



## ECJ referral: Federal Fiscal Court raises doubts re VAT exemption for supplies of swimming lessons

### 1 Background – Tightening by the ECJ

It has been known for some time now that the national VAT exemptions for tuition services for professional purposes pursuant to sec. 4 no. 21 German VAT Act are not in accordance with Union law (see KMLZ Newsletter 16/2019). Private teachers and private law educational institutions are often not in possession of the necessary certificate from the state authority, which is a requirement of sec. 4 no. 21 German VAT Act. Affected suppliers have often directly invoked the less stringent requirements of Union law. Both the ECJ and the Federal Fiscal Court have so far interpreted the VAT exemptions under Union law quite broadly. As a result, all forms of teaching were covered, provided that they did not have the character of a mere leisure activity. The Federal Fiscal Court was previously satisfied if there was a general interest in what was being learned. Recently, the ECJ denied the VAT exemption for driving lessons and formulated a new definition of tuition. Tuition must henceforth equate to teaching conducted in pursuit of the deepening and development of knowledge and skills in relation to a broad and varied spectrum of materials, and it must be teaching, which is typical for schools and universities. This more stringent interpretation corresponds to a change in case law. The Federal Fiscal Court no longer regards it as certain that swimming lessons fall within the scope of the new definition of "school and university education". Further, it is left open to question, whether the legal form dictates the VAT exemption. The proposal thus concerns the entire commercial education sector.

### 2 Facts

A private corporation operated a swimming school and provided typical swimming lessons including training and testing for the "Seahorse badge". Such supplies do not fall under sec. 4 no. 21 German VAT Act. As some tax courts and the Federal Fiscal Court itself have confirmed in the past, providers could normally directly invoke Art. 132 para. 1 lit. j of the



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VAT Directive in order to be VAT exempt. This was based on the interpretation that the quality of a "private teacher" was not dependent on the legal form of the taxable person. The belief that swimming lessons constitute an integral part of school education has not yet been questioned. In addition, the Federal Fiscal Court was satisfied with the general public interest in people learning to swim, which was affirmed on its own authority but has never been confirmed by the ECJ. The tax office claims that Art. 132 para 1 lit. j of the VAT Directive was not applicable as the Plaintiff was not a private teacher.

### 3 Questions referred to the ECJ

Even before the ECJ changed its case law in the driving school ruling, the deviation between national and Union exemptions led to a legally uncertain and conflicting situation. Sec. 4 no. 21 German VAT Act is confusing and contains some provisions, which are not included in the Union law. However, other conditions, which are found in both the national law and the VAT Directive, are being interpreted differently. This is why the tightening of a single criterion ("school and university education") in the ECJ driving school ruling resulted in three questions being referred to the ECJ.

First, the Federal Fiscal Court referred the question of whether "school and university education" also includes learning how to swim. The court regards the referral as being a necessity, justified by the ECJ's new teaching definition. This is surprising in view of the fact that swimming lessons are part of the curriculum in all German states. Swimming schools do not impart any special knowledge comparable to driving school education. The ECJ has previously denied the qualification of driving lessons as "school and university education" due to its specialization. However, in the end, each component of school education and thus also each teacher and each institution is specialized in a certain way.

The second question referred concerns the application of Art. 132 para 1 lit. i of the VAT Directive, according to which private suppliers must pursue objectives comparable to those of public authorities and must be recognized as such by the Member State concerned. The Federal Fiscal Court wishes to know whether this necessary recognition results from the general public interest in learning to swim. To date, the ECJ has only specified the institutional characteristics for the social sector, but not in connection with educational services.

If the answer to question 2 is in the negative, the Federal Fiscal Court has asked for clarification as to whether – as the tax office submits – Art. 132 para. 1 lit. j of the VAT Directive only applies to sole traders. This question has been referred based on the opinion of the Advocate General in the driving school judgment who, for the first time, ascribed the characteristic of private teacher exclusively to sole proprietors. Ultimately, however, the ECJ did not have to answer this question. It is now left open as to how a distinction, according to the legal form for the application of a VAT exemption, would be compatible with the principle of neutrality or the fundamental right of equal treatment.

### 4 Possible consequences and recommendations for action

The case clearly illustrates the current uncertainty for taxable persons who have directly invoked the VAT exemptions under Union law. They have to reckon with the fact that VAT will be charged for their supplies after all. Above all, tuition that goes beyond the core of school teaching should be reviewed. Taking into account the case law that has been passed in this regard, in addition to fitness, ballet, martial arts, yoga, surfing, sailing and dance classes, also music and language courses, as well as courses teaching the immediate measures to be taken at the scenes of accidents, are affected. Providers of such supplies should check if their courses can also be VAT exempt according to the stricter ECJ standards. It may be possible to be recognized by the State authority and to apply a national VAT exemption. Anyone who intends to commence offering courses should clarify the application of a VAT exemption, in advance, by obtaining a binding ruling.