Joined Cases C-394/04 and C-395/04

Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE

v

Ypourgos Oikonomikon

(Reference for a preliminary ruling from the Symvoulio tis Epikrateias)

(Sixth VAT Directive – Article 13A(1)(b) – Exemptions – Activities closely related to hospital and medical care – Provision of telephone services and hiring out of televisions to in-patients – Provision of beds and meals to persons accompanying in-patients)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions laid down by the Sixth Directive – Exemption for hospital and medical care and closely related activities – Definition of 'closely related activities' and of 'medical care' – Provision of telephone services and the hiring out of televisions to in-patients and the provision of beds and meals to persons accompanying them – Not included – Exception – Conditions – Assessment by the national court

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

The supply of telephone services and the hiring out of televisions to in-patients by persons covered by Article 13A(1)(b) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, and the supply by those persons of beds and meals to people accompanying in-patients do not amount, as a general rule, to activities closely related to hospital and medical care within the meaning of that provision. The exemption of such activities provided for in Article 13A(1)(b) of the Directive is designed to ensure that access to such care is not prevented by the increased costs of providing it that would follow if it, or closely related activities, were subject to value added tax. The hospital and medical care envisaged by this provision is, according to the case?law, that which has as its purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders. Accordingly, taking account of the objective pursued by the exemption provided for in Article 13A(1)(b) of the Sixth Directive, it follows that 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.

The supply of those services can amount to a 'closely related' activity only if those supplies are essential to achieve the therapeutic objectives sought by the hospital and medical care and their basic purpose is not to obtain additional income for the supplier by carrying out transactions which are in direct competition with those of commercial enterprises liable for value added tax. It is for the referring court, taking account of all of the specific facts in the litigation before it and, if appropriate, of the content of the medical prescriptions drawn up for the patients concerned, to determine whether the services supplied satisfy those conditions.

(see paras 23-25, 30, 35, operative part 1-2)

JUDGMENT OF THE COURT (Third Chamber)

1 December 2005 (*)

(Sixth VAT Directive – Article 13A(1)(b) – Exemptions – Activities closely related to hospital and medical care – Provision of telephone services and hiring out of televisions to in-patients – Provision of beds and meals to persons accompanying in-patients)

In Joined Cases C-394/04 and C-395/04,

REFERENCES for a preliminary ruling under Article 234 EC from the Simvoulio tis Epikratias (Greece), made by decisions of 16 June 2004, received at the Court on 17 September 2004, in the proceedings

Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE

v

Ipourgos Ikonomikon,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.-P. Puissochet, S. von Bahr, U. Lõhmus and A. Ó Caoimh (Rapporteur), Judges,

Advocate General: P. Léger,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 June 2005,

after considering the observations submitted on behalf of:

– Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE, by K. Karlis, dikigoros,

– the Greek Government, by E.-M. Mamouna, S. Trekli and V. Kiriazopoulos, acting as Agents,

– the German Government, by W.-D. Plessing and A. Tiemann, acting as Agents,

– the Cypriot Government, by A. Miltiadou-Omirou, acting as Agent,

– the Commission of the European Communities, by D. Triantafyllou, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 15 September 2005,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 13A(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').

2 These references were made in the course of proceedings between Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE ('Ygeia'), a legal person governed by private law whose objects are the provision of hospital and medical care, and Ipourgos Ikonomikon (Minister for Economic Affairs), concerning the refusal of Dimosia Ikonomiki Ipiresia Forologias Anonimon Emporikon Etairion Athinon (State Financial Service for the Taxation of Public Limited Trading Companies, Athens) to exempt from value added tax ('VAT'), as activities closely related to hospital and medical care, the provision of telephone services and the hiring out of televisions to in-patients and the provision of beds and meals to persons accompanying them.

Law

Community legislation

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

'1. 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'.

4 Article 13A(2)(b) of that directive provides:

(b) The supply of services or goods shall not be granted exemption as provided for in (1)(b), (g), (h), (i), (l), (m) and (n) above if:

– it is not essential to the transactions exempted,

– its basic purpose is to obtain additional income for the organisation by carrying out transactions which are in direct competition with those of commercial enterprises liable for value added tax.'

National legislation

5 Article 18(1)(d) of Law No 1642/1986 on the application of value added tax and other provisions (FEK (Official Gazette), A' 125) provides:

'The following shall be exempt from tax:

…

(d) hospital and medical care services and closely related supplies of goods and services, provided by persons operating lawfully. Services supplied in establishments offering spa therapy

and medicinal springs shall be placed on the same footing as those services'.

The main proceedings and the question referred for a preliminary ruling

6 Following an audit of Ygeia's accounts for the taxation periods corresponding to the years 1992 and 1993, the Dimosia Ikonomiki Ipiresia Forologias Anonimon Emporikon Etairion Athinon considered that the income earned by this company from, firstly, the provision of telephone services and the hiring out of televisions to in-patients and, secondly, the provision of beds and meals to persons accompanying them should be subject to VAT on the ground that those services could not be considered to be activities closely related to hospital and medical care. Consequently, it adjusted the company's tax liability by two separate decisions relating to each of the two years at issue.

7 Ygeia brought applications against those decisions before the Diikitiko Protodikio Athinon (Administrative Court of First Instance, Athens), then, on appeal, before the Diikitiko Efetio Athinon (Administrative Appeal Court, Athens). In support of those applications, Ygeia claimed that the services at issue contribute to patient care and to maintenance of patients' social contacts and, consequently, help to hasten their recovery by creating favourable conditions from a psychological point of view. These applications were dismissed on the ground that since the services at issue are intended to facilitate patients' hospital stays and do not contribute to their care, they cannot be considered closely related to hospital care.

8 Ygeia appealed to the Simvoulio tis Epikratias (Council of State) against the judgments given by the Diikitiko Efetio Athinon.

9 In its orders for reference the Simvoulio tis Epikratias states that it is common ground that Ygeia, as a legal person governed by private law, satisfies the conditions for exemption from VAT as regards hospital and medical care and closely related activities. According to it, the only issue to be examined relates to whether the services at issue fall within the concept of 'activities closely related' to hospital and medical care.

10 The referring court points out that that concept is not defined in Article 13A(1) of the Sixth Directive. It notes, however, that, on the basis of the conditions laid down in Article 13A(2)(b) of that directive, it could be considered that a transaction is closely related to hospital and medical care where, firstly, it is essential to the transactions exempted and, secondly, its purpose is not to obtain additional income for the person carrying out the exempted transactions. It adds, moreover, that, in its judgment in Case C-45/01 *Dornier* [2003] ECR I-12911, paragraphs 33 to 35, the Court held that the question as to whether an activity falls within the concept of 'closely related activities' depends on whether it is ancillary in nature. That means that it must be determined whether the service is provided to the recipients as a means of enhancing the enjoyment of other services or constitutes for them an end in itself.

11 In those circumstances, the Simvoulio tis Epikratias decided, in the action relating to the tax period corresponding to the year 1992, to stay proceedings and to refer to the Court for a preliminary ruling the following question (Case C-394/04):

'Do services supplied by persons referred to in Article 13A(1)(b) of [the Sixth Directive] comprising the grant of use of a telephone and a television to patients and the provision of food and a bed to persons accompanying patients come under activities closely related to hospital and medical care, within the meaning of that provision, as activities ancillary to that care but also essential to it?'

12 In relation to the tax period corresponding to the year 1993, the Simvoulio tis Epikratias decided to stay the proceedings before it until the Court had replied to the question cited above

(Case C-395/04).

13 By order of the President of the Court of 14 October 2004, Cases C?394/04 and C?395/04 were joined for the purposes of the written and oral procedure and of the judgment.

Consideration of the question

14 By its question, the referring court essentially asks whether the supply of telephone services and the hiring out of televisions to in-patients by a medical establishment referred to in Article 13A(1)(b) of the Sixth Directive and the supply by that establishment of beds and meals to persons accompanying in?patients amount to activities closely related to hospital and medical care within the meaning of that provision.

15 It should be noted at the outset that, according to the Court's case-law, the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (Case C-287/00 *Commission* v *Germany* [2002] ECR I-5811, paragraph 43, and Case C?498/03 *Kingscrest AssociatesandMontecello* [2005] ECR I?4427, paragraph 29). 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 (Case C-349/96 *CPP* [1999] ECR I-973, paragraph 15, and Case C-240/99 *Skandia* [2001] ECR I-1951, paragraph 23).

16 Moreover, the aim of Article 13A of the Sixth Directive is to exempt from VAT certain activities which are in the public interest. That provision does not, however, provide exemption from VAT for every activity performed in the public interest, but only for those which are listed therein and described in great detail (see, inter alia, Case C?149/97 *Institute of the Motor Industry* [1998] ECR I?7053, paragraph 18, and Case C-8/01 *Taksatorringen* [2003] ECR I?13711, paragraph 60).

17 As the Court has already stated, Article 13A(1)(b) of the Sixth Directive does not include any definition of the concept of 'activities closely related' to hospital and medical care (Case C-76/99 *Commission* v *France* [2001] ECR I?249, paragraph 22). None the less, 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 (*Dornier*, cited above, paragraph 33).

18 Accordingly, services fall within the concept of an 'activity closely related' to hospital or medical care appearing in Article 13A(1)(b) of that directive only when they are actually supplied as a service ancillary to the hospital or medical care received by the patients in question and constituting the principal service (*Dornier*, paragraph 35).

19 It is apparent from the case-law that a service can be considered to be ancillary to a principal service where it constitutes not an end in itself but a means of enhancing the enjoyment or benefit of the principal service supplied by the provider (see, to this effect, in particular, Joined Cases C-308/96 and C-94/97 *MadgettandBaldwin* [1998] ECR I?6229, paragraph 24, and *Dornier*, paragraph 34).

20 In that regard, Ygeia maintains that the provision of accommodation and food to persons accompanying in-patients, which has the effect of assisting the in-patients from a psychological point of view and helping them where, by reason of their health, they would no longer be able to perform on their own the tasks of everyday life, facilitates their recovery while reducing the workload on auxiliary hospital staff. Telephone services provided to in-patients and the hiring out

to them of televisions enable them to remain in contact with the outside world, which puts them in a psychological state facilitating a faster recovery, thereby reducing the final cost of hospitalisation. It follows, according to Ygeia, that the relevant criterion in order to determine whether or not such services come within the concept of 'activities closely related' to hospital and medical care is the intention of the patient himself who has sought to benefit from those services as he judged them to be necessary to his recovery.

21 That proposition cannot be upheld.

22 For the purpose of determining whether services such as those at issue in the main proceedings amount to a means of enhancing the benefit of hospital and medical care dispensed by Ygeia, it is appropriate, as maintained by all of the governments of the Member States which have submitted observations and the Commission of the European Communities, to take into account the purpose for which those services are carried out (see, in this regard, *Commission* v *France*, cited above, paragraph 24).

23 The exemption of activities closely related to hospital and medical care provided for in Article 13A(1)(b) of the Sixth Directive is designed to ensure that access to such care is not prevented by the increased costs of providing it that would follow if it, or closely related activities, were subject to VAT (*Commission* v *France*, paragraph 23).

24 The hospital and medical care envisaged by this provision is, according to the case-law, that which has as its purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders (*Dornier*, paragraph 48).

25 Accordingly, taking account of the objective pursued by the exemption provided for in Article 13A(1)(b) of the Sixth Directive, it follows that 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. Only such services are of a nature to influence the cost of health care which is made accessible to individuals by the exemption in question.

26 That finding is confirmed, as is correctly maintained by those governments that submitted observations, by the first indent of Article 13A(2)(b) of that directive, according to which the Member States are not to exempt the supply of services envisaged, inter alia, in Article 13A(1)(b) if they are not essential to the transactions exempted. As the Advocate General noted at points 30 to 32 of his Opinion, that provision, which is binding on the Member States, lays down conditions which must be taken into account for the interpretation of the various exemptions referred to therein, which, like that provided for in Article 13A(1)(b), relate to the supply of services or goods which are 'closely related' or 'closely linked' to an activity in the public interest.

27 In addition, at paragraphs 48 and 49 of the judgment in *Commission* v *Germany*, cited above, the Court held, in relation to the exemption provided for in Article 13A(1)(i) of the Sixth Directive concerning the supply of services 'closely related' to university education, that the carrying out of research projects for consideration, even though it may be regarded as of great assistance to university education, is not essential to attain its objective, that is, in particular, the teaching of students to enable them to pursue a professional activity, and that, accordingly, it could not benefit from that exemption.

28 Taking into account the objective of the exemption provided for in Article 13A(1)(b) of that directive and having regard to the wording of Article 13A(2)(b), those findings are equally valid, as the Advocate General has essentially noted in point 35 of his Opinion, for the interpretation of the

concept of ‘an activity closely related’ to hospital and medical care featuring in the first of those provisions.

29 It follows that the provision of services which, like those at issue in the main proceedings, are of such a nature as to improve the comfort and well-being of in-patients, do not, as a general rule, qualify for the exemption provided for in Article 13A(1)(b) of the Sixth Directive. It can be otherwise only if those services are essential to achieve the therapeutic objectives pursued by the hospital services and medical care in connection with which they have been supplied.

30 It falls to the referring court, taking account of all of the specific facts in the litigation before it and, if appropriate, of the content of the medical prescriptions drawn up for the patients concerned, to determine whether or not the services supplied are essential in nature.

31 Those findings are not affected by the arguments relied on by Ygeia, according to which the concept of ‘activities closely related’ to hospital and medical care featuring in Article 13A(1)(b) of the Sixth Directive does not, taking account of the objective of the exemption, call for an especially narrow interpretation (*Commission* v *France*, paragraph 23). As is already clear from paragraph 25 of the present judgment, subjecting services which are not of an ancillary character to VAT does not have the effect of increasing the cost of the hospital and medical care the accessibility of which this provision seeks to ensure for individuals, since those services are not essential to achieve the therapeutic objectives pursued by that care (see, to this effect, Case C-307/01 *D’Ambrumenil and Dispute Resolution Services* [2003] ECR I?13989, paragraph 59).

32 Moreover, as observed by the Advocate General at point 47 of his Opinion, the imposition of VAT on such services respects the principle of fiscal neutrality, which precludes, in particular, treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (Case C-109/02 *Commission* v *Germany* [2003] ECR I-12691, paragraph 20).

33 Contrary to Ygeia’s submission and as correctly claimed by the German Government, when a medical establishment provides services such as the services at issue, it is in competition with taxable persons who provide services of the same nature, such as providers of telephone and television services as regards services of this nature offered to in-patients and hotels and restaurants as regards the provision of accommodation for people accompanying them.

34 Thus, in conformity with the second indent of Article 13A(2)(b) of the Sixth Directive, services such as those at issue in the main proceedings are also not to be granted exemption as provided for in Article 13A(1)(b) of the directive if their basis purpose is to obtain additional income for the person who provides them, a matter which is for the referring court to verify on the basis of the specific facts of the litigation before it.

35 Consequently, the answer to the question asked must be that the supply of telephone services and the hiring out of televisions to in-patients by persons covered by Article 13A(1)(b) of the Sixth Directive and the supply by those persons of beds and meals to people accompanying in-patients do not amount, as a general rule, to activities closely related to hospital and medical care within the meaning of that provision. It can be otherwise only if those supplies are essential to achieve the therapeutic objectives sought by the hospital and medical care and their basic purpose is not to obtain additional income for the supplier by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT.

It is for the referring court, taking account of all of the specific facts in the litigation before it and, if appropriate, of the content of the medical prescriptions drawn up for the patients concerned, to determine whether the services supplied satisfy those conditions.

Costs

36 Since these proceedings are, for the parties to the main actions, a step in the actions 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 (Third Chamber) hereby rules:

1. **The supply of telephone services and the hiring out of televisions to in-patients by persons covered by Article 13A(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, and the supply by those persons of beds and meals to people accompanying in-patients do not amount, as a general rule, to activities closely related to hospital and medical care within the meaning of that provision. It can be otherwise only if those supplies are essential to achieve the therapeutic objectives sought by the hospital and medical care and their basic purpose is not to obtain additional income for the supplier by carrying out transactions which are in direct competition with those of commercial enterprises liable for value added tax.**

2. **It is for the referring court, taking account of all of the specific facts in the litigation before it and, if appropriate, of the content of the medical prescriptions drawn up for the patients concerned, to determine whether the services supplied satisfy those conditions.**

[Signatures]

* Language of the case: Greek.