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VAT'S UP

VAT NEWSLETTER

No taxable supplies in case of symbolic consideration

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1 Background

It is a matter of fact that municipalities permanently maintain loss-making facilities, in this case in the form of a swimming pool. In order to limit the loss, a private third party (e.g. an association) is often sought to operate the facility. However, the association makes its operation of the facility conditional on the municipality not expecting it to pay for leasing the said facility. In addition, such an association also obtains a grant. At this point, the tax authorities come into play. They raise their finger and point out that, in the case of gratuitousness, input VAT deduction is no longer possible regarding future refurbishments, and even input VAT adjustments for previous acquisition or production costs must be arranged in accordance with sec. 15a of the German VAT Act. Also, the "grant" could take the form of consideration for a business management service. In the end, a lazy compromise is reached: The municipality only demands symbolic consideration, and the association gets the grant. Everyone is satisfied, with the exception of the tax authority. This or something similar happened in the proceedings XI R 35/19 at the Federal Fiscal Court. The court has now published its decision of 22.6.2022.

2 Facts of the case

A municipality had leased its municipal swimming pool to an association for €1 per year. In the operating lease agreement, the municipality also undertook to pay the association an annual grant of €75,000. This was for the purpose of promoting the association in the public interest. In 2015, the municipality decided to renovate the swimming pool. It wanted to claim input VAT regarding the renovation but was unsure whether this was possible and therefore approached the tax authorities about the issue. The result of the conversation was sobering. The tax authority took the view that, given the amount of the lease fee and the grant, the lease had been granted free of charge and therefore the plaintiff was not engaged in economic

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activity regarding the lease and therefore had no right to input VAT deduction. However, the municipality did not accept the decision of the tax office and went on to redesign the facts somewhat: The previous contract was replaced on 01.10.2015, by a new lease agreement with a rent of €10,000 per annum plus €1,900 VAT. The new agreement no longer contained a subsidy grant agreement. Instead, the parties concluded a separate grant agreement for €90,000 per year. Now the municipality believed that it was performing an economic activity by receiving the €10,000 and could therefore claim input VAT from the investments it had carried out on the swimming pool.

3 German Federal Fiscal Court decision

The Federal Fiscal Court ruled in favour of the tax authority: It held that, in the case of an annual lease payment of €1 and considerable expenses being incurred on the leased object, the obligation to pay the fee recedes into the background to such an extent that the connection between the transfer of use and the remuneration no longer exists. In this respect, the municipality does not act as a “lessor”. According to the Federal Fiscal Court, the circumstances under which the party in question provides the supply, and the circumstances under which such a supply is usually provided, are to be compared. In the case in dispute, the Federal Fiscal Court concludes that there is an "asymmetry" between costs and remuneration. A supply against remuneration must therefore be denied. For this reason, there would also be no input VAT deduction. Even the separation of the lease agreement from the grant agreement does not change anything. And even the increase in the lease fee did not lead to a different result since the increase in the lease was ultimately offset by an increase in the grant.

4 Consequences for the practice

With this decision, the XI Senate follows the line of the V Senate (Federal Fiscal Court judgment of 15.12.2016, V R 44/15). In its previous jurisprudence, the V Senate denied the status of a taxable person in the event of an asymmetry of supplies and remuneration. The XI Senate follows this, insofar as the association was required to pay a remuneration of €10,000 from 01.10.2015 and at the same time received a grant. A new aspect is that the XI Senate rejects the “supply against remuneration” in the case of a symbolic lease fee of €1 (period 01.01.-30.09.2015). To our knowledge, this is the first decision of the Federal Fiscal Court that does not recognize a symbolic payment as being a remuneration within the meaning of sec. 1 para 1 no. 1 of the German VAT Act.

Both Federal Fiscal Court Senates are trying to implement the difficult jurisprudence of the ECJ in the *Gemeente Borsele* case (ECJ, judgment of 12.05.2016, C-520/14). The ECJ examines the “supplies against remuneration” incidentally in the context of the status as a taxable person (economic activity). According to the ECJ, a symbolic price does not lead to the denial of a supply against remuneration. However, if additional aspects exist that make the supply and remuneration appear asymmetrical, the status as a taxable person must be denied. All of the circumstances of the individual case must be considered. The asymmetry can result from an extremely low remuneration (ECJ, C-520/14, 3% cost recovery rate for school transportation), from the netting of lease payment and grant (Federal Fiscal Court, XI R 35/19) or from a disproportion between remuneration and costs incurred (Federal Fiscal Court, V R 44/15, annual lease in the amount of €77,000 at acquisition costs of approximately €11.2 million).

In practice, this means: An "economic" activity entitling input VAT deduction cannot be denied, even if the remuneration is low. Rather, it depends on the circumstances of the individual case. The more atypical, strange, or peculiar these are, the more caution should be exercised. In the case of a large excess of input VAT, the traffic light turns yellow. Binding rulings are therefore recommended if you want legal certainty in input VAT deduction.

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