



## VAT exempt medical treatment within a therapeutic continuum

### 1 Background

Sec. 4 no. 14 lit. a of the German VAT Act exempts certain forms of medical treatment from VAT. For classification as a VAT exempt medical treatment, an activity must pursue therapeutic objectives.

The tax authorities allow for the VAT exemption of the freezing (cryopreservation) and storage of sperm and oocytes as a medical treatment if these supplies of services are carried out in connection with fertility treatment (sec. 4.14.2 para. 4 of the German Administrative VAT Guidelines). Following the German Federal Fiscal Court, the tax authorities also consider the “further storage” of frozen sperm or oocytes to be VAT exempt if a therapeutic purpose is (still) being pursued, such as inducing a further pregnancy in the case of organically induced infertility.

The “mere storage” of frozen sperm and oocytes by a third party, who does not provide the preceding or subsequent fertility treatment is, however, presumed to be subject to VAT according to sec. 4.14.2 para. 4 sentence 4 of the German Administrative VAT Guidelines. The German Federal Fiscal Court has now expressly contradicted this view.

### 2 Facts of the case

Three gynaecological and obstetrics specialists are shareholders in a partnership under civil law (*GbR*), which stores frozen sperm and oocytes for the purpose of medically indicated artificial insemination in cases of organically induced infertility. In addition, the medical specialists operate a medical care centre (*MVZ*), which does not form a VAT group with the *GbR*. If patients decide to undergo cryopreservation within the framework of a fertility treatment, they conclude an agreement for



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the cryopreservation of oocytes or embryos with the MVZ and an agreement concerning their storage with the GbR. The tax authorities considered the GbR's supplies of services to be subject to VAT.

### 3 German Federal Fiscal Court decision of 07.07.2022 (V R 10/20)

The German Federal Fiscal Court first clarifies that the isolated storage of frozen oocytes is also VAT exempt if it is undertaken in pursuit of a therapeutic purpose. According to the German Federal Fiscal Court, this already follows from its previous judgment on the (prolonged) storage of frozen sperm and oocytes following successful fertilisation (Federal Fiscal Court, judgment of 29 July 2015 – XI R 23/13). According to this judgment, storage for therapeutic purposes (e.g. to induce a further pregnancy in the case of organically induced infertility) is VAT exempt as a separate supply, irrespective of whether it was preceded or followed by further fertility treatment provided by the taxable person.

With regard to the classification as a medical treatment, the German Federal Fiscal Court states that, in the case at hand, the storage pursued a therapeutic purpose due to the preceding or subsequent fertility treatment. Being an indispensable component of fertility treatment, storage takes place in a therapeutic continuum and thus fulfils the requirements of a medical treatment. The German Federal Fiscal Court considers the fact that fertility treatment and storage are carried out by different taxable persons to be irrelevant "in any event if" as in the present case, the same persons act for both taxable persons.

### 4 Consequences for the practice

Due to the concept of the therapeutic continuum, indispensable components of medical treatments can not only benefit from VAT exemption as dependent supplies of ancillary services but also as independent supplies. It is to be welcomed that the German Federal Fiscal Court has now explicitly clarified this, also with regard to medical treatments. While the ECJ introduced this term and concept in connection with VAT exempt medical treatments, the German Federal Fiscal Court had, until now, only actively applied it to activities closely related to hospital services.

It is particularly interesting that the VAT exemption can also be applied if different taxable persons are involved in the therapeutic continuum. This should undoubtedly apply in cases where the same personnel work for both taxable persons. However, the German Federal Fiscal Court's decision suggests that the concept of the therapeutic continuum can lead to the VAT exemption of supplies of services carried out by different taxable persons even without the acting personnel being the same. This is at least how the wording "in any case if", as well as the reference to its previous judgment on VAT exempt analyses of a laboratory doctor acting as an independent entrepreneur vis-à-vis the treating doctor, can be understood.

At least as regards the (isolated) storage of sperm and oocytes by third parties, the tax authorities' view has been overtaken by the German Federal Fiscal Court's decision and therefore the corresponding regulation in the German Administrative VAT Guidelines will have to be changed. It remains to be seen what further changes to the definition of medical treatment will ultimately result. The German Federal Fiscal Court has not, as yet, actively applied the therapeutic continuum for curative treatment. Nevertheless, it did rule in favour of VAT exemption in the mentioned judgment on medical analyses carried out by a laboratory doctor, by finding that the analyses fell within the scope of medical treatment, given that they supported preventive observations and examinations. Also in this case, the German Federal Fiscal Court focused on how the analyses were included in the treatment, which corresponded to the concept of a continuum. Nevertheless, taxable persons operating in the context of medical treatments should now check whether the principles of the decision can be applied to their supplies of services and thus possibly be VAT exempt.