



Current developments regarding the VAT exemption for private hospitals

07 | 2020

1 Background

The German Federal Fiscal Court, the highest German fiscal court, decided in 2015 that medical treatments provided by private hospitals can be VAT exempt (see KMLZ Newsletter 09/2015). Since then, an ongoing dispute has developed concerning the exact requirements of this VAT exemption. In most cases, the question is whether the private hospital operates under social conditions comparable to those applicable to bodies governed by public law. On 06.10.2016, the tax authorities set out the requirements they consider necessary for the exemption in a letter issued by the German Ministry of Finance. On 23.01.2019, the German Federal Fiscal Court decided that, in order to be exempt from VAT, the requirements of sec 109 para 3 Social Security Code V must, above all, be fulfilled. Despite this, the concrete requirements to fulfil this law remain unclear.

2 ECJ judgment of 05.03.2020

In its current judgment on this issue, the ECJ takes into account, as an argument for the existence of socially comparable conditions, that medical treatments are provided at fixed prices on the basis of agreements with public authorities and that social security institutions partially reimburse the costs. However, the ECJ does not consider such agreements (including the price) and partial reimbursements to be mandatory requirements for VAT exemption. The extent to which costs of hospital services are covered often plays a role in discussions with the tax authorities and decisions by the courts on the



Dr. Michael Rust
Lawyer

+49 (0) 89 217 50 12-74
michael.rust@kmlz.de

social comparability of the conditions. The assumption of the costs of a private hospital by the aid scheme or by private health insurance companies must be taken into account in favour of socially comparable conditions. The ECJ judgment is in line with this view. In particular, the aid scheme only covers hospital costs to the extent previously defined in the respective regulation. The provisions of this regulation correspond to the 'agreement' referred to by the ECJ.

3 Judgment of the fiscal court in Münster

As previously mentioned, the German Federal Fiscal Court recently decided, for the first time, that a private hospital is exempt from VAT if it fulfils the material requirements for approval in accordance with secs 108, 109 Social Security Code V. This requires firstly, the ability to perform and secondly, economic efficiency. The private hospital must provide evidence that these conditions are being met. As a rule, private hospitals do not encounter any problems in proving their ability to perform. However, disputes about the requirement of economic efficiency are common. What is necessary is an appropriate cost-benefit ratio.

It is precisely this "economic efficiency" that the Fiscal Court in Münster has commented on in its current judgment. According to this judgment, the comparability of the level of daily nursing rates (in a psychiatric clinic) is pushed into the background primarily with regard to different forms of hospital financing. Unlike licensed hospitals, private hospitals must finance investment costs from the fees they earn for the provision of their hospital services. The same applies to the base rate when billing according to DRG rates. The decisive factor is the ratio of the supplies performed, including an investment premium, to the billed nursing charge (or base rate). The Fiscal Court cites the assumption of costs by aid schemes, as well as statutory health insurers, as an argument for socially comparable conditions. On the other hand, the assumption of costs, by statutory social insurance agencies, to a considerable extent or a certain number of days of occupancy of such patients, is not decisive.

4 Consequences for the practice

On the basis of both of the above-mentioned judgments, private hospitals can argue in tax audits and the like, for periods up to the end of 2019, that cost assumptions by aid scheme and statutory health insurers fulfil the necessary economic efficiency criteria. In this respect, however, it is often important to be able to prove that the costs have been covered, particularly with regard to the aid scheme. Moreover, arguments must be found in individual cases as to why the price and the medical treatment are in reasonable proportion to each other. There are no fixed criteria in this respect. Possibly one argument could be a low profit margin. In addition to the lack of reimbursement by statutory health insurers, the tax authorities often primarily refer to a comparison of equipment between private hospitals and licensed hospitals. Here it should be explained, in the individual case, why the equipment is similar in both types of hospitals.

A new version of the VAT exemption regulation for hospitals applies to supplies as of 01.01.2020 (see KMLZ Newsletter 47/2019). The legislator is returning to a quota system that has already been applied in the past. In at least 40% of the days of occupancy, no more than general hospital supplies may be charged in accordance with the Krankenhausentgeltgesetz or the Bundespflegesatzverordnung.