



KMLZ VAT NEWSLETTER

Referral to ECJ on the provision of commercial education

1. Education exempt in accordance with Union law

VAT exemptions for the provision of commercial education services, in accordance with the German VAT Act, are not consistent with Union law. Taxable persons may therefore directly refer to the less stringent regulations in accordance with the EU VAT Directive. The provision of education services, which are job related and which are not merely aimed at leisure activities or which promote the common good are covered by the VAT exemptions under community law. Additionally, taxable persons must meet specific requirements. The German version of the EU VAT Directive suggests a rather stringent interpretation of the VAT exemption. The ECJ, however, has interpreted the VAT exemptions less stringently, based on other language versions.

2. Exemptions for recognized organisations

According to Art. 132 para 1 letter i of the EU VAT Directive, the provision of children's or young people's education, school or university education, vocational training or retraining, is VAT exempt. Where these supplies are rendered by a private organization, it must be recognized by

Possible expansion of VAT exemption for commercial education

The Federal Fiscal Court has referred the question of the possible VAT exemption of driving schools to the ECJ (Ref. V R 38/16). Fortunately, the referred questions are comprehensive. If the ECJ affirms a VAT exemption, its scope of application will be expanded. Such a ruling may ultimately result in the supply of educational services, by other commercial schools and self-employed teachers, also being found to be VAT exempt. In order to benefit, to the optimum level from the VAT exemption, affected taxable persons need to react now.

the Member State. It is necessary that the aims of the private organization are comparable to those of the public authorities.

3. Exemption for private tuition

In accordance with Art. 132 para 1 letter j of the EU VAT Directive tuition given privately by teachers and covering school or university education is exempt. The term "education" in both exemption standards is to be applied identically. From ECJ case law, it appears that the terms are to be interpreted less stringently than as suggested by the wording.

According to this, a teacher acts "privately" if he acts for his own account and on his sole responsibility. On his sole responsibility means that he must not work for an institution as a subcontractor. The current ECJ case law is also clear that legal entities, in addition to natural persons, fall within the scope of the exemption. The provision of education services does not necessarily have to be "school or



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university education". It is sufficient that the activity has a job-related character. Where a job related character is denied, any education, which is not purely carried out for the purpose of leisure activities, may nevertheless be exempt. A mere leisure activity cannot be assumed where the acquired knowledge is of public interest. As a result, the exemption goes far beyond the maths tutor with study one keeps in mind in terms of the German text of the EU VAT Directive.

4. Questions on driving schools referred to the ECJ

Fortunately, the questions referred to the ECJ are, at least in part, very general in nature. It is for the ECJ to decide whether the recognition of an organization may solely result from the legal framework conditions. In the case at hand, the Court refers to the tests for driving instructors laid down by law of driving instructors (*Gesetz über das Fahrlehrerwesen*). If the ECJ answers the question referred to it in the affirmative, a separate formal recognition by the Member State would be superfluous.

Further, the ECJ is required to comment on whether the activities of a "private teacher" are restricted to individual companies. In this regard, the referring Senate came to the conclusion that such a restriction would probably violate the principles of neutrality. Further, the ECJ was asked to decide on whether it draws conclusions on "private teachers" from the EU VAT Directive's chapter heading. The chapter that provides for both VAT exemptions is called "Exemptions for certain activities in the public interest". To date, the ECJ has not taken chapter headings into consideration for its interpretations. Rather, it corresponds more to the current ECJ case law that the activities

contained in the respective chapter were qualified to be in the public interest because they were listed, per se (ECJ-case *Brockenhurst College – C-699/15*, recital 22). Now, the ECJ has an opportunity to affirm the standard's neutrality, in terms of legal form.

5. Expansion to other sectors

If the ECJ maintains its view, it may lead to a significant expansion of VAT exemptions. The exemption could then also be applied to many different types of schools, including dancing, hunting, aviation, riding and language schools. These supplies of educational services are currently predominantly treated as being subject to VAT. The relevance of the ECJ decision will therefore extend far beyond driving schools.

6. Tips for the practice

In order to benefit, to an optimum level, from VAT exemption in the case of a positive outcome of the proceedings, some arrangements should be made:

- An application for VAT exemption in accordance with Art. 132 para 1 letter i or j of the EU VAT Directive should be filed with the tax office for the periods which are not yet time barred.
- VAT should continuously be reported and paid.
- Taxable persons should issue invoices stating only the gross amount, this means that VAT should not be shown separately. Otherwise, there is a risk that the tax authorities will assume a VAT liability in accordance with sec. 14c of the German VAT Act (Art. 203 of the EU VAT Directive).