

JUDGMENT OF THE COURT (Third Chamber)

21 March 2013 (*)

(VAT — Directive 2006/112/EC — Exemptions — Article 132(1)(b) and (c) — Hospital and medical care and closely related activities — Provision of medical care in the exercise of the medical and paramedical professions — Services consisting in the performance of plastic surgery and cosmetic treatments — Interventions of a purely cosmetic nature based solely on the patient's wishes)

In Case C-91/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Högsta förvaltningsdomstolen (Sweden), made by decision of 8 February 2012, received at the Court on 17 February 2012, in the proceedings

Skatteverket

v

PFC Clinic AB,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, E. Jarašinas, A. Ó Caoimh (Rapporteur), C. Toader and C.G. Fernlund, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Skatteverket, by K. Korpinen, acting as Agent,
- the German Government, by T. Henze and K. Petersen, acting as Agents,
- the Greek Government, by K. Paraskevopoulou and D. Kalogiros, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and A. De Stefano, avvocato dello Stato,
- the Hungarian Government, by M. Fehér and K. Szíjjártó, acting as Agents,
- the Netherlands Government, by C. Wissels and C. Schillemans, acting as Agents,
- the European Commission, by J. Enegren and L. Lozano Palacios, 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) and (c) 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 Skatteverket, which is competent, in Sweden, to collect value added tax (‘VAT’) and PFC Clinic AB (‘PFC’) concerning VAT due for the accounting period May 2007.

Legal context

The VAT Directive

3 The VAT Directive repeals and replaces, from 1 January 2007, the existing Community legislation on VAT, in particular 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).

4 Title IX of the VAT Directive is entitled ‘Exemptions’. Chapter 1 of that title consists solely of Article 131, which is worded 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.’

5 Chapter 2 of Title IX is entitled ‘Exemptions for certain activities in the public interest’. It consists of Articles 132 to 134.

6 Article 132(1) of the VAT Directive 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;

(c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned;

...’

7 Article 133 of the VAT Directive provides that Member States may subject, on a case-by-case basis, the granting to bodies other than those governed by public law of the exemption provided for in, among other provisions, Article 132(1)(b) thereof in respect of one or other of the conditions that it lays down.

8 Under Article 134 of the VAT Directive:

‘The supply of goods or services shall not be granted exemption, as provided for in Article 132(1)(b) 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.’

9 In accordance with Article 173 of the VAT Directive, in the case of goods or services used by a taxable person both for transactions in respect of which VAT is deductible and for transactions in respect of which VAT is not deductible, only such proportion of the VAT as is attributable to the former transactions is to be deductible. The deductible proportion is to be determined, in accordance with Articles 174 and 175 of that directive, for all the transactions undertaken by the taxable person.

Swedish law

10 In accordance with Chapter 3(4) of Law 1994:200 on VAT (mervärdeskattelagen (1994:200), ‘ML’), the supply of services which constitute medical care, dentistry or social care is exempt from taxation.

11 According to Chapter 3(5) of the ML, medical care means the medical prevention, examination or treatment of diseases, physical impairment and injuries and care in pregnancy and confinement, if the care is provided in a hospital or other institute operated by the public bodies or in the private sector institutes for inpatient care or if the care is provided otherwise by persons specially licensed to practise as medical professionals.

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

12 PFC offers medical services in the field of plastic surgery and cosmetic treatments. At the material time, it provided services involving both cosmetic and reconstructive plastic surgery and also some skincare services.

13 PFC carries out procedures such as breast augmentation and reduction, breast lifts, abdominoplasty, liposuction, face lifts, brow lifts, eye, ear and nose operations and other plastic surgery. That company also offers treatments such as permanent hair removal and skin rejuvenation by pulsed light, anti-cellulite treatments and botox and restylane injections.

14 PFC claimed the refund of input tax for the period corresponding to May 2007. In response to that claim, the Skatteverket refused both the refund and the deduction of that tax. According to the Skatteverket, VAT could not be refunded in respect of exempt transactions nor could a deduction of VAT be granted since cosmetic and reconstructive surgery constitute medical care exempt from taxation.

15 PFC appealed against the decision of the Skatteverket before the länsrätten i Stockholms län (County Administrative Court, Stockholm). The latter upheld the appeal, holding that the services offered by that company in respect of plastic surgery and cosmetic treatments did not constitute medical care.

16 The Skatteverket appealed against the judgment of the länsrätten i Stockholms län before

the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm). That court partially upheld the appeal and ruled that surgery and treatments which are reconstructive or which are carried out for psychological reasons are exempt from taxation if they are carried out by persons specially licensed to practise as medical professionals.

17 The Skatteverket appealed before the Högsta förvaltningsdomstolen (Supreme Administrative Court), arguing that the services supplied by PFC as regards both cosmetic and reconstructive surgery and treatments constitute medical care within the meaning of Chapter 3(4) of the ML and that, accordingly, PFC was not entitled to deduct input tax in respect of acquisitions made as part of its activity.

18 According to the order for reference, the purpose of the interventions carried out is, in certain cases, to treat patients who, as a result of an illness, injury or a congenital physical impairment, are in need of plastic surgery. In other cases, the interventions carried out are more as a result solely of the patient's wishes to alter or improve his physical appearance. Irrespective of their purpose, and from a medical point of view, the various interventions are, according to the referring court, comparable services and can be carried out by the same personnel.

19 The Högsta förvaltningsdomstolen is unsure as to the manner in which the expressions 'medical care' and 'the provision of medical care' are to be applied in the context of medical services consisting in surgery and various treatments of the kind at issue in the main proceedings. That court asks in particular whether those expressions must be understood as including any type of plastic surgery or other cosmetic treatments carried out by doctors or other authorised healthcare professionals, or whether the underlying purpose of the acts is question is decisive for that purpose.

20 In those circumstances, the Högsta förvaltningsdomstolen decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 132(1)(b) and (c) of the VAT Directive to be interpreted as meaning that the stated exemption from taxation covers services such as those at issue in the present case and which consist of:

- plastic surgery,
- cosmetic treatments?

(2) Does it affect that assessment if the surgery or treatments are carried out with the purpose of preventing or treating illnesses, physical impairments or injuries?

(3) If due account is to be taken of the purpose, can the patient's understanding of the purpose of the intervention be taken into consideration?

(4) Is it of any importance to the assessment whether the intervention is carried out by licensed medical professionals, or that such professionals decide on its purpose?'

Consideration of the questions referred

21 By its questions, which it is appropriate to examine together, the referring court asks essentially whether Article 132(1)(b) and (c) of the VAT Directive must be interpreted as meaning that the supply of services such as those at issue in the main proceedings, consisting of plastic surgery and cosmetic treatments, are exempt from VAT.

22 Thus, by its second question, that court asks more specifically whether a preventive or

therapeutic purpose for such services has any effect on the issue of whether they are exempt, which is the subject of the first question. If the answer is affirmative that court asks, by its third question, whether, in order to determine the existence of such a purpose, the subjective understanding the recipients of those services have of them must be taken into consideration. The fourth question asks what effect the fact that such services are supplied by licensed medical personnel has on the assessment to be carried out in the main proceedings.

23 With respect to those points, it must be recalled from the outset that the terms used to specify the exemptions in Article 132 of the VAT Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all goods and services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 should be construed in such a way as to deprive the exemptions of their intended effect (see by analogy, in particular, Case C-86/09 *Future Health Technologies* [2010] ECR I-5215, paragraph 30 and the case-law cited).

24 As regards medical services, it is apparent, by analogy, from the case-law on Directive 77/388 that Article 132(1)(b) and (c) of the VAT Directive, which have distinct fields of application, are intended to regulate all exemptions of medical services in the strict sense (see *Future Health Technologies*, paragraphs 26, 27 and 36 and the case-law cited). Article 132(1)(b) of that directive covers all services supplied in a hospital environment while Article 132(1)(c) thereof covers medical services provided outside such a framework, at the private address of the person providing the care, at the patient's home or at any other place (see, to that effect, Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 36, and *Future Health Technologies*, paragraph 36).

25 Accordingly, the concept of 'medical care' in Article 132(1)(b) of the VAT Directive and that of 'the provision of medical care' in Article 132(1)(c) are both intended to cover services that have as their purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders (see *Future Health Technologies*, paragraphs 37 and 38).

26 In that regard, it should be borne in mind that, whilst 'medical care' and 'the provision of medical care' must have a therapeutic aim, it does not necessarily follow that the therapeutic purpose of a service must be confined within a particularly narrow compass (see *Future Health Technologies*, paragraph 40 and the case-law cited).

27 Accordingly, it is clear from the case-law that medical services effected for the purpose of protecting, including maintaining or restoring, human health can benefit from the exemption under Article 132(1)(b) and (c) of the VAT Directive (see *Future Health Technologies*, paragraphs 41 and 42 and the case-law cited).

28 It follows, in the context of the exemption laid down in Article 132(1)(b) and (c) of the VAT Directive, that the purpose of the services such as those at issue in the main proceedings is relevant in order to determine whether those services are exempt from VAT. That exemption is intended to apply to services whose purpose is for diagnosing, treating or curing diseases or health disorders or to protect, maintain or restore human health (*Future Health Technologies*, paragraph 43).

29 Thus, services such as those at issue in the main proceedings, in so far as their purpose is to treat or provide care for persons who, as a result of an illness, injury or a congenital physical impairment, are in need of plastic surgery or other cosmetic treatment may fall within the concept of 'medical care' in Article 132(1)(b) of the VAT Directive and 'the provision of medical care' in

Article 132(1)(c) thereof respectively. However, where the surgery is for purely cosmetic reasons it cannot be covered by that concept.

30 However, the Skatteverket states, in essence, that the examination of the purpose of the operation or treatment concerned would be extremely onerous for suppliers of services and the tax authorities and raises the possibility of 'serious problems of application and definition'.

31 It is true that, in situations such as that at issue in the main proceedings, it is possible that the same taxable person carries out both exempt activities under Article 132(1)(b) or (c) of the VAT Directive and activities subject to VAT.

32 However, such a situation is specifically envisaged by that directive and is governed by Article 173 et seq. thereof. In accordance with Article 173, in the case of goods or services used by a taxable person both for transactions in respect of which VAT is deductible and for transactions in respect of which VAT is not deductible, only such proportion of the VAT as is attributable to the former transactions is to be deductible. The deductible proportion is to be determined, in accordance with Articles 174 and 175 of that directive, for all the transactions undertaken by the taxable person acting as such.

33 As far as concerns whether the subjective understanding that the recipients of services, such as those at issue in the main proceedings, have must be taken into consideration in the assessment of the purpose of a specific intervention, which is the subject of the third question, it follows from the case-law that the health problems covered by exempt transactions under Article 132(1)(b) and (c) of the VAT Directive may be psychological (see to that effect, in particular, Case C-45/01 *Dornier* [2003] ECR I-12911, paragraph 50, and Joined Cases C-443/04 and C-444/04 *Solleveld and van den Hout-van Eijnsbergen* [2006] ECR I-3617, paragraphs 16 and 24).

34 However, the subjective understanding that the person who undergoes plastic surgery or a cosmetic treatment has of it is not in itself decisive for the purpose of determining whether that intervention has a therapeutic purpose.

35 Since that is a medical assessment, it must be based on findings of a medical nature which are made by a person qualified for that purpose.

36 It follows that the fact, referred to in the fourth question, that services such as those at issue in the main proceedings are supplied or undertaken by a licensed member of the medical profession or that the purpose of such interventions is determined by such a professional, may influence the assessment of whether interventions such as those at issue in the main proceedings fall within the concepts of 'medical care' or 'medical treatment' within the meaning of Article 132(1)(b) and (c) of the VAT Directive respectively.

37 In order to give a complete answer to the questions referred, it must be recalled that, in order to determine whether services such as those at issue in the main proceedings are exempt from VAT, pursuant to Article 132(1)(b) or (c) of the VAT Directive, account must be taken of all the requirements laid down in Article 132(1)(b) or (c) and of the other relevant provisions of Title IX, Chapters 1 and 2 thereof (see by analogy, in particular, Case C-262/08 *CopyGene* [2010] ECR I-5053, paragraph 37), and not simply of the issue of whether such services fall within the concepts of 'medical care' and 'the provision of medical care' within the meaning of Article 132(1)(b) and (c) of that directive.

38 Thus, as far as concerns, in particular, the exemption laid down in Article 132(1)(b) of the VAT Directive, where appropriate, in addition to the full text of that provision, Articles 131, 133 and 134 of that directive must be taken into consideration.

39 In light of all of the foregoing considerations, the answer to the questions referred is that Article 132(1)(b) and (c) of the VAT Directive must be interpreted as meaning that:

- supplies of services such as those at issue in the main proceedings, consisting in plastic surgery and other cosmetic treatments, fall within the concepts of ‘medical care’ and ‘the provision of medical care’ within the meaning of Article 132(1)(b) and (c) where those services are intended to diagnose, treat or cure diseases or health disorders or to protect, maintain or restore human health;
- the subjective understanding that the person who undergoes plastic surgery or a cosmetic treatment has of it is not in itself decisive in order to determine whether that intervention has a therapeutic purpose;
- the fact that services such as those at issue in the main proceedings are supplied or undertaken by a licensed member of the medical profession or that the purpose of such services is determined by such a professional may influence the assessment of whether interventions such as those at issue in the main proceedings fall within the concept of ‘medical care’ or ‘the provision of medical care’ within the meaning of Article 132(1)(b) and (c) of the VAT Directive respectively;
- in order to determine whether supplies of services such as those at issue in the main proceedings are exempt from VAT pursuant to Article 132(1)(b) or (c) of the VAT Directive, all the requirements laid down in subparagraphs 1(b) or (c) thereof must be taken into account as well as the other relevant provisions in Title IX, Chapters 1 and 2 of that directive such as, as far as concerns Article 132(1)(b), Articles 131, 133 and 134 thereof.

Costs

40 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 (Third Chamber) hereby rules:

Article 132(1)(b) and (c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning:

- **supplies of services such as those at issue in the main proceedings, consisting in plastic surgery and other cosmetic treatments, fall within the concepts of ‘medical care’ and ‘the provision of medical care’ within the meaning of Article 132(1)(b) and (c) where those services are intended to diagnose, treat or cure diseases or health disorders or to protect, maintain or restore human health;**
- **the subjective understanding that the person who undergoes plastic surgery or a cosmetic treatment has of it are not in themselves decisive in order to determine whether that intervention has a therapeutic purpose;**
- **the fact that services such as those at issue in the main proceedings are supplied or undertaken by a licensed member of the medical profession or that the purpose of such services is determined by such a professional may influence the assessment of whether interventions such as those at issue in the main proceedings fall within the concept of ‘medical care’ or ‘the provision of medical care’ within the meaning of Article 132(1)(b) and**

(c) of Directive 2006/112 respectively;

– in order to determine whether supplies of services such as those at issue in the main proceedings are exempt from VAT pursuant to Article 132(1)(b) or (c) of Directive 2006/112 all the requirements laid down in subparagraphs 1(b) or (c) thereof must be taken into account as well as the other relevant provisions in Title IX, Chapters 1 and 2, of that directive such as, as far as concerns Article 132(1)(b), Articles 131, 133 and 134 thereof.

[Signatures]

* Language of the case: Swedish.