

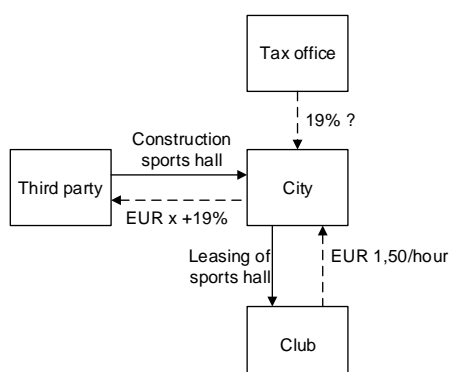


KMLZ UMSATZSTEUER NEWSLETTER

VAT deduction also possible in the case of low cost recovery

1. Facts

A city leased a sports hall to clubs by means of private agreements. On the basis of a table of charges, the city levied a lump sum to cover the operating costs of EUR 1,50 per hour for the lease to the clubs. By so doing, the city achieved a cost recovery of 12,03%. The city requested that it be permitted to deduct VAT from the hall's construction costs, insofar as it was proportionate to the leasing of the sports halls to the clubs. Due to the high construction costs and the low charge, an excess of input VAT occurred. The tax office denied the requested VAT deduction.



Asymmetric charges – Part 2

Service offerings below cost price often result in an excess of input VAT. At the end of 2016, the V. Senate of the German Federal Fiscal Court assumed that an emerging asymmetry would indicate that the person performing the supply was not acting as a taxable person (KMLZ-Newsletter 8/2017). In this case, VAT deduction would not be possible. A new judgment of the XI. Senate clarifies that, when checking if a person is acting as a taxable person, all aspects of the individual case must be taken into account in an overall assessment. The decision, regarding the public sector, might also ultimately impact on the private sector.

2. Decision of the German Federal Fiscal Court

The decision of the German Federal Fiscal Court (judgment of 28 June 2017, XI R 12/15) is to be considered in the context of two other judgments on the same subject. In the decision of the ECJ in the case *Borsele* (concerning school transport provided by a municipality), a deduction of VAT was not possible with a 3% cost cover. The ECJ ruled that the municipality was not economically active and therefore not a taxable person. In another decision involving a municipal sports hall, the V. Senate of the German Federal Fiscal Court referred the procedure back to the tax court. The tax court has yet to clarify various aspects of the case in order to be able to assess whether the municipality is economically active (V R 44/15). The XI. Senate of the German Federal Fiscal Court has now decided that the city is entitled to deduct VAT in this individual case. The decisive factor was the fact that the city was acting as a taxable person when the sports halls were leased to the clubs.



Contact: Dr. Michael Rust
Lawyer
Phone: +49 89 217501274
michael.rust@kmlz.de

Like any other person, a legal person under public law is only a taxable person if it carries out an economic activity. First of all, there needs to be a supply for consideration. It is vital that there is a direct connection between the supply (leasing of halls) and payment. The amount of the payment is irrelevant when it comes to determining the direct connection. This direct connection was established in the specific case as a result of the concluded contracts.

Such a supply is necessary but is not, in and of itself, sufficient for an economic activity to be found to exist. An overall assessment must also be carried out. In this case, all circumstances must be considered, including the following:

- the circumstances of the service compared to the circumstances under which comparable services are usually provided;
- the number of customers and the amount of revenue;
- the appearance as a final consumer or as a service provider on the general market; and
- the market standard of remuneration.

The German Federal Fiscal Court expressly clarified that the request for VAT deduction is not an abuse of rights, although it results in an excess of input VAT as there are extra tax considerations for the cost over. The German Federal Fiscal Court is equally clear with regard to the determination of the taxable basis where the consideration is lower than the open market value. Sec. 10 para. 5 no. 1 German VAT Act is not applicable for legal persons under public law, either directly or analogously.

3. Impact on the practice

The decision is not only very important for the public sector, but also for other businesses. The ECJ and the V. Senate of

the German Federal Fiscal Court emphasized, in their respective decisions, aspects which spoke against an economic activity on the part of the respective municipality. VAT deduction is excluded in the case of a lack of economic activity. The XI. Senate of the German Federal Fiscal Court shows, in a case design frequently occurring in the practice of the public sector that the individual case is important. Even in the case of a low cost recovery through revenue, an economic activity may be present. Particularly in the case of private law subjects, the characteristics cited by the German Federal Fiscal Court will usually refer to an economic activity.

In the planning of unprofitable activities, legal persons under public law, as well as subjects governed by private law, will have to take into account the aspects mentioned by the German Federal Fiscal Court in its consideration of the individual case. Against the background of sec. 2b German VAT Act, it can be in the interest of the public sector not to pursue an economic activity in order to be able to provide non taxable supplies. However, as this case study shows, it can also be important to carry out an economic activity in the case of high input VAT volumes.

The German Federal Fiscal Court did not expressly deal with the decision of the symbolic charge. The tax office expressly stated in the proceedings that such symbolic charges existed. It can be inferred from this that the German Federal Fiscal Court will probably continue to decide such constellations on the basis of the feature "economic activity" rather than the symbolic charge. This is understandable in the light of the comments made by the ECJ in the case *Hotel Scandic Gasabäck*. If the charges are part of an economic activity, they are not "symbolic".