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Municipality as a business for VAT

In a recent decision the Supreme Tax Court dealt with the provision of services by public bodies under German VAT law. If the economic activities of a public body are not outstanding and distinct from its overall activities it is not a taxable business for VAT and thus not eligible to deduct input VAT incurred on the underlying costs.

A municipality erected a sports center, let it to an affiliated GmbH against a rental fee and treated the rental as a taxable service. In addition, the municipality (who was in charge of approving the admission fees for the use of the premises) made loss compensation payments to the GmbH. The rentals paid by the GmbH were fairly low and not more than 10% of the amounts regularly paid as loss compensation, while – on the other hand - the GmbH claimed input VAT in the amount of some €1.8 m. The BFH held that the service of the municipality was not necessarily a business (economic) activity within the scope of VAT. The rental fee and the costs for which an input VAT deduction was sought might be disproportionate in view of the ECJ decision C-520/14 "*Gemeente Borsele*". There, the municipality of Borsele recovered, through the contributions received, only a small part of the costs incurred. The contributions were not owed (payable) by each user and rather paid by only a third of the users, with the result that the contributions received accounted for only 3% of the overall costs, the balance being financed by public funds. The ECJ held that such a difference (asymmetry) between the operating costs and the sums received suggests that the contribution is not a genuine consideration for services. There is no real link between the amount paid and the services supplied.

The lower tax court must now review the facts of the case at hand and determine whether there is actually a disproportion between rental income and costs.

Supreme Tax Court judgment V R 44/15 of December 15, 2016 published on March 22, 2017

Keywords

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