



New legal regulation of VAT exemption for private clinics

1 Background

Previously, the German VAT law provided that medical treatment services supplied by private clinics were not VAT exempt. However, European law has regulated this differently. In 2015, the BFH, the highest German fiscal court, therefore decided that private clinics are permitted to directly invoke European law (see KMLZ-Newsletter 09/2015). If the conditions regulated there are met, private clinics can treat their services as exempt from VAT. As a result of this case law, many disputes arose between private clinics, the tax administration and, in part, private health insurance companies, as to whether or not the condition for tax exemption was met. Most recently, the BFH decided that, in order to fulfil the conditions for the VAT exemption, a private clinic must, above all, fulfil the conditions of sec 109 para 3 SGB V (Social Code) like a hospital licensed under sec. 108 SGB V.

2 New legal regulation

On 29 November 2019, the German Federal Council approved a new legal regulation. The legislator incorporated the VAT exemption for private clinics into German law. According to the newly worded sec 4 no. 14 lit. b, aa German VAT Act, hospital treatment and medical treatment in a hospital, which is not a public-law institution or licensed under sec. 108 SGB V (= private clinic), are VAT exempt if:



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- the services offered by the private clinic correspond to those of the aforementioned hospitals, and
- the costs are expected to be incurred in at least 40% of the annual days of occupancy by patients, for whom no higher charges have been levied for hospital services than for general hospital services, in accordance with the Krankenhausentgeltgesetz or the Bundespflegesatzverordnung.

This new legal regulation corresponds to the content of a current regulation of the tax administration, on the basis of which the tax authorities (but not the tax courts) have so far examined the VAT exemption under European law. The new regulations will come into force on 1 January 2020.

3 Consequences for the practice

In the future, a private clinic will have to check the medical indication of the treatment as well as the two conditions mentioned in the bullets in order to determine whether it provides VAT exempt services. It should be noted that the private clinic must prove the above-mentioned requirements to the tax authorities. The first prerequisite – services that correspond to those of a planned hospital (personnel, spatial and medical-technical equipment) – should be available for most medical treatment services and can be proven without any significant problems.

The audit and fulfilment of the 40% quota is, however, likely to be problematic. It is necessary to determine in which cases remuneration is higher than that for general hospital services. In principle, hospitals licensed under sec. 108 SGB V settle DRG flat rates on the basis of a uniform base rate. In addition, they receive investment costs in the form of public subsidies, regardless of their services. Since private clinics do not receive this service-independent investment support, the amount billed by them is often higher for this reason alone (due to a higher base rate). They must also generate the investments. This different funding situation must not be to the detriment of private clinics when calculating the quota. Insofar as private clinics bill according to the DRG flat rates, this aspect must be taken into account when comparing the level of fees.

Furthermore, fees for optional services are to be included in the quota formation. According to the aforementioned regulation of the tax administration, it is therefore important whether the remuneration for optional services is adequate to the services. There is much to suggest that the tax authorities will transfer this approach to the new legal version. Of course, it must then be clarified what is "adequate". In practice, this will certainly often result in a comparison of the prices of hospitals licensed under sec. 108 SGB V for optional services.

A detailed examination of the tax exemption is, for various reasons, suitable for private clinics. Firstly, the tax exemption is important for the price calculation: If the services are VAT exempt, the private clinic is not required to include VAT in its invoice. If the services are taxable, the clinic has the right to deduct input tax. Secondly: In the past, when a private clinic has shown VAT on its invoice, private health insurance companies have refused to reimburse it (much to the annoyance of patients). This threat looms even larger in the future due to the legal reorganization. VAT should therefore only be shown in the invoice if the private clinic is quite sure of this. In case of any doubt it should not issue invoices with separate VAT amounts.