



UMSATZSTEUER
NEWSLETTER

ECJ denies VAT exemption for swimming lessons

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1 VAT exemption for educational services

It has been known for some time now that the national VAT exemptions for tuition services pursuant to sec. 4 no. 21 of the German VAT Act are not in accordance with Union law (see KMLZ Newsletter 16 | 2019). However, educational institutions and self-employed teachers could, in line with the Federal Fiscal Court case law, directly invoke Art. 132 para 1 (i) and (j) of the VAT Directive. Until the decision of the ECJ in the legal case *A & G Fahrschul-Akademie* (C-449/17), both the ECJ and, following it, the Federal Fiscal Court, interpreted the VAT exemptions under Union law quite broadly. As a result, practically all forms of instruction were covered, provided they were not characterized as mere leisure activities.

In its driving school decision, however, the ECJ formulated a new, significantly stricter definition of "school and university education". This new definition of tuition is riddled with undefined legal terms, which resulted in the education sector becoming overwhelmed with uncertainty as to the continued existence of the VAT exemption. Even the Federal Fiscal Court became uncertain as to whether swimming lessons still fell within the scope of the ECJ's new definition of "school and university education".

2 Facts and Questions referred to the ECJ

A private corporation operated a swimming school and provided typical swimming lessons, including training and testing for the German "Seahorse badge". Such supplies do not fall under sec. 4 no. 21 of the German VAT Act. The private corporation therefore directly invoked Art. 132 para 1 (j) of the VAT Directive. In the past, the Federal Fiscal Court had affirmed the exemption for swimming lessons under Union law, but now found itself expressing doubt as to whether this



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remained the case, given the new definition of tuition. The request for referral was intended to clarify whether swimming lessons constitute "school and university education", whether recognition as an institution, within the meaning of Art. 132 para 1 (i) of the VAT Directive, results from the public interest in learning to swim, and whether only sole traders can be private teachers, within the meaning of Art. 132 para 1 (i) of the VAT Directive.

3 ECJ judgment

In the legal case *Dubrovin & Tröger GbR - Aquatics* (C-373/19), the ECJ denied the VAT exemption for swimming lessons. In doing so, it makes significant reference to its decision on driving schools and to the decision on surfing and sailing lessons in the legal case of *Finanzamt Hamburg-Barmbek-Uhlenhorst* (C-47/19). In these decisions, the ECJ had already denied the VAT exemption with reference to the recent definition of "school and university education".

According to the ECJ, the Union legislator intended the term "school and university education" to refer to a specific type of education, which is commonly offered in all Member States, irrespective of the specificities of the national systems. The concept of "school and university education" refers, in general, to an integrated system for the provision of knowledge and skills relating to a wide and varied range of matters, and to the deepening and development of such knowledge and skills by pupils and students according to their progress and their specialization at the various levels constituting the system.

In its order for reference, the Federal Fiscal Court had tended towards being in favour of the VAT-exemption and, in the course of this, emphasized that there is a pronounced public interest in learning to swim - in contrast to the acquisition of a car driver's license. The ECJ seizes on this argument and confirms the importance of swimming lessons, but nevertheless concludes that swimming schools do not constitute "school and university education". Swimming lessons are specialized and selective. Therefore, it is not, in itself, equivalent to the teaching, deepening and development of knowledge and skills in relation to a wide and varied range of subjects, which is characteristic of "school and university education".

4 Consequences for the practice

The decision is a disappointment for the education sector and significantly restricts the scope of VAT exemptions for educational services. The ECJ understands "school and university education" as being an autonomous concept under Union law, which only the court itself can interpret. However, it remains unclear what exactly the ECJ understands by "selectively" provided instruction, "which in itself" does not meet the requirements for education. In this context, it now seems doubtful whether language schools, dance and music schools, etc. can remain exempt from VAT. By the way, isn't tutoring in mathematics also "specialized tuition in itself"? As a result of this development, part of the fiscal court case law will probably become obsolete in the near future.

The decision also directly affects the education providers mentioned in sec 4 no. 22 German of the VAT Act (legal entities under public law, adult education centres, non-profit institutions, etc.). The "lectures, courses and other events of a scientific or instructional nature" are to be interpreted in conformity with the VAT Directive as "school and university education". A narrow understanding thus also restricts the national exemption standard. In some cases, sec 4.22.1 para 4 of the German VAT Circular provides protection of legitimate expectations. However, if the case ends up in court, the VAT exemption is likely to become a distant prospect according to the standards of the ECJ's definition of education.

All education providers should now question the VAT assessment of their courses and events and examine whether their services might still be exempt using a different justification.