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By PwC Deutschland | 02 January 2023

Waiver of head physician’s right for future private liquidation subject to VAT

The Supreme Tax Court decided that the waiver of a head physician of the right to private liquidation in return for monthly compensation payments made by the clinic owner to be able to bill privately insured persons himself is a taxable service and subject to VAT. Moreover, relinquishing the future right for private medical treatment does not fall under the medical services exemption as provided by national law.

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Background

The plaintiff was employed as a professor of medicine at a university. He was also the director of a clinic. He was permitted to treat patients privately and to charge for his service. This right of private treatment and billing was granted to him in accordance with civil service regulations and guaranteed until he left the civil service. The tax office treated the plaintiff's services as tax-exempt in accordance with Section 4 No. 14 of the German Value Added Tax Act (VAT Act).

In the course of a reorganization, the university, the clinic, and the plaintiff entered into a three-way agreement: The plaintiff relinquished the management of the clinic and the right for treatment and billing vis-à-vis private patients. The university provided him with another workplace. The clinic paid the plaintiff a monthly sum as "compensation for waiving the right to private liquidation and other financial disadvantages".

The tax office considered the waiver to be a taxable supply of service and held that it does not fall within the scope of the tax exemption under Section 4 No. 14 VAT Act for "human medicine provided as part of the activities carried out by a doctor". With his complaint, the plaintiff claimed that the agreed waiver of the right to private liquidation should be treated as a severance payment within the context of his position under civil service law. The Regional Tax Court granted the appeal.

Supreme Tax Court decision

The Supreme Tax Court considered the tax office's appeal to be founded and reversed the decision of first instance: The waiver is a separate service altogether and subject to VAT and does also not qualify as a (tax-exempt) waiver of future medical treatment services to the privately insured.

The plaintiff rendered a taxable service by waiving "the right granted to him for private liquidation for the treatment of outpatient and/or inpatient private patients and self-payers" and thus a pecuniary legal position to which he was entitled by virtue of the respective university state law. According to Section 3 (9) VAT Act a taxable supply of service may also arise because of an omission or in the acquiescence to an act or a condition.

Contrary to the opinion of the regional tax court, the waiver is also not VAT exempt under Section 4 No. 14 VAT Act considering previous case law of the European Court of Justice (ECJ) and the Supreme Tax Court. For this, the Supreme Tax Court went back to an older ECJ decision from 15 December 1993 in the case **C-63/92** *Lubbock Fine.* This case dealt with VAT charged in respect of the consideration received by *Lubbock Fine* for the surrender of a lease. The ECJ held that the EU Directive does not authorize Member States to tax the consideration paid by one party to the other in connection with the surrender of the lease when the rent paid under the lease was exempt from VAT. The relations created by a lease cannot be broken up in this way. The ensuing VAT treatment should be in the same manner both for lessor and lessee (as actus contrarius).

Hence, an *actus contrarius* is found to take place in the same two-person relationship as the VAT exempt supply (here: between tenant and landlord). In the present case, however, the situation was altogether

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different as the VAT exempt service and the waiver took place in in a three-person scenario: The plaintiff had provided the medical treatment to the private patients whilst the waiver was agreed between the plaintiff and the clinic.

In its conclusion, the Supreme Tax Court stated that an exemption of the waiver would not be in line with the purpose of § 4 No. 14 letter a VAT Act (exempting “the treatment in the area of human medicine provided as part of the activities carried out by a doctor, dentist, an alternative practitioner…”). The purpose of this exemption is to reduce the cost of medical treatment in general and to make it more accessible to individuals.

Source

Supreme Tax Court judgment of 30 June 2022, case V R 36/20 published on 17 November 2022.

Keywords

medical treatment, severance payment, waiver