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By PwC Deutschland | 28 March 2024

Provision of spa facilities not a VATable service if accessible to everyone free of charge

According to a decision of the Supreme Tax Court, the provision of spa facilities by a municipality does not constitute a service for consideration if the municipality collects a spa tax (visitor's tax) per day from guests staying in the municipality. However, this only applies if the obligation to pay this tax is not tied to the use of the spa facilities but rather to the stay in the municipal area and if the facilities are accessible to everyone free of charge.

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Background

The plaintiff is a state-recognized air spa town. Its spa administration is managed as a government-operated business under municipal law. On that basis, the plaintiff collects a spa tax to cover the costs of erecting and maintaining the facilities provided for spa and leisure purposes and for the events organized for that purpose.

The spa tax applies for (a) outside persons visiting the municipality with the opportunity to use the spa facilities and to participate in events, (b) residents of the municipality, the focal point of whose life is in a different municipality, and (c) non-local persons staying in the municipality for professional reasons to attend conferences or other events. In essence, the spa facilities could be used free of charge by everyone. By contrast, the spa tax is not collected from day visitors, non-local persons or residents working or undergoing training in the municipality.

In the years 2009 to 2012, the plaintiff financed the erection, maintenance and renovation of the spa park, spa building and footpaths with the revenue from the collection of that tax. Those facilities are freely accessible to everyone; there is no need to present a spa card to gain admittance. Taking the view that the spa tax constituted remuneration for an activity subject to VAT, namely the operation of a spa establishment, the plaintiff claimed a deduction of the VAT paid on all the input services which had been provided to it and which related to tourism. The tax office refused the input VAT deduction in part.

The Baden-Wuerttemberg Tax Court had rejected the appeal and held, in essence, that the plaintiff had not acted as a trader in the course of its activity which gave rise to the collection of the spa tax.

The Supreme Tax Court subsequently referred the case to the ECJ for a preliminary ruling. The ECJ decided that „*the provision of spa facilities by a municipality* ***does not constitute a 'supply of services for consideration'****, on the basis that municipality imposes a spa tax of a certain amount per day's stay on visitors staying in the municipality,* ***when the obligation to pay that tax is linked not to the use of those facilities*** *but rather to the stay in the municipal territory and those facilities are freely and gratuitously accessible to everyone"* (ECJ decision of 13 July 2023 **C-344/22**, *Gemeinde A*).

In its final judgment the Supreme Tax Court thus found that, under the given circumstances and according to the principles laid down by the ECJ, there were no taxable services supplied by the plaintiff to the spa guests for consideration and in consequence an input VAT deduction on the related input costs was not possible.

Reference:

Supreme Tax Court, judgment of 18 October 2023, XI R 21/23 (XI R 30/19), published on 28 March 2024.

Note:

In another nearly identical decision, the Supreme Tax Court held that the plaintiff (a municipality located on an island) was economically active as a taxable person with its spa business. The court stated that the

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above mentioned ECJ decision in the case C-344/22*Gemeinde A* did not affect its decision, since in the current case of dispute the spa facilities could primarily **not be used freely and free of charge** by everyone in accordance with the plaintiff's statutes. Visitors who use the spa facilities without proof of authorization must pay the visitor's tax. The levying of the spa tax follows the standardized and general point of view that out-of- town visitors typically come to the spa town to use and benefit from its spa facilities. However, as an exception, the plaintiff had provided the spa facilities to its residents and to residents of neighboring municipalities free of charge. Analogous to the parameters set by the ECJ, the Supreme Tax Court saw these as non-economic activities.

Reference: Supreme Tax Court, judgment XI R 33/21 of 6 December 2023 – published on 28 March 2024.

Keywords

municipality, taxable service