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VAT'S UP

VAT NEWSLETTER

Sales mark-ups for group insurance contracts: IPT, VAT or VAT exempt?

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1 Background

It is not uncommon for so-called sales mark-ups to be charged on group insurance policies. As a reminder: In the case of a group insurance, an insurance relationship is only established between the insurer and the policyholder (so-called group head). The policyholder includes the insured persons and their risks in the group insurance either automatically or by registering them with the insurer. The insurance is therefore for the account of a third party (sec. 43 et seqq. Insurance Contract Act). This inclusion in the group insurance policy provides the insured persons with insurance cover. In some cases, the policyholder will demand a higher price (sales price) from the insured persons for the insurance cover than the policyholder has to pay to the insurer (insurance premium). The difference between the sales price and the insurance premium is referred to as the sales mark-up.

Since the Federal Fiscal Court's (BFH) judgment of 7 December 2016 - II R 1/15 and the subsequent Federal Ministry of Finance's (BMF) letter of 29 November 2017, there has been some discussion about sales mark-ups on group insurance policies. In its 2016 decision, the BFH ruled that sales mark-ups may be subject to Insurance Premium Tax (IPT). In the case of a travel insurance, the BFH assumed a marketing agreement for consideration between the insurer and the policyholder. The decisive factor for the assumption in that case was that the sales mark-up was agreed between the insurer and the policyholder. In a widely criticized BMF letter, the BFH ruling was heavily generalized. According to this BMF letter, a sales price for a group insurance policy that is not broken down into a separate insurance premium and sales mark-up should result in an IPT liability for the full sales price. A fictitious agreement between the insurer and the policyholder is simply assumed by the BMF, in the absence of any examination of the interests in the individual case.

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2 Fiscal Court Köln, judgment of 27 September 2023 - 2 K 2132/21

In its judgement published on 25 March 2024, the Fiscal Court Köln (FG Köln) once again had to decide on a case involving sales mark-ups on group insurance policies. For the FG Köln, the sales mark-up in this case did not constitute insurance remuneration within the meaning of sec. 3 of the IPT Act, because it was not agreed or discussed between the insurer and the policyholder. The FG Köln also appears to reject the generalization of the BFH ruling from 2016 in the aforementioned BMF letter. The FG Köln argues the fundamental importance of this issue. This is because the IPT treatment of sales mark-ups in connection with group insurance policies, even in light of the 2016 BFH ruling, has not yet been clarified. The FG Köln provides the following reasons for its judgment:

- The insurance remuneration, within the meaning of sec. 3 of the IPT Act, is decisive for the IPT, as only the insurance remuneration paid on the basis of the insurance relationship, which cancels the policyholder's debt towards the insurer, is taxed.
- The insurance remuneration, in turn, is largely determined by the insurance contract between the insurer and the policyholder.
- Even in the case of group insurance policies, only the policyholder is obliged to pay the insurance premium as the contractual partner of the insurer. The premium must be paid in order to establish an insurance relationship.
- The internal relationship between the insurer and the policyholder is therefore decisive for determining the insurance remuneration. The external relationship between the policyholder and the insured person is irrelevant in this respect.
- In the recent case, there was no indication of an agreement or arrangement regarding the sales mark-up in the internal relationship between the insurer and the policyholder.
- An economic consideration, according to which the insurer also has an interest in the marketing of the group insurance policy, cannot lead to an assumption of insurance remuneration. As a transaction tax, ITP is based on civil law and treatment.

3 Conclusion

The tax assessment of sales mark-ups remains challenging. An appeal to the BFH has been lodged (V R 3/24), meaning that the BFH can, once again, take a position on the issue. It will be interesting to see how the fifth Senate, which is now responsible, deals with the issues and how the BMF reacts to this new judgment. Taxpayers who are already affected should consider whether they wish to keep any declaration periods open for assessment. If new group insurance structures are set up, the different possibilities the BFH may decide should be anticipated and taken into account. By doing so, taxpayers will be prepared for the future and may even avoid the problems associated with sales mark-ups completely.

Following the judgement by the FG Köln, it should also be discussed how sales mark-ups are to be treated from a VAT perspective. Do they constitute a supply subject to VAT, as argued by the policyholder in the case with reference to the ECJ jurisprudence (*BGZ Leasing*), or do they constitute a VAT exempt supply (sec. 4 no. 10 lit. b of the German VAT Act) with the corresponding limitations for input VAT deduction?

In our view, this assessment is particularly relevant because, in its explanations to the BMF letter of 11 May 2021, the BMF pointed out group insurance policies as being an option for taxpayers to avoid IPT obligations for guarantee commitments (see KMLZ VAT Newsletter 18 | 2021 and 16 | 2023). Some taxpayers will therefore have set up group insurance policies for their guarantee commitments, which may include sales mark-ups, in order to be able to maintain good margins.

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