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By PwC Deutschland | 18 July 2017

Disallowance of discount on delivery of pharmaceuticals in breach of EU VAT law?

An ECJ advocate general has suggested that the court should rule that price rebates granted by manufacturing pharmaceutical companies on deliveries of pharmaceutical products to public health insurances and private health insurances must be treated equally for VAT purposes insofar as they both reduce the taxable basis for VAT.

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In Germany pharmacies issue the pharmaceutical products to *persons with statutory (public) health insurance* pursuant to a framework agreement concluded with the National Association of Public Health Insurance Funds. The pharmaceutical products are supplied to the public health insurance funds and the latter delivers them to persons insured by them. The pharmacies grant the public health insurance funds a discount on the price of the medicinal products. In consequence the pharmaceutical company is legally required to reimburse the pharmacies — or wholesalers as the case may be - for this discount. For the purposes of turnover tax the German tax authorities treat this discount as a reduction of the VAT turnover base. In contrast, the pharmacies issue – from a contractual point of view - pharmaceutical products directly to *the individuals with the private health insurance* pursuant to individual contracts with them. Unlike the public health insurance funds, private health insurance funds are not themselves the customer for the pharmaceutical products, but merely reimburse the persons insured by it for the costs incurred when they purchase pharmaceutical products. Pharmaceutical companies are then bound, pursuant to legal regulation, to grant the private health insurance funds a discount on the price of the medicinal product. In contrast to the treatment under the auspices of the statutory health insurance rules, the German tax office does not regard this discount as a reduction of the VAT base.

On the basis of ECJ case-law (ECJ judgment of 24 October 1996 *Elida Gibbs*, C?317/94) and also with regard to the principle of equal treatment under EU law the Advocate General (AG) has proposed that the court should rule that a pharmaceutical company which supplies pharmaceutical products is entitled to reduce its VAT basis under Article 90 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax also in cases where it supplies those pharmaceutical products to pharmacies via wholesalers, where the pharmacies supply those taxable products to persons covered by private health insurance, where the private health insurance company reimburses the persons insured by it for the costs of purchasing the medicinal products, and where the pharmaceutical company is required to pay a ‘discount’ to the private health insurance company pursuant to a statutory provision. The AG is of the opinion that the answer to the questions raised by the Supreme Tax Court must respect the fundamental principles of VAT, namely that the basis of VAT assessment is the consideration actually received.

The AG also points out that the pharmaceutical company does not have at its free disposal the full amount of the price received at first sale of its products to pharmacies or wholesalers. At most but importantly so, it is a ‘mere temporary custodian’ of the part of the amount received that it is bound to pay later to public and private health funds as a rebate and which is indexed to the price of the pharmaceutical products supplied. Lastly, the AG takes the view that treatment of pharmaceutical supplies to publicly and privately insured persons are comparable situations that are being treated differently for no apparent objective justification.

The ECJ case reference is C-462/16 *Boehringer Ingelheim Pharma* opinion of July 11, 2017.

Keywords

VAT basis, health insurance, pharmaceuticals, pharmacies, price rebate