

Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

13 January 2022 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 132(1)(b) – Exemptions for certain activities in the public interest – Exemption of hospital and medical care – Closely related activities – Thermal treatment – Amount charged for compiling an individual file including the user’s clinical history)

In Case C-513/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 1 July 2020, received at the Court on 13 October 2020, in the proceedings

Autoridade Tributária e Aduaneira

v

Termas Sulfurosas de Alcafache SA,

THE COURT (Seventh Chamber),

composed of I. Ziemele (Rapporteur), President of the Sixth Chamber, acting as President of the Seventh Chamber, T. von Danwitz and A. Kumin, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the European Commission, by J. Jokubauskaitė and B. Rechená, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 132(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; ‘the VAT Directive’).

2 The request has been made in proceedings between the Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal) ('the tax authority') and Termas Sulfurosas de Alcafache SA ('Termas Sulfurosas'), concerning the exemption from value added tax (VAT) of amounts charged for 'thermal registration'.

Legal context

European Union law

3 Article 131 of the VAT Directive is the sole article in that directive's Chapter 1 ('General provisions') of Title IX ('Exemptions'). That article reads as follows:

'The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.'

4 Article 132(1)(b) of the VAT Directive, which appears in Chapter 2, entitled 'Exemptions for certain activities in the public interest', of Title IX, provides:

'Member States shall exempt the following transactions:

...

(b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with 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;

...'

5 Article 134 of the VAT Directive is worded as follows:

'The supply of goods or services shall not be granted exemption, as provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1), in the following cases:

(a) where the supply is not essential to the transactions exempted;

(b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT.'

Portuguese law

6 Article 9(2) of the Código do Imposto sobre o Valor Acrescentado (Value Added Tax Code; 'the CIVA') provides that, inter alia, the supply of medical and healthcare services and closely related activities effected by hospitals, clinics, health centres and other similar entities is exempt from VAT.

The dispute in the main proceedings and the question referred for a preliminary ruling

7 The Alcafache (Portugal) thermal baths are a primary care unit which is not part of the Portuguese national health service and does not have the capacity to provide hospital care.

8 Termas Sulfurosas operates those thermal baths. It invoiced its users for a service called 'thermal registration' in the total amount of EUR 87 003, EUR 72 654 and EUR 55 627.50 for the years 2010, 2011 and 2012, respectively. Following a tax inspection report, those amounts formed the basis of the *ex officio* assessments to VAT, at a rate of 23% plus interest.

9 According to that tax inspection report, Termas Sulfurosas applies two different procedures depending on the service desired by the user.

10 For the 'traditional thermal cure' services, it is necessary to undergo a prior consultation with one of the doctors at the thermal baths in order to receive a prescription for the treatments to be performed. When paying for the consultation, the user also pays a fee for 'thermal registration', which is valid for that year and covers the prescribed treatments, failing which those treatments may not be availed of. Termas Sulfurosas does not request payment of VAT in respect of that sum, but makes a reference on the invoices to Article 9(2) of the CIVA. It is stated on Termas Sulfurosas' official website that all 'thermal registrations' are individual and made with a view to the arrangement of a prior medical consultation, and the treatments are then prescribed by the doctor at the thermal baths. During the relevant years, thermal registration was invoiced at EUR 30, EUR 33 and EUR 36 respectively.

11 In respect of the 'thermal spa' services, prior medical consultation is optional in the case of treatments of a duration not exceeding three days. For such services, Termas Sulfurosas does not charge for 'thermal registration', regardless of whether there is a medical consultation.

12 It is also apparent from the tax inspection report that all that is obtained in return for the payment of the 'thermal registration' fee is the possibility to avail of hydrological treatments, regardless of whether those treatments are actually provided. That payment entitles users to purchase the treatments they are seeking.

13 Termas Sulfurosas brought an action before the Tribunal Administrativo e Fiscal de Viseu (Administrative and Tax Court, Viseu, Portugal) against the decision of the tax authorities to calculate, *ex officio*, the VAT payable for 'thermal registration' at the rate of 23% plus interest.

14 By judgment of 14 June 2018, the Tribunal Administrativo e Fiscal de Viseu (Administrative and Tax Court, Viseu) declared the action brought by Termas Sulfurosas to be well founded.

15 That court held, first, that since the 'thermal registration' fee is charged with a view to the provision of thermal treatments, which are already regarded as being exempt from VAT, it too should be regarded as exempt, since it is charged only after a medical consultation has been conducted and on condition that a qualified doctor has prescribed the thermal treatment in question.

16 Secondly, that court found that the services known as 'traditional thermal cures', which include a number of ENT, respiratory tract and rheumatology treatments, perform a therapeutic function, unlike the 'thermal spa' services.

17 The tax authority lodged an appeal before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), claiming, in particular, that the exemption provided for in Article 132(1)(b) of the VAT Directive, transposed into Portuguese law by Article 9(2) of the CIVA, must be interpreted restrictively, given that it is an exception to the general principle that VAT is to be levied on each supply of services made for consideration by a taxable person.

18 According to the tax authority, it follows from the case-law of the Court that even though the

'therapeutic purpose' of a supply is not to be interpreted in a particularly restrictive manner, only medical services in a strict sense and those 'closely related' to the former are to be regarded as falling within the scope of the exemption.

19 The tax authority deduces, in particular, from the judgment of 2 July 2015, *De Fruytier* (C-334/14, EU:C:2015:437), that an act whose connection with the 'principal' provision of medical care is weaker or equal to that found to exist in that judgment cannot be regarded as an 'activity closely related to medical or healthcare services'. In its view, the amount charged by Termas Sulfurosas for 'thermal registration' cannot be regarded as an 'activity closely related to' the supply of medical or healthcare services.

20 The referring court states that, in the light of the criteria already defined by the Court, it is not clear whether the amounts levied for 'thermal registration' are to be regarded as closely related to the provision of medical care within the meaning of Article 132(1)(b) of the VAT Directive.

21 According to the referring court, certain factors support the conclusion that that is the case, such as, for example, the fact that ['thermal registration'] includes the service of opening each user's individual file, which includes his or her clinical history and entitles the user to purchase 'traditional thermal cure' treatments, the nature of which as a supply of services and as an activity exempt from VAT is not at issue in the main proceedings.

22 In those circumstances the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'May payments made in return for the service of opening, for each user, an individual file setting out the clinical history entitling the user to purchase "traditional thermal cure" treatments, be included within the concept of "closely related activities", provided for in Article 132(1)(b) of the VAT Directive, and may they, as such, be regarded as being exempt from VAT?'

Consideration of the question referred

23 By its question, the referring court asks, in essence, whether Article 132(1)(b) of the VAT Directive must be interpreted as meaning that a service consisting in compiling an individual file, including the user's clinical history, which entitles the user to purchase 'traditional thermal cure' treatments within a spa establishment, is capable of coming within the VAT exemption provided for in that provision as an activity closely related to medical care.

24 Article 132(1)(b) of the VAT Directive provides that Member States are to exempt hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with 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.

25 It must be borne in mind from the outset that the terms used to specify the exemptions laid down in Article 132 of the VAT Directive are to be interpreted strictly, as they are a departure from the general principle that VAT is to be levied on each supply of services made for consideration by a taxable person. However, the interpretation of those terms must comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT and be consistent with the objectives underlying those exemptions. Accordingly, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 must be construed in such a way as to deprive the exemptions of their intended effect (judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA*, C-846/19, EU:C:2021:277,

paragraph 57).

26 The hospital and medical care envisaged in Article 132(1)(b) of the VAT Directive is, according to the case-law, that which has as its purpose the diagnosis, treatment and, in as far as possible, cure of diseases or health disorders (judgments of 6 November 2003, *Dornier*, C?45/01, EU:C:2003:595, paragraph 48; of 1 December 2005, *Ygeia*, C?394/04 and C?395/04, EU:C:2005:734, paragraph 24; and of 18 September 2019, *Peters*, C?700/17, EU:C:2019:753, paragraph 20). In addition, medical services supplied for the purpose of protecting, including maintaining or restoring, human health may benefit from the exemption provided for in that provision (see, to that effect, judgment of 10 June 2010, *CopyGene*, C?262/08, EU:C:2010:328, paragraph 30).

27 In the present case, the referring court considers it to be established that the ‘traditional thermal cure’ treatments offered at the thermal baths which are at issue in the main proceedings, in particular certain ENT, respiratory tract and rheumatology treatments that perform a therapeutic function and which are prescribed by a doctor, constitute medical care within the meaning of Article 132(1)(b) of the VAT Directive.

28 It is therefore appropriate to ascertain whether a transaction consisting in the compilation of an individual file, which includes the user’s clinical history and entitles the user to purchase such medical care, in return for the payment of the ‘thermal registration’ fee, comes within the concept of medical care and ‘closely related activities’.

29 Since Article 132(1)(b) of the VAT Directive does not define the concept of ‘activities closely related’ to hospital and medical care (see, to that effect, judgment of 11 January 2001, *Commission v France*, C?76/99, EU:C:2001:12, paragraph 22), that provision must be interpreted in the light of the context in which it is used and of the aims and scheme of the VAT Directive, with particular regard to the underlying purpose of the exemption which it establishes (judgment of 4 March 2021, *Frenetikexito*, C?581/19, EU:C:2021:167, paragraph 23 and the case-law cited). Nonetheless, it is apparent from the very terms of that provision that it does not envisage services which are unrelated to hospital care for the patients receiving those services or to any medical care which they might receive (see, to that effect, judgment of 1 December 2005, *Ygeia*, C?394/04 and C?395/04, EU:C:2005:734, paragraph 17 and the case-law cited).

30 As regards the context of which Article 132(1)(b) of the VAT Directive forms part, it is important to note that that provision must be read in the light of Article 134(a) of that directive, which requires, in any event, that the supply of goods or services concerned be essential to the transactions exempted within the scope of hospital and medical care (see, to that effect, judgments of 1 December 2005, *Ygeia*, C?394/04 and C?395/04, EU:C:2005:734, paragraph 26; of 14 June 2007, *Horizon College*, C?434/05, EU:C:2007:343, paragraph 38; and of 8 October 2020, *Finanzamt D*, C?657/19, EU:C:2020:811, paragraph 31).

31 As regards the objective pursued by Article 132(1)(b) of the VAT Directive, the Court has already held that the exemption of activities closely related to hospital and medical care provided for in that provision 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 (judgments of 11 January 2001, *Commission v France*, C?76/99, EU:C:2001:12, paragraph 23, and of 1 December 2005, *Ygeia*, C?394/04 and C?395/04, EU:C:2005:734, paragraph 23).

32 In view of that objective, only the supply of services which are logically part of the provision of hospital and medical care services and which constitute an indispensable stage in the process of the supply of those services to achieve their therapeutic objectives, is capable of amounting to

'closely related activities' within the meaning of that provision, since only such services are of a nature to influence the cost of health care which is made accessible to individuals by means of the exemption in question (see, to that effect, judgments of 1 December 2005, *Ygeia*, C-394/04 and C-395/04, EU:C:2005:734, paragraph 25; of 10 June 2010, *CopyGene*, C-262/08, EU:C:2010:328, paragraph 40; and of 2 July 2015, *De Fruytier*, C-334/14, EU:C:2015:437, paragraph 29).

33 For the purposes of determining whether services such as those at issue in the main proceedings are essential for medical care transactions, it is appropriate to take into account, in particular, the purpose for which those services are carried out (see, to that effect, judgments of 11 January 2001, *Commission v France*, C-76/99, EU:C:2001:12, paragraph 24, and of 1 December 2005, *Ygeia*, C-394/04 and C-395/04, EU:C:2005:734, paragraph 22), as well as all the particulars of the dispute before the referring court (judgment of 2 July 2015, *De Fruytier*, C-334/14, EU:C:2015:437, paragraph 30).

34 Furthermore, it follows from the case-law that the possibility that some considerable time may elapse between the service in question and the medical care does not, as such, preclude that service from coming within the exemption in Article 132(1)(b) of the VAT Directive. However, transactions which are only liable, if certain eventualities come to pass, to be closely related to medical care that has not been performed, commenced or yet envisaged, cannot be regarded as being services which are 'closely linked' to medical care within the meaning of that provision (see, to that effect, judgment of 10 June 2010, *CopyGene*, C-262/08, EU:C:2010:328, paragraphs 45, 46 and 50).

35 In the present case, the activity at issue in the main proceedings consists, according to the referring court, in compiling an individual file, including the user's clinical history, which entitles the user to purchase 'traditional thermal cure' medical care.

36 It is for the referring court, which alone has jurisdiction to assess the facts, to determine the nature of that activity and of the information contained in that individual file, as well as its purpose.

37 Where that activity consists in compiling an individual file, including the user's clinical history, setting out data relating to the user's state of health and to prescribed care, which may therefore be regarded as planned, as well as the manner in which that care is administered, data which must be consulted for the provision of care and to achieve the therapeutic objectives pursued, such a transaction may be regarded as 'closely related' to such medical care within the meaning of Article 132(1)(b) of the VAT Directive.

38 By contrast, where all that is obtained in return for the payment of the thermal registration fee is the possibility to purchase prescribed care, or if the content of the individual file including the user's clinical history is not essential for the provision of the care and for achieving the therapeutic objectives pursued, such an activity must not be regarded as 'closely related' to medical care within the meaning of Article 132(1)(b) of the VAT Directive, irrespective of the fact that, without payment of the 'thermal registration' fee, the prescribed care may not be availed of.

39 If the referring court is of the opinion that the activity at issue in the main proceedings is indeed an essential step in the process of supplying medical care in order to achieve the therapeutic objectives pursued by those services, and therefore constitutes an activity closely related to medical care, it will then be for that court to determine whether that activity is carried out by an establishment referred to in Article 132(1)(b) of the VAT Directive, under the conditions laid down in that article.

40 It is apparent from Article 132(1)(b) of the VAT Directive that, in the case of bodies which

are not governed by public law, hospital and medical care and closely related activities are exempt if they are undertaken, 'under social conditions comparable' with 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'.

41 In the present case, since the thermal baths in question in the main proceedings clearly are not a hospital, it is for the referring court to determine whether the medical care and closely related activities that establishment provides are undertaken under social conditions comparable to those applicable to bodies governed by public law, and whether it is a centre for medical treatment or diagnosis or other duly recognised establishment of a similar nature within the meaning of Article 132(1)(b) of the VAT Directive, with the result that all the requirements laid down in that article are fulfilled.

42 In the light of the foregoing, the answer to the question referred for a preliminary ruling is that Article 132(1)(b) of the VAT Directive must be interpreted as meaning that an activity consisting in compiling an individual file, including the user's clinical record, which entitles the user to purchase 'traditional thermal cure' medical care within a spa establishment, is liable to come within the exemption from VAT provided for by that provision as an activity closely related to medical care, where those files set out data relating to the user's state of health, planned and prescribed medical care as well as the manner in which that care is to be administered which must be consulted for the provision of care and to achieve the therapeutic objectives pursued. That medical care and activities closely related to it must also be undertaken, under social conditions comparable to those applicable to bodies governed by public law, by a centre for medical treatment or diagnosis or by another duly recognised establishment of a similar nature within the meaning of Article 132(1)(b).

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

Article 132(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that an activity consisting in compiling an individual file, including the user's clinical record, which entitles the user to purchase 'traditional thermal cure' medical care within a spa establishment, is liable to come within the exemption from value added tax provided for in that provision as an activity closely related to medical care, where those files set out data relating to the user's state of health, planned and prescribed medical care as well as the manner in which that care is to be administered which must be consulted for the provision of care and to achieve the therapeutic objectives pursued. That medical care and activities closely related to it must also be undertaken, under social conditions comparable with those applicable to bodies governed by public law, by a centre for medical treatment or diagnosis or by another duly recognised establishment of a similar nature within the meaning of Article 132(1)(b).

[Signatures]

* Language of the case: Portuguese.