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By PwC Deutschland | 18. Juli 2021

Assessing care and support needs on behalf of Medical Health Service not exempt from VAT

The Supreme Tax Court held that expert reports (appraisals) on the care and support needs of patients in order to determine the extent of their entitlement to medical care on behalf of the Medical Service of the Health Insurance (“MDK”) are not exempt from VAT under national law. A tax exemption under EU law is also not possible according to an earlier ECJ judgement pertaining to the case in dispute.

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Background

The plaintiff, a trained nurse with basic medical training and academic education in the field of nursing as well as further training in quality management in the field of nursing, appraised and prepared opinions on the need for medical care of patients on the order of the MDK. The local tax office took he opinion that the activity of assessing care and support needs was neither exempted by national law (German VAT Act) nor by EU law. Whilst the Lower (district) Tax Court granted the appeal, the Supreme Tax Court (STC) had a different view and had referred the case to the ECJ for a preliminary ruling. According to German VAT law, the plaintiff is not entitled to an exemption from VAT on the services concerned. However, the STC – as stated in his reference order to the ECJ - did not rule out that it might be possible to rely directly on the VAT exemption in Article 132(1)(g) of the VAT Directive for supplies closely linked to welfare and social security work.

ECJ judgement (preliminary ruling)

On that former question the ECJ did indeed concur with the view of the STC. However, the ECJ also stated in his decision of 8 October 2020 (case ref. **C-657/19, *Finanzamt D***) that Article 132(1)(g) does not preclude that the plaintiff be denied recognition as an “institution of social character”. In principle it is at the discretion of the national law of each Member State to lay down the rules and circumstances under which the desired status may be granted to such organizations and from case to case it may therefore also refuse the desired recognition as being devoted to social wellbeing. And – by doing so in the case of dispute – Germany would not violate or exceed the limits of its discretion.

STC decision

Hence, the STC dismissed the plaintiffs’ claim. The services in question are not exempt from VAT since the appraisal activities of the MDK and thus also those of the plaintiff do not, according to their main purpose, serve to treat, alleviate or prevent an illness - rather, they are the basis for determining the amount to which the insured person is entitled to reimbursement of costs under the Long-Term Care Insurance Act. The role of the MDK is therefore to provide an expert opinion for social insurance purposes, not to provide therapy.

Furthermore, the plaintiff is not recognized in Germany as an institution with a social character. In this regard, the STC refers to the more detailed explanations of the ECJ: Although the plaintiff supplied her services in her capacity as a subcontractor of the MDK, which, under German law, is recognized as a body devoted to social wellbeing, she has not herself been recognized as such. Independent experts may indeed be recognized as bodies devoted to social wellbeing if they have entered into a contract directly with the care and support insurance fund for the purpose of providing those services, since the direct conclusion of such a contract enables that fund itself to establish the professional skills of those experts and, thus, to guarantee the quality of the services provided. However, the plaintiff has not concluded such a contract.

The STC - in his previous decisions - has held that it was sufficient for recognition that the costs were borne indirectly by social security institutions, even if - as in the case of a subcontractor - there were no direct

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contractual relationships with the public sector. This view is now no longer upheld as a result of the preliminary ruling of the ECJ in its judgement in the case C-657/19, *Finanzamt D*.

Source:

Supreme Tax Court decision of 24 February 2021 case ref.: XI R 30/20 (XI R 11/17), published on 1 July 2021.

Schlagwörter

Medical health care, VAT Exemption, social character