



# KMLZ VAT NEWSLETTER

## Update: VAT Exemption for private hospitals

### 1. Flashback

In its decision of 23.10.2014 (V R 20/14), the Federal Fiscal Court decided that, as of 2009, supplies carried out by private hospitals with no health insurance license, might be tax exempt (see KMLZ Newsletter 09/2015). The German legislator, however, has not yet amended the respective national law, which is correspondingly contrary to European Union law. Private hospital operators must therefore directly invoke Union law in order to claim VAT exemption. The subsequent tax court decisions dealt with individual questions and left many other questions unanswered. With its circular of 06.10.2016, the Federal Ministry of Finance basically adopted the Federal Fiscal Court's case law. Private hospital operators are now wondering whether they must continue to include VAT in their invoices. Health insurance companies partly refuse to reimburse any invoiced VAT by simply referring to the (alleged) VAT exemption. In the proceedings XI R 23/15, the Federal Fiscal Court referred, to the ECJ, the question as to how the scope of application of curative treatments and hospital treatments are to be differentiated from one another.

### VAT exemption for private medical care center just as for private hospitals?

More than three years ago, the Federal Fiscal Court decided that hospital treatments carried out by private hospitals could be VAT exempt. To date, the legislator has not amended the German VAT law in this regard, which is contrary to European law. In its current decision, the Federal Fiscal Court points to a possible VAT exemption, based on Union law, for medical care centers which are not licensed in accordance with sec. 95 of the Social Security Code V.

### 2. Facts of the Federal Fiscal Court decision of 24.08.2017 – V R 25/16

A GmbH operated a medical laboratory for the examination of blood samples and serum for the detection of food allergies and chronic complaints. The GmbH received the order from the respective patient in cooperation with the treating doctor or the alternative practitioner. The GmbH invoiced its supplies to the patient. The GmbH was (probably) not recognized as a licensed medical care centre.

### 3. Grounds for the decision

The tax court assumed that the GmbH rendered VAT-exempt curative treatments in the field of medical care in accordance with sec. 4 no. 14 lit. a of the German VAT Act. The Federal Fiscal Court took an alternative view. It was of the opinion that only sec. 4 No. 14 lit. b of the German VAT Act, which also applies to hospitals, might be applicable. The Federal Fiscal Court specifically mentioned the exemption with regard to medical care centres in accordance with sec 95 of the Social Security Code V. The Federal Fiscal Court referred the issue back to the tax court. It is now for



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the tax court to check whether the national tax exemption regulation, which applies to medical care centres, is contrary to European Union law due to a restriction under social law being a criterion for the allocation.

#### 4. Consequences

There is reason to believe that VAT exemption for medical care centres will be found to be contrary to European law by the case law. There is a restriction under social law, similar to that which applies to private hospitals. If this proves to be the outcome, private medical care centres may directly invoke VAT exemption pursuant to European Union law. It will, however, take a few years until a final decision is reached. Until then, private medical care centres are recommended to calculate VAT in their prices and report it in their VAT returns. However, the VAT amount probably does not need to be separately shown in the invoice. If the Federal Fiscal Court decides that private medical care centres can invoke VAT exemption pursuant to European law, the medical care centres may be entitled to a refund (with interest). A precondition is that the material characteristics pursuant to Art. 132 para. 1 lit. b of the VAT Directive are met and that it is still possible to amend the VAT assessments, from a procedural perspective.

#### 5. Characteristics Art. 132 para. 1 lit. b of the VAT Directive

Private hospitals or medical care centres often find it difficult to prove that they are a duly recognized establishment. According to current case law, as well as the Federal Ministry of Finance's circular of 06.10.2016, this arises from different criteria. Particularly important in this context is the question as to whether health insurance companies or other social security institutions bear a large percentage of the

patient's costs. Statutory health insurance basically does not cover any of the costs incurred in private hospitals. It has still not finally been resolved whether state aid carriers and private health insurance companies are deemed to be social security institutions. If this were not the case, VAT exemption, in accordance with European law, would often "run dry". In practice, the hospital must be able to provide evidence as regards the assumption of the costs. This is often only possible where an agreement with the patient exists.

Further, the conditions under which private hospitals render supplies must, from a social point of view, be comparable to supplies rendered by public hospitals. Insofar, case law and fiscal authorities apply different criteria. In the Federal Ministry of Finance's view, the range of services supplied by private hospitals must correspond to those rendered by public hospitals. Additionally, social security institutions must, to a large extent, bear the costs incurred. The Federal Ministry of Finance would like to see a 40% quota be applied. In practice, this is often difficult to prove, especially, where the invoice is issued by an attending doctor. The Federal Fiscal Court, in contrast, also compares the equipment of private hospital and public hospitals, in addition to comparing the offered range of supplies. The case law of various tax courts is also inconsistent in this regard.

It is quite possible that treatments of further institutions, beyond the wording of the German law, are VAT exempt. Doubts continue to exist, where VAT exemption depends on social law contracts, which are concluded in tune with respective needs.