



VAT NEWSLETTER

## Educational services still VAT exempt? Federal Fiscal Court for the first time confirms the ECJ's narrower definition of tuition

35 | 2019

### 1 Background – ECJ's new definition of tuition

In the legal case *A & G Fahrschul-Akademie* the ECJ limited the VAT exemption for commercial educational services. On the basis of the new definition of tuition, the court ruled that tuition given at driving schools does not constitute "school and university tuition" within the meaning of Art. 132 para 1 (i) and (j) of the VAT Directive (see KMLZ Newsletter 16 | 2019). According to the ECJ, "school and university education" must be based on the following:

1. An integrated system for the provision of knowledge and skills relating to a wide and varied range of matters, and
2. the deepening and development of such knowledge and skills by pupils and students according to their progress and their specialization at the various levels within the educational system.

The ECJ found that driving lessons were specialized lessons for which VAT exemption is excluded. The new definition will lead to a toughening up of the VAT exemption for commercial education services, as compared to the previous definition.

### 2 Primary confirmation by the Federal Fiscal Court

As was to be expected, the Federal Fiscal Court followed the decision of the ECJ in its most recent judgement dealing with this issue (Ref.: V R 7/19). The consequences for other educational services resulting from the decision are, however, more important than this particular judgment. The adoption of the ECJ's new definition of tuition will ultimately have far-reaching effects on other commercial educational services previously exempted from VAT.



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### 3 Conclusion

In particular, those entrepreneurs who have previously directly invoked the VAT exemptions under Union law will be negatively affected by the adoption of the narrower definition. Previously, the wide interpretation of the term “educational services” meant that activities, which included a leisure characteristic, as well as those services, which were considered to be in the public interest, were exempt from VAT. This situation will now change.

Given the considerable number of German Financial Courts’ decisions on this subject, the educational services now affected include, in particular, (aqua) fitness courses, ballet classes, martial arts courses, dance and music classes, language courses for pre-school and primary school children, courses on emergency measures at the scene of an accident, as well as museum tours and the German Bundestag’s visitor services. In addition, the Federal Fiscal Court no longer regards it as a certainty that swimming lessons will fall under the new definition of tuition and has submitted this question to the ECJ for a preliminary ruling (see KMLZ Newsletter 23 | 2019).

Some of the above mentioned services may either not be embedded in an integrated system for the provision of knowledge and skills relating to a wide and varied range of matters, or the lessons do not build on each other and do not interlock with each other. In these cases, the need for the deepening and development of such knowledge and skills by pupils and students, according to their progress and their specialization at the various levels within the educational system, will not be considered to be fulfilled. These suppliers will need to come to terms with the fact that VAT could end up being charged for their supplies.

### 4 Outlook and recommendations for action

On 31.07.2019 the Federal Government’s bill for a law on the further fiscal promotion of e-mobility and for a change to further fiscal regulations was published. The bill contains a comprehensive revision as regards educational services. The new regulation serves to adapt the national exemption provision of sec. 4 No. 21 German VAT Act to Union law and to incorporate the relevant ECJ case law. However, according to Art. 35 para 5 of the draft law, this amendment will not enter into force until 01.01.2021. Until then, service providers will find themselves in a legally uncertain limbo existing between the old and new case law. It is to be expected that the Federal Fiscal Court will, henceforth, measure educational services against the significantly stricter standards of the ECJ’s definition of tuition, even prior to the new statutory regulation coming into force. Part of the jurisdiction of German fiscal courts will therefore be obsolete in the near future. The Federal Fiscal Court has now laid the foundation for this by adopting the new definition of tuition for the very first time.

Providers of educational services should not delay checking whether their courses can also be exempt from VAT according to the stricter ECJ standards. In order to ensure the highest possible legal certainty, for both the past and for the period up to 1 January 2021, the possibility of benefiting from the national tax exemption should be examined. The precondition for this is a certificate issued by the State authority according to which the services properly prepare for a profession or an examination to be taken before a legal entity under public law. This certificate can also be issued for previous periods. In addition, the supplier must qualify as a general or vocational training institution. This examination is carried out by the tax authority. Procedural protection of confidence under Art. 176 German Tax Code should be granted for the past, provided that a VAT exemption for the particular service results from the previous Federal Fiscal Courts’ decisions.