



German Federal Fiscal Court: No turnaround in the taxation of company cars

1 Background

On 30 June 2022, the German Federal Fiscal Court (V R 25/21), following decisions of the Saarland Fiscal Court and the ECJ, commented on the taxation of the provision of company cars for private use. Essentially, the specific decision dealt with the question of whether a barter-like transaction, under sec. 3 para. 12 sentence 2 of the German VAT Act, was given. A taxable barter-like transaction is assumed if the consideration for a supply of services consists of a supply of goods or a supply of services.

A dispute existed as to whether the work performance constitutes consideration for the provision of the company car. The Saarland Fiscal Court rejected this view. It assumed that the company car was provided free of charge. For the purpose of determining the place of the provision carried out free of charge, it referred the question to the ECJ. Namely, whether the determination of the place of rental also applies to the provision of the company car if the employer does not retain a sum of money for the provision, and nor does the employee pay any remuneration or have the option to choose whether he takes the company car in lieu of other benefits on the basis of an agreement. The question referred dealt with the interpretation of Art. 56 para. 2 of the VAT Directive, which the German legislator implemented with sec. 3a para. 3 no. 2 sentence 3 of the German VAT Act.

In its judgment of 20 January 2021 (C-288/19), the ECJ responded in the negative. However, the question was formulated in such a way, that the ECJ was not required to comment on whether the provision of company cars to employees was for consideration or was carried out free of charge (see KMLZ VAT Newsletter 03 | 2021). The Fiscal Court subsequently ruled that the provision of the company car was outside the scope of German VAT. The tax office appealed against this judgment.



Dr. Matthias Oldiges
Lawyer

+49 (0) 211 54 095-366
matthias.oldiges@kmlz.de

2 German Federal Fiscal Court decision

The German Federal Fiscal Court set aside the Saarland Fiscal Court's judgment. It assumed the work performance to constitute consideration for the provision of the company car. In the grounds for its decision, the German Federal Fiscal Court does not refer to the reference for a preliminary ruling. This is because the ECJ did not decide on whether a barter-like transaction existed. The Saarland Fiscal Court did not include this issue in its referral to the ECJ.

In the German Federal Fiscal Court's view, the question of whether a direct link exists between the provision of the company car and the work performance is crucial. A direct link is regularly given if the provision is individually agreed upon. The German Federal Fiscal Court found these circumstances to exist in the case decided, due to the presence of a contractual employment agreement. From an economic point of view, the possibility of making use of a company car was one of the reasons why the employee entered into the specific employment relationship. Thus, a barter-like transaction is given. The place of supply is in Germany in accordance with sec. 3a para. 3 no. 2 sentence 3 of the German VAT Act.

3 Consequences for the practice

The German Federal Fiscal Court convincingly interprets the ECJ judgment of 20 January 2021 (C-288/19) and does not contradict the ECJ. However, it disagrees with the Saarland Fiscal Court's assumption that the provision, in the specific case, was carried out free of charge. This incorrect assumption by the Fiscal Court had an effect on the question referred. Therefore, the ECJ only ruled on the rare circumstances where the employer does not retain a sum of money for the provision and nor does the employee pay consideration or have the option to choose whether he takes the company car in lieu of other benefits on the basis of an agreement. The ECJ did not rule on the question of whether the company car was provided for consideration, because the Fiscal Court incorrectly assumed, in its referral, that the car was not provided for consideration. This is why the ECJ judgment does not turn the German practice of company car taxation upside down. Based on the ECJ judgment, it cannot be assumed that the provision of a company car is made free of charge (see KMLZ VAT Newsletter 03 | 2021).

The German Federal Fiscal Court's judgment is in line with previous jurisprudence on barter-like transactions within an employment relationship. The judgment also confirms the tax authorities' view to the extent that the provision of a company car for consideration regularly requires a corresponding provision in the employment agreement. A mere link to an employment relationship is not sufficient. The German Federal Fiscal Court, on the other hand, has intentionally not commented on the tax authorities' view that the provision of a company car for consideration also exists if the provision takes place due to a business practice or takes place de facto for a certain period of time.

The German Federal Fiscal Court did not question the ECJ's decision, and therefore the conclusions to be drawn from it continue to apply. The ECJ decision emphasises the principles regarding the provision of a company car to employees for private use for consideration. The following criteria are therefore important for the practice:

- Is the transfer of use regulated in the employment agreement?
- Is the transfer of use regulated in the employment agreement as part of the remuneration or does the employee partially waive his salary in exchange for the private use of the company car?

If these questions can be answered in the affirmative in a specific case, the transfer of use will continue to be classified as being a barter-like transaction.