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Ecclesiastical Asset Management and the New Introduction Of Section 2b of the Value Added Tax Act

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ABSTRACT

This paper deals with church assets and the changes in the German VAT law with the resulting consequences. The implementation of EU law has resulted in numerous changes in the handling of assets and commercial facilities of institutional bodies such as the church. Using the example of the church district administration of the Evangelical Lutheran Church District of Dithmarschen, an overview of the application cases for assets was examined. After an introductory overview and an analytical examination of the new law in the value added tax law, a result of action is provided in this elaboration, which will also be of interest for comparable facilities, corporations and institutions.

Keywords: Indirect Tax, Church Management, Church Tax

JEL Codes: M 31, Z 12

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INTRODUCTION

What consequences do tax changes have for the wealthy client? This question is asked by natural persons, but legal entities can also be affected. There are different opinions as to the extent to which assets are to be regarded as such. Corporations, for example, are certainly provided with tasks of general interest or with charitable or benevolent tasks and are not primarily to be spoken of as assets. However, tax changes do not stop there and may well affect any institution. The new introduction of § 2b UStG in general and in particular for the church / the church district Dithmarschen? To answer this question under content-related and methodological aspects is the focus of this work. However, only a limited case of the identified problem cases can be shown, many cases such as entrance fees, subsidies, sponsoring, sales proceeds, church congresses, etc. are certainly already identifiable, but for this elaboration only the view on asset management is put. This is complicated by the fact that the Federal Ministry of Finance did not comment in detail on this matter until 16.12.2016 - i.e. a short time before the legal regulation came into force.

Thus, the impression may arise that the legislator does not sufficiently consider the consequences of some legislative changes in advance and promises wholeheartedly that the changes will not be made to the detriment of the public sector. However, when the above-mentioned law is interpreted meticulously, this is exactly what occurs. Thus, entities such as administrations at all levels, broadcasters, universities and, indeed, churches are affected.

Chapter 2 focuses on the handling of the legislation. Chapter 3 describes in detail the problems in the area of asset management that arise from the interpretation of the law, as well as the demarcation difficulties due to ambiguous provisions. These problems are highlighted by means of subsumption on the basis of the valid legal situation and a legal solution is presented. The results are authoritative for the finance department of the corporations concerned, on the one hand, in order to fulfill their tax obligations properly and, on the other hand, in order to influence the calculations of infected areas at an early stage. Chapter 4 ends with a conclusion and a sketched recommendation for action.

TEST SCHEME FOR § 2B USTG AND DELIMITATION PROBLEMS

In order to verify whether the requirements of § 2b UStG and thus the non-taxability of the performance of legal persons under public law (jPöR) are met, Küffner[1] developed a test scheme (see Figure 2). This test scheme provides an overview, but leaves numerous questions unanswered, which will be answered in the course of this paper.

[1] Küffner/Rust, DStR 2016, S. 1634.

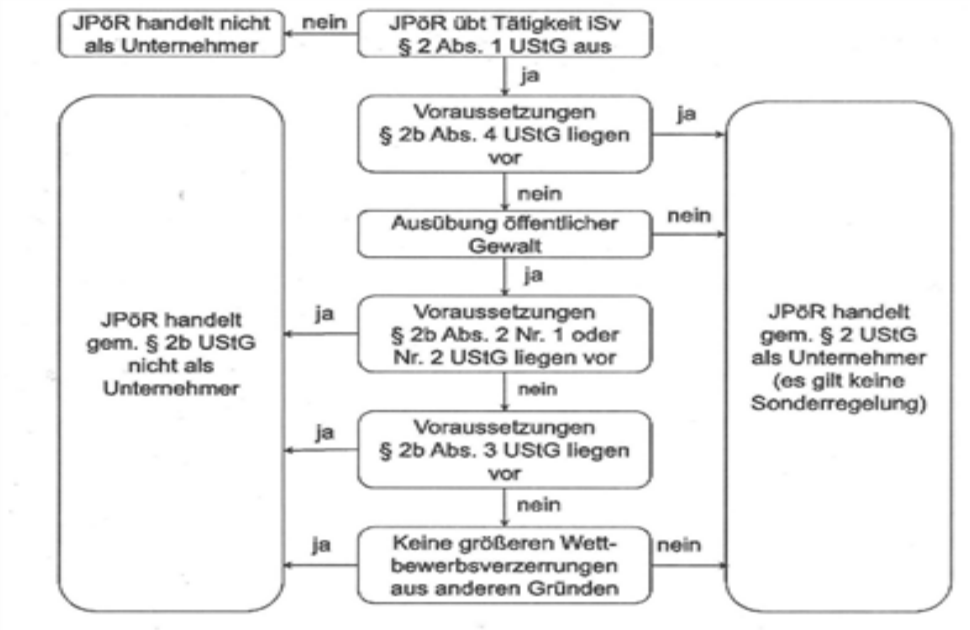


Figure 1 Test scheme § 2b UStG
Source: Küffner/Rust, DStR 2016, S. 1634.

Therefore, a test in several steps is required, which will be presented in the following..

JPÖR does not act as an entrepreneur

Whether a jPöR acts as an entrepreneur for VAT purposes could be easily answered with regard to the entrepreneurial status according to § 2 para. 1 sentence 3 UStG. A commercial or professional activity as an entrepreneur is considered to be given if it is a sustainable activity to generate income, regardless of a possible profit. Since the ruling of the European Court of Justice (ECJ) [2], it has been possible to deny the status of an entrepreneur, particularly in the case of services rendered by the jPöR, if the jPöR provides services but consideration (e.g. from social factors such as income or assets) is outstanding from the recipient of the services.

JPÖR carries out activities within the meaning of § 2 para. 1 UStG

The principle of entrepreneurial status is therefore always established on the basis of Section 2 (1) of the German Turnover Tax Act (UStG) - insofar as the contractual arrangements of jPöR are governed by private law. If the jPöR now also acts on a public law basis with sovereign tasks, the VAT treatment is based on the criteria of § 2b UStG. [3] Whether the performance of the sovereign task exempts the jPöR from a VAT obligation depends on the fulfillment of the following criteria.

Prerequisite § 2b para. 4 UStG are present

In spite of sovereign areas of responsibility, the new introduction provides for a reverse exception to the exemption rule. Accordingly, jPöR are to be treated per se as entrepreneurs for VAT purposes, provided they meet the requirements of Section 2b (4) UStG. This fact is not

[2] EUGH, Resolution from 29.10.2009 - C-246/08, Slg. 2009, I-10605.
[3] Maier/Übleiß, KommJur2016, S. 331.

relevant for this analysis with its focus on the church or church district administration and concerns, among other things, notaries in the state service, eyeglass services provided by the statutory social security institutions, services provided by surveying and cadastral authorities, and activities of the Federal Agency for Agriculture and Food. This is not the subject of this study and will not be elaborated further.

Exercise of official authority

Sovereign tasks are those tasks which are incumbent upon the state by virtue of public law. For the assessment of what sovereign tasks are, the European Court of Justice has defined in its rulings activities[4] "within the scope of public authority" as those which the bodies of public law exercise within the framework of the legal regulations specifically applicable to them (e.g. public-law contract, public-law agreement, administrative act). [5] These also form the basis for a jPöR so that it can escape the concept of an entrepreneur.

It is to be expected that the BFH will continue to uphold its previous case law on this requirement - contrary to the view of the tax authorities. In the explanatory memorandum to the law, special positions under public law, laws that lead to an administrative act, the state treaty as well as special regulations under church law are to be understood[6]. Likewise, the BFH has determined under which conditions churches are to be regarded as jPöR. The church is established as a corporation under public law without territorial sovereignty in Article 140 GG with reference to Article 136ff of the WRV. As a special church-legal regulation the church district administration law with appropriate standardization is justified. [7] This is also confirmed by the BMF letter , which is specifically to be identified as a public law contract for the church:

> *"The special mission consists in the perception of its own affairs. These are teaching, pastoral care, worship and the administration of the sacraments, as well as all activities to which the churches are called according to their self-understanding, in order to fulfill a part of their mission in this world. In this respect, organization, standard-setting and administration are also protected, as is asset management."*

Thus, the sovereign areas do not fall under the concept of an entrepreneur; other areas of responsibility of the church must be examined separately. According to the BFH (in two decisions on the Real Estate Tax Act), ecclesiastical legal entities are not sovereign as soon as they do not have a special position under public law within the scope of their proclamation mandate. The proclamation mandate alone does not constitute a sovereign activity; rather, it depends on the contractual arrangement in this case, in private-law form. A special position must be established for the fulfillment of the task.

The situation is more problematic with the preparation of sovereign notices of the church district council. The preparation, thus the office service, takes over the rent office Dithmarschen

[4] EUGH, Resolution from 17.10.1989 - C-231/87, Slg. 1989, S. 3233.
[5] EUGH, Resolution from 14.12.2000 – C – 129/88, Slg. 2000, I-11435.
[6] Küffner/Rust, DStR 2016, S. 1633-1646.
[7] BFH, Resolution from 08.07.1971, VR 1/68, BFHE 103, S. 247.

as independent legal entity. The notice as such is a sovereign task. To the outside world, however, the cooperation of the Rentamt is not necessarily apparent to a third party.

Prerequisites § 2b para. 2 no. 1 or no. 2 UStG are present

With the new introduction of § 2b UStG, a separation between sales tax law and corporate tax law is taking place. The assessment under competition law gains in importance. If there is a major distortion of competition, it can be stated as a general rule that an exception cannot be realized through § 2b UStG. In general, it is clear that competition in principle is sufficient. It does not matter whether a competitive situation actually exists, only the potential for distortion of competition is sufficient and decisive. The EU Court of Justice has already interpreted the existence of a competitive situation in conformity with European law in the Isle of Wight Council ruling.[8] It is therefore to be expected that both the BFH and the tax authorities will follow this approach. Accordingly, competition does not exist if competitors do not provide comparable services or comparable services are tax-exempt. It does not depend on spatial or local boundaries. It is also sufficient that there is a potential and real possibility of market entry.[9] However, the use of the word "*in particular*" makes it clear that this is not a conclusive definition for major distortions of competition. This is achieved with the help of negative delimitation criteria in relation to the justification of an entrepreneurial status in the test scheme. If, in practice, an activity does not fall under the provisions of Section 2b (2) UStG, no further examination is required with regard to its VATability. However, it could be questionable whether the national regulations narrow the concept of major distortion of competition used under Art. 13 of the VAT Directive, which the EU Court of Justice understands as an autonomous concept, too much through negative delimitations.[10]

Non-take-up limit of EUR 17,500

The previous link to the business of a commercial nature is now no longer applicable, thus also the previous non-take-up limit of previously EUR 30,367, or most recently of EUR 35,000. This corresponded to a de facto exemption limit for each type of turnover. Whereas it was previously possible to exhaust several exemption limits by cleverly structuring the different types of turnover, this non-take-up limit is now limited to the respective jPöR, albeit for each type of turnover. It is important to note here that this is an activity-related formulation. This means that a jPöR may generate sales of up to EUR 17,500 per year from several fundamentally different activities that are not in competition with third parties in the private sector. Therefore, it was assumed as a general rule that with such low sales of a jPöR in one area, at least no major distortions of competition occur in relation to other companies that pursue a comparable acquisition. Thus, it is irrefutably assumed that non-taxation will not cause any major distortions of competition. Thus, according to Section 2b (1) No. 2 UStG, entrepreneurial status cannot be justified.[11]

Delimitation problems exist in the limitation of the non-take-up limit to similar activities. At the time, the Finance Committee did not comment on a justification for the law. It would be

[8] EUGH, Resolution from 16.09.2008, C-288/07, Slg. 2008, I-7203.
[9] Küffner/Rust, DStR 2016, S. 1646.
[10] Heidner/Korn/Leonard/Robisch, Umsatzsteuergesetz, §§2 Rn 36.
[11] Heidner/Korn/Leonard/Robisch, Umsatzsteuergesetz, §§2 Rn 38,39.

conceivable to interpret the law in accordance with the prevailing view of the market on the basis of the characteristics perceived by the average consumer. Accordingly, the BgA would be distinguishable from each other as before. The decisive factor is that BgA are not fragmented into very small areas.[12]

Comparable services without the right to waive tax exemption

Pursuant to Section 2b (2) No. 2 UStG, there is no major distortion of competition if comparable services are provided on a private-law basis without granting the option of waiving tax exemption. In this intention, major distortions of competition to the detriment of the public sector are avoided.[13] If private entrepreneurs carry out tax-exempt activities without the possibility of waiving the tax exemption, they are also not subject to any actual competitive disadvantage if jPöR are also not taxed. According to Heider[14], the legislator can base this exception on Art. 13 (2) VAT Directive, even if it has chosen a different approach with its wording of the law. It is to be expected that this limit will be raised in the near future to EUR 22,000 with a corresponding orientation to the small business limit of Section 19 (2) of the VAT Act of 2020..

Prerequisites of § 2b para. 3 UStG are met

An exclusion of the distortion of competition and, consequently, the non-entrepreneurship may be subject to the re-exception under the conditions outlined below, provided that the services are provided to other jPöR.

Services that may only be provided by jPöR

With reference to the German Bundestag[15], special public-law regulations based on special church-law regulations are to be attributed to public authority. In addition, the tax authorities have also published extensive decrees to date stating that large areas of activity, particularly in the church sector, are not tax-relevant. For example, social welfare centers, homes for the elderly and nursing homes, kindergartens, etc. run by the established church are regarded as sovereign and therefore not taxable under the old law. Treatment according to the new legal situation differentiates here on the basis of the contractual arrangement according to public-law or private-law principles. When interpreted according to the wording of the law, the latter is to be assigned to the entrepreneurial sphere. However, in order not to subject the latter to taxation per se, the legislator has provided for a reverse exception which applies if the cooperation is determined by public interests and the premises mentioned below apply.[16]

Such a case is inter-municipal cooperation or, more generally, when a jPöR provides services to other jPöR. If the following conditions are met, the entrepreneurial status is denied due to specific public interests:

- - Regularity
- - Long-term agreement

[12] Küffner/Rust, DStR 2016, S. 1633-1646.
[13] BT-Drucks. 18/6094, 2013, S. 91.
[14] Heidner/Korn/Leonard/Robisch, Umsatzsteuergesetz § 2b Rn 36.
[15] BT-Drucks. 18/6094, 2013, S. 91-92.
[16] Hammerl/Fietz, MwStR 2017, S. 56-65.

- - Public infrastructure
- - Against reimbursement of costs
- - Essentially to other jPöR
- - No major distortion of competition for other reasons

APPLICATION RECOMMENDATIONS USING THE SELECTED EXAMPLE OF ASSET MANAGEMENT

Asset management has a significant role to play. Both for the church and for the Dithmarschen church district. At present, capital requirements are still largely covered by church tax revenue. However, due to demographic change on the one hand and the departure from church membership on the other, church taxes will be lower in the future. Current budget developments already indicate this trend. This makes it all the more important to focus on returns in asset management, which is already being used to compensate for financing shortfalls. Additional taxation of income from asset management could make this path more difficult. The extent to which this is the case is shown below.

Renting and leasing

The ECJ's Salix ruling[17] clarified that a national provision is required if a member state wishes to treat the rental activities of a public corporation, such as a church, as non-taxable. Until now, this was done by linking § 2 (3) UStG to § 4 of the Corporate Income Tax Act. This has now been abolished. Therefore, a basic exemption for land can now only apply if it is connected with the fulfillment of sovereign tasks. This would be the case for parish land of the Dithmarschen church district, which is used for pastorates, or church land on which church buildings are located. All other land is basically competition-distorting and taxable. [18]

Rental of land for residential purposes

Almost all parishes in the Dithmarschen church district are also landlords or lessors of real estate. Even with the introduction of the law § 2b UStG, the taxable base for residential premises used for residential purposes remains unchanged. Basically, the sales are taxable. However, short-term contracts with a term of more than 6 months or at least unlimited rental contracts for residential space are excluded from VAT, as the exemption clause under § 4 No. 12 UStG applies here. Conversely, no input tax deduction can be claimed here, e.g. for construction expenses or maintenance expenses.

Leasing of shares in real estate

In addition, parishes use the revenue stream of leasing agricultural land, church steeples for erecting mobile phone antennas, or land for power lines. Wind turbines will be considered separately later. For agricultural management, only the land of plots or parts of plots is leased. Provided that it is not a farm or essential farm equipment, only the lease of land is exempt from sales tax. The granting of land for the erection of electricity pylons for a transmission line remains exempt from VAT, provided that the absence of taxation does not lead to a major

[17] EUGH, 04.06.2009 – C-102/08, Slg. 2009, I-4629.
[18] Küffner/Rust, DStR 2014, S. 2533-2541.

distortion of competition. Most recently, the Chemnitz Regional Tax Office[19] confirmed that the leasing of sites for mobile communications facilities by the public sector is not taxable.[20]

The short-term rental of commercially usable or common rooms including inventory, e.g. the parish center for a private celebration or the common room for the training of the German Red Cross, constitutes a business of a commercial nature, since changing tenants can be accepted here. If this offer can lead to a distortion of competition, i.e. if the turnover limits of EUR 17,500 are exceeded, taxation must be applied for.

The rental of garages and vehicle parking spaces are tax-exempt if they exist as a dependent ancillary service to the actual (tax-exempt) rental agreement. If independent rental agreements are concluded for garages or vehicle parking spaces, the exemption provision under § 4 No. 12 UStG does not apply. Therefore, the entrepreneurial activity is given in the present case. If the sales threshold is reached, the sales tax portion must also be reported and paid here.

Renting and leasing wind farm areas (Wind power)

Special attention should be paid to the leasing of land areas for wind turbines (WT) and the adjacent areas. Dithmarschen with its coast is one of the most profitable areas for wind power in Germany, both for WTGs on land (onshore) and on water (offshore). Thus, the Dithmarschen church district cannot avoid facing the sales tax issues in this context. In the last few years, the jurisdiction has decreed numerous changes in this regard, which make it necessary to take a close look at the land areas. Thus, a distinction must be made between the property with the wind turbine and the wind stray area around it.

Property with wind turbine

The exclusive use of the parking space is classified as asset management. This does not fall within the scope of sovereignty, so it is taxable in principle, but exempt from tax under § 4 No. 12 letter a UStG. The Dithmarschen church district does not operate its own wind turbines. In recent years, many church congregations have entered into participations in a wide variety of legal forms. An example may be the parish Hemme, which holds a participation in the wind farm company GmbH & Co. KG as a limited partner. For VAT purposes, the KG Hemme does not carry out any entrepreneurial activity by holding the participation in the Bürgerwindparkgesellschaft. The income from the participation is therefore not subject to sales tax.

Wind scattering area

The area adjacent to the parcel with a wind turbine is required as a distance area, as a so-called windbreak area, on which, according to the agreements on the rotor right, no building or other use is possible.

An agricultural use is allowed, a building development is not, since possible negative influences on the wind use area are expected.

[19] OFD Chemnitz, Verfügung vom 01.02.2005, DStR 2005, S. 333.
[20] Vgl. Abschn. 2.11 Abs. 2 S. 4 Hs 2 UStAE.

These fundamental differences lead to differentiated tax valuations:

> *The lease income for land owners is tax-exempt if he owns both the parcel with the wind turbine and at least one of the adjacent wind strewn areas. In this case, the lease payments are joined by the acquiescence payments. Overall, the income is nevertheless tax-exempt. .*

The OFD Lower Saxony has taken a position on this issue in its ruling of 14.09.2016. Accordingly, for a land lease, if an acquiescence service is also provided, the turnover as a whole is remuneration for a tax-exempt uniform service for the acquiescence of the construction of wind turbines. Thus, the turnover is exempt according to § 4 No. 12 a UStG.

In order to ensure legal certainty in practice for the parishes of the Dithmarschen church district, it is recommended that the model contract of the EKD be used.

Adjacent parcel to a WT on third-party property

The situation is different if the wind dispersal area is not declared as an ancillary service to the lease agreement, but the toleration service is formulated as an independent agreement because different land owners are the contractual partners. If a compensation for use is paid for the tolerated erection of the WTG and for the renunciation of the own development, these are not leasing services. Therefore, the exemption feature of § 4 No. 12 UStG is missing and the VAT obligation applies. In the example of KG Hemme, this relates to parcels 32/2 No. 20 and No. 22.[21]

RESULT WITH RECOMMENDATION FOR ACTION

Action is urgently required based on the findings of the preceding inventory. The required action is presented in the following phases: At the end of the option period, which has now been extended to 2023 by the BMF's ruling of November 14, 2019, it must be ensured that all relevant business transactions are recorded accordingly. Personnel and time resources must be deployed to bring about a changeover without delay. Although there is still a need for clarification and regulation in one or two places, this can be clarified by the churches' own regulations. It is true that Section 2b UStG contains undefined legal terms. However, the tax authorities will not make any significant changes to the application for the VAT liability of churches with their sovereign part. The economic and competitive activities of the church, which have so far already been regarded as BgA, continue to be covered by the basic standard of Section 2 (1) UStG, now with lower turnover limits and classification criteria.[22]

LIST OF FIGURES

Figure 1: Test scheme § 2b UStG

[21] Heidner/Korn/Leonard/Robisch, Umsatzsteuer § 2b Rn 59.
[22] Weber, MwStR 2016, S. 830.

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