VAT exemption will no longer be applicable to the provision of golf balls (V R 74/07), individual golf lessons (XI R 21/09), horse boarding (XI R 34/11) and also not to the provision of sports facilities with regard to Art. 132 para. 1 lit. m of the EU VAT Directive.

With regard to the concept of a non-profit-making organisation, however, the German provision of sec. 4 no. 22 lit. b of the German VAT Act is contrary to the Directive, as it refers exclusively to organisations recognised as non-profit organisations within the meaning of secs. 51 ff. of the German Fiscal Code. According to Union law, such non-profit recognition is not mandatory. However, it must be ensured in the statutes of the organisation that the Union law requirements (see above) are complied with in the event of the dissolution of the organisation. On the other hand, this also means that if the organisation is recognised as being non-profit-making in accordance with secs. 51 ff. of the German Fiscal Code, it can generally be considered a "non-profit-making organisation" within the meaning of Union law.

The judgment is both a wake-up call and an appeal to politicians to finally make use of the scope of discretion available under Union law. In accordance with Union law, sport can be privileged much more generously than is currently common practice under national law. With a little more generosity towards sports clubs, the federal government would even be fully in line with its own policy: in the coalition programme, the government has set itself the objective of strengthening the non-profit sector, above all as regards VAT: for example, supplies of educational services are to be VAT exempt in future and inclusive businesses are to be able to claim the reduced VAT rate. Now sports would be added to the list. Thousands of sports clubs would be happy not only to benefit more from the VAT exemption, but also to gain more legal certainty.

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