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Judgment of the Court (Sixth Chamber) of 11 January 2001. - Commission of the European Communities v French Republic. - Failure by a Member State to fulfil its obligations - Sixth VAT Directive - Article 13(A)(1)(b) - Closely related activities - Concept. - Case C-76/99.

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Keywords

Tax provisions Harmonisation of laws Turnover taxes Common system of value added tax Exemptions provided for by the Sixth Directive Exemption of hospital and medical care and closely related activities Concept of closely related activities Transmission of samples for the purpose of medical analysis Inclusion

(Council Directive 77/388, Art. 13(A)(1)(b))

Summary

\$\$A Member State which levies value added tax on fixed allowances for the transmission of samples for the purpose of medical analysis fails to fulfil its obligations under Article 13(A)(1)(b) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes.

For the purpose of any possible exemption from value added tax under the abovementioned Article 13, on the exemption of hospital and medical care and closely related activities, for the act of transmitting medical samples, it is appropriate to have regard to the purpose for which those samples are taken. Thus, where a duly authorised health-care worker orders, for the purpose of making his diagnosis and with a therapeutic aim, that his patient should undergo an analysis, the transmission of the sample, which logically takes place between the taking of the sample and the analysis itself, must be regarded as closely related to the analysis and must therefore be exempt from value added tax.

(see para. 24 and operative part)

Parties

In Case C-76/99,

Commission of the European Communities, represented by E. Traversa, acting as Agent, assisted by N. Coutrelis, Avocat, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger and S. Seam, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by levying value added tax on fixed allowances for the taking of samples for medical analysis, the French Republic has failed to fulfil its obligations under Article 13(A)(1)(b) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1),

THE COURT (Sixth Chamber),

composed of: V. Skouris, President of the Second Chamber, acting for the President of the Sixth Chamber, R. Schintgen and F. Macken (Rapporteur), Judges,

Advocate General: N. Fennelly,

Registrar: D. Louterman-Hubeau, Head of Division,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 29 March 2000,

after hearing the Opinion of the Advocate General at the sitting on 25 May 2000,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 3 March 1999, the Commission of the European Communities brought an action, pursuant to Article 169 of the EC Treaty (now Article 226 EC), for a declaration that, by levying value added tax (VAT) on fixed allowances for the taking of samples for medical analysis, the French Republic has failed to fulfil its obligations under Article 13(A)(1)(b) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; the Sixth Directive).

Legal framework

Community legislation

2 Article 13(A)(1)(b) of the Sixth Directive provides:

Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

...

(b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable to those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature.

National legislation

3 It is clear from Article 261-4-1 of the French Code Général des Impôts (General Tax Code) that the biological analysis of medical samples is exempt from VAT.

4 According to the first paragraph of Instruction 3 A-7-82 of 6 April 1982 of the Minister attached to the Minister for Economic Affairs, Finance and the Budget, the purpose of that article is to exempt biological examinations designed to facilitate the prevention, diagnosis or treatment of human ailments.

5 Under Article L.760(5) of the French Code de la Santé Publique (Public Health Code), the transmission of a sample between two laboratories for the purpose of analysis may occur only under a collaboration contract already concluded between them, except in respect of the acts referred to in Article L.759 and very specialised acts the list of which is fixed by ministerial order after the opinion of the Commission Nationale Permanente de Biologie Médicale (National Standing Committee on Biomedicine) has been obtained.

6 As regards analyses carried out under collaboration contracts, the VAT exemption applies not only to the costs of sample-taking and analysis, but also to the costs of sending the samples for the purpose of analysis. Furthermore, under Article L.760(8) of the Code de la Santé Publique, the laboratory which takes the sample and transmits it is legally responsible vis-à-vis the client both for the analysis and the invoicing.

7 On the other hand, the analyses referred to in Article L.759 of the Code de la Santé Publique and very specialised acts may not form the subject of collaboration contracts. In that regard, Article L.759 of the Code de la Santé Publique provides that the performance of biological analyses which require a special qualification or which necessitate the use of either products which are particularly dangerous or techniques which are exceptionally delicate or novel may be reserved to certain laboratories and categories of person. The list of laboratories thus authorised is fixed by the Minister for Health.

8 In order to ensure a service throughout France, patients requiring such special analyses are permitted to go to the laboratory of their choice to have the sample taken, and that laboratory will send the sample to a specialised laboratory under a fixed-fee contract.

9 The last paragraph of Article L.760 of the Code de la Santé Publique, as amended by Article 36 of Law No 94-43 of 18 January 1994, provides that the laboratory carrying out special analyses under such contracts must pay the laboratory which took the sample a fixed allowance for the transmission of the sample, that allowance being called transmission fees, the level of which is fixed by ministerial order.

10 Under fixed-fee contracts, the specialised laboratory invoices the patient directly for the analysis carried out on the sample sent to it by the laboratory which took that sample, and that analysis is not subject to VAT. The laboratory which took the sample invoices the patient for it, and that service is not subject to VAT either. On the other hand, in accordance with the third paragraph of Instruction 3 A-7-82, the transmission fees paid by the laboratory which carried out the analysis to the laboratory which took the sample are subject to VAT.

Pre-litigation procedure

11 Since the Commission considered that that liability to VAT was contrary to Article 13(A)(1)(b) of the Sixth Directive, by letter of 7 July 1997 and pursuant to Article 169 of the Treaty, it set out its complaints in that regard and gave the French Government formal notice to submit to it its observations within two months of receipt of that letter.

12 In the absence of a reply within the period prescribed, on 5 March 1998, the Commission sent a reasoned opinion to the French Republic requesting it to comply with it within two months of its notification.

13 On 28 May 1998, the French Government sent the Commission a letter disputing the complaints made against it.

14 Since it was not satisfied by that reply, the Commission decided to bring the present action.

Substance

15 The Commission claims, first, that the concept of closely related activities within the meaning of Article 13(A)(1)(b) of the Sixth Directive includes the transmission of a sample, by the laboratory which took it, to another laboratory for the purpose of analysis, since the objective of taking a sample is to have it analysed. According to the Commission, the transmission of the sample is ancillary and closely linked to the biological analysis by the second laboratory, so that it must be regarded as constituting an activity closely related to medical care.

16 The Commission then points out that the definition of the substantive content of the activities covered by Article 13(A)(1)(b) of the Sixth Directive is a matter of Community law.

17 Finally, the Commission submits that the distinction drawn under the French rules between collaboration contracts and fixed-fee contracts offends against the principle of neutrality of the VAT

system, according to which the scope of liability to, and of exemptions from, VAT must be interpreted objectively. There is no meaningful economic distinction between the contracts in question.

18 The French Government justifies the liability to VAT of the transmission of the sample by reference to the principle that the scope of exemptions from VAT is to be construed narrowly. In that regard, it contends that, under collaboration contracts, the laboratory which takes the sample and which invoices the patient for the analysis is responsible vis-à-vis the patient, whichever laboratory carries out the analysis. On the other hand, under fixed-fee contracts, the laboratory which carries out the analysis invoices the patient directly for the analysis and is also responsible for it vis-à-vis the patient.

19 According to the French Government, a series of transactions may be classified as a single transaction for VAT purposes only if the transactions concerned are legally indistinct and effected between the same persons, which is precisely not the case as regards fixed-fee contracts.

20 It is common ground that both the sample-taking and the analysis itself must be exempt from VAT under Article 13(A)(1)(b) of the Sixth Directive. The dispute therefore relates exclusively to the question whether, because of the need to give a narrow interpretation to derogations from liability to VAT for certain transactions, the differences between collaboration contracts and fixed-fee contracts justify, in the latter case, making the act of transmitting the sample, as a distinct act, subject to VAT.

21 In that regard, it should be observed, first, that although, as the Court has held, in particular in Case 348/87 *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën* [1989] ECR 1737, paragraph 13, the exemptions referred to in Article 13 of the Sixth Directive are to be interpreted strictly, the Court has also noted, in paragraph 15 of Case C-349/96 *Card Protection Plan v Commissioners of Customs and Excise* [1999] ECR I-973 (CPP), that those exemptions constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another.

22 It must be pointed out, second, that Article 13(A)(1)(b) of the Sixth Directive does not include any definition of the concept of activities closely related to hospital and medical care.

23 As the Advocate General noted in point 23 of his Opinion, that concept does not, however, call for an especially narrow interpretation since the exemption of activities closely related to hospital and medical care is designed to ensure that the benefits flowing from such care are not hindered by the increased costs of providing it that would follow if it, or closely related activities, were subject to VAT.

24 For the purpose of any possible exemption from VAT for the act of transmitting medical samples, it is appropriate to have regard to the purpose for which those samples are taken. Thus, where a duly authorised health-care worker orders, for the purpose of making his diagnosis and with a therapeutic aim, that his patient should undergo an analysis, the transmission of the sample, which logically takes place between the taking of the sample and the analysis itself, must be regarded as closely related to the analysis and must therefore be exempt from VAT (see, as regards services which, since they do not have a therapeutic aim, must be subject to VAT, Case C-384/98 *D v W* [2000] ECR I-6795, paragraph 19).

25 The French Government contends, none the less, that the transmission of samples cannot be regarded, for the purposes of VAT, as ancillary or an integral part of the analysis, since that transmission may be regarded as a business-support service for the laboratory which carries out the analysis. Since the activities of sample-taking and analysis are distinct and are invoiced separately, they are legally and economically separable, so that the act of transmission should be subject to VAT.

26 First, it should be observed that, according to settled case-law, although the introductory sentence of Article 13(A)(1) of the Sixth Directive states that Member States are to lay down the conditions for exemptions in order to ensure the correct and straightforward application of the exemptions and to prevent any possible evasion, avoidance or abuse, those conditions cannot affect the definition of the subject-matter of the exemptions envisaged (see, in particular, Case C-124/96 *Commission v Spain* [1998] ECR I-2501, paragraphs 11 and 12). From that point of view, the subjection to, or exemption from, VAT of a specific transaction cannot depend on its classification in national law.

27 Second, the Court has held that a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (see *CPP*, paragraph 30).

28 In the present case, the patient is indifferent as to whether the laboratory which takes the sample also carries out the analysis, or subcontracts it to another laboratory but remains responsible to him for the analysis, or, because of the nature of the analysis at issue, is obliged to send the sample to a specialised laboratory. The obligation, in the last case, to send the sample to a specialised laboratory arises from the need to ensure for the patient that the analysis is as reliable as possible.

29 Moreover, the fact that, according to the French Government, the transmission of the sample constitutes a distinct act does not preclude it from being regarded as closely related to the analysis for the purpose of the Sixth Directive.

30 In those circumstances, the taking of the sample and the transmission of the sample to a specialised laboratory constitute services which are closely related to the analysis, so that they must be treated in the same way as the analysis for fiscal purposes and, accordingly, must not be subject to VAT.

31 It must therefore be concluded that, by levying VAT on fixed allowances for the transmission of samples for the purpose of medical analysis, the French Republic has failed to fulfil its obligations under Article 13(A)(1)(b) of the Sixth Directive.

Decision on costs

Costs

32 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

Operative part

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. Declares that, by levying value added tax on fixed allowances for the transmission of samples for the purpose of medical analysis, the French Republic has failed to fulfil its obligations under Article 13(A)(1)(b) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes Common system of value added tax: uniform basis of assessment;

2. Orders the French Republic to pay the costs.