

Recent judgement on the distinction between subsidy and donation

Author 1 christoph.drexl@primetax.ch

Author 2 zsuzsanna.serra@primetax.ch

BACKGROUND

From a VAT perspective, subsidies and donations constitute so-called "non-consideration". This means that they are considered to be flows of funds that are not matched by any supply. As non-consideration, subsidies and donations are equally not subject to VAT. In contrast, subsidies and donations differ at the level of input tax deduction. While donations do not lead to a reduction in input tax, subsidies trigger the requirement for a corresponding reduction in input tax. The distinction between donations and subsidies is made on the one hand according to whether the donor is a "subject of public law" (hereinafter "public authority"). Corresponding grants that are not paid by a public authority are generally considered donations. However, if the grant is made by a public authority, it cannot automatically be concluded that it is a subsidy, as public authorities should also be able to "donate" within the meaning of VAT. Recently, the Federal Supreme Court once again had to deal with the question of the distinction between a donation and a subsidy.

BG DECISION 9C_609/2022

Facts of the case

In the present Federal Supreme Court case 9C_609/2022, the taxpayer, which is organised under private law and whose statutory purpose is to provide teaching, research and service infrastructures for conventional medicine, intended to build a campus on a plot of land owned by the Canton of Zurich. For this construction project, the taxpayer received an investment amount of CHF 9,000,000 from the Lottery Fund of the Canton of Zurich.

As part of an inspection, the FTA took the view that the taxpayer had wrongly qualified the investment contribution from the lottery fund as a donation and not as a subsidy and had therefore wrongly not amended its input tax deduction. In particular, the FTA claimed that the contribution was based on a legal basis and was also earmarked for a specific purpose, namely as an investment contribution for the construction of the musculoskeletal research and development centre, the activities of which could be considered to be in the public interest. The taxpayer argued that the funds should be recognised as a donation and not as a subsidy.

Accordingly, it was disputed in this case whether the lottery fund had made an input tax-effective subsidy or an input tax-neutral donation.

Decision of the Federal Supreme Court

In general, the Federal Supreme Court states that a (tax-neutral) donation exists if a voluntary donation is made with the intention of enriching the recipient without the expectation of a supply in the VAT sense in return. The person receiving the donation can largely dispose of the funds as

they see fit, which does not rule out the possibility of donations being made linked to a specific project. In principle, the beneficiary is not subject to any legally standardised duty of conduct. This means that, in principle, public authorities can also make donations.

The Federal Supreme Court examines three key criteria for distinguishing a subsidy from a donation:

1. Are the funds provided by a public authority?
2. Is the allocation of funds based on a legal basis?
3. Are the funds awarded without any expectation of a specific supply in return?

In the opinion of the court, the first two criteria were met relatively easily in the present case. The lottery fund was considered an extension of the Canton of Zurich and the legal basis for the grant was not lacking in the present case.

In the opinion of the court, the decisive factor for the distinction between a donation and a subsidy in this case was whether the donation was made in expectation of a specific individual supply in return. Specifically, the court assessed the question of whether the recipient of the donation could dispose of it "freely and at its discretion".

As a result, it denied this, as "the expectations on the part of the Canton of Zurich inevitably [had] to go further, as considerable public funds are at stake, which must be used economically and in a targeted manner". The canton of Zurich could "not be accused of having donated the funds and leaving their use largely to the taxpayer". However, this excludes a donation, as "in the case of a donation [...] it is to be expected that it is made free of a legally enforceable behavioural obligation, apart from the fact that the funds are used appropriately."

CONCLUSION

The judgement of the Federal Supreme Court raises questions. At the crucial points, the court relies more on conjecture than on substantiating its decisive considerations. In particular, the distinction between a "project-related donation" and a subsidy is unclear (although the court expressly recognises that there can be project-related donations).

Taxable persons who receive donations that could be considered to be made by a public authority in the broadest sense should review their position from a VAT perspective. If such funds are newly awarded, the corresponding contracts should be checked to see whether they are sufficiently clearly formulated to be able to clearly distinguish between a donation and a subsidy.

Subsidies are also to be part of the partial revision of the VAT Act. It remains to be seen whether this will create more clarity.