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VAT'S UP

VAT NEWSLETTER

Golf clubs and sports clubs beware: ECJ defines scope of VAT exemption

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1 Background

It has been known for some time now that sec. 4 No. 22 lit. b) German VAT Act is not in accordance with Art. 132 para 1 lit. m VAT Directive. The national law only exempts participation fees for sporting events. Only services provided by the entrepreneurs listed in sec. 4 No. 22 lit. b) German VAT Act, including, inter alia, institutions serving non-profit purposes, are exempted. To date, the German Federal Fiscal Court has allowed the direct invocation of the much broader Union law. Art. 132 para 1 lit. m VAT Directive exempts services closely related to sports that are provided by non-profit organisations. Some clubs therefore directly invoke the VAT Directive in order to exempt, for example in the case of golf, the mere provision of services such as sports court fees or green fees, club and ball hire, the hiring of caddies, the organisation of tournaments and similar services. Other clubs have, so far, treated these transactions as taxable under the national regulations in order to benefit from the input VAT deduction. In addition, it has not yet been clarified by the highest courts whether non-profit institutions must necessarily fulfil the requirements for non-profit status according to the German Fiscal Code.

2 New ECJ case law

In the case decided, a golf club already fulfilled all of the requirements for qualification as a non-profit organisation, with the exception of the asset retention regulations. The income from green fees, ball machines, hiring of caddies, the organisation of tournaments/events and racket sales was treated as VAT-exempt in direct application of Art. 132 para 1 lit. m VAT Directive. The tax office objected to this treatment. However, the Munich Tax Court confirmed the golf club's view. In the appeal proceedings, the German Federal Fiscal Court finally asked the ECJ to clarify whether a direct invocation was possible and how the term "non-profit-making organisations" was to be interpreted, especially in the context of the non-profit requirements of the German Fiscal Code.

Markus Müller, LL.M.
Dipl.-Finanzwirt (FH),
Certified Tax Consultant

+49 (0) 211 54 095-387
markus.mueller@kmlz.de

Contrary to the German Federal Fiscal Court's previous case law, the ECJ states, in its current decision *Golfclub Schloss Igling* (Case C-488/18), that a direct application of the Union law is not possible. According to the wording, only "certain services" are exempt. Direct application fails due to the discretion that Member States have to define "certain services".

Moreover, the ECJ defines the term "non-profit institutions" as an autonomous concept under EU law. Accordingly, non-profit institutions may not have the objective of generating profits for their members. If profits are nevertheless made, they are not permitted to be distributed, but must instead be used to maintain or improve the services provided. The prohibition of distribution also applies in the event of the dissolution of the institution. It is the responsibility of the competent national bodies to determine the status of the institution.

3 Effects on the practice

Until now, clubs were free to choose between the VAT liability of the right of use under national law with input VAT deduction and the VAT exemption of these services under Union law without input VAT deduction. This option will no longer exist. Associations that have treated the mere right of use as VAT-exempt are now obliged to treat these services as subject to VAT. However, a potential for input VAT corrections under sec. 15a German VAT Act can serve to lessen the consequences. Based on the previous case law, procedural protection of confidence is to be granted for the past pursuant to sec. 176 German Fiscal Code. The question of the taxability of membership fees remains unaffected. According to the Federal Ministry of Finance, membership fees are not taxable. However, such fees can be treated as taxable events and input VAT deduction can be claimed for mere rights of use if the club directly applies the EU Law.

The ECJ's comments on the concept of "non-profit-making institutions" under EU law are very significant. In the literature, it was previously disputed whether, in addition to serving charitable purposes within the meaning of sec. 52 German Fiscal Code, the further requirements of the non-profit status according to sec 51 et seq. German Fiscal Code must be fulfilled. The ECJ now requires retention of assets beyond the dissolution of the association, comparable to the regulations on altruism in German non-profit law (sec. 55 German Fiscal Code). Associations that use the model template for the statutes (Annex 1 to sec 60 German Fiscal Code) thus fulfil the ECJ requirements. However, the ECJ's definition of a "non-profit-making organisation" is to be understood more broadly than the regulations on non-profit status according to sec. 51 et seq. German Fiscal Code. In particular, the formal recognition according to sec. 60a German Fiscal Code is irrelevant.

The German Federal Fiscal Court is shortly expected to rule, for the first time, that associations, which are not formally recognised as non-profit organisations under the German Fiscal Code, can also be "non-profit-making institutions" and collect VAT-free attendance fees. This will affect a number of associations, as profits are usually not paid to the members according to the statutes. For these clubs, it is important whether the German Federal Fiscal Court, in its subsequent ruling, allows the direct application of the Union law or finds its result through an interpretation in conformity with the VAT Directive. The possibility of direct application would grant non-recognised non-profit associations a right of choice that the tax authorities cannot apply unilaterally to the disadvantage of the association. The interpretation in conformity with the VAT Directive, on the other hand, applies in any case. This could also have a disadvantageous effect, for example if the loss of input VAT deduction and corrections, pursuant to sec. 15a German VAT law for previous investments, exceed the advantages of the VAT exemption.

In particular, non-recognised non-profit associations should immediately check whether the VAT exemption offers them any advantages. In these cases, it is important to avoid the impending statute of limitation before the end of the year.

KMLZ Rechtsanwaltsgesellschaft mbH | www.kmlz.de | office@kmlz.de
D-80331 München | Unterer Anger 3 | Tel.: +49 89 217501220 | Fax: +49 89 217501299
D-40221 Düsseldorf | Speditionstraße 21 | Tel.: +49 211 54095320 | Fax: +49 211 54095399