

**JUDGMENT OF THE COURT (Third Chamber)**

13 March 2014 (\*)

(Reference for a preliminary ruling — Sixth VAT Directive — Exemptions — Article 13A(1)(b) — Supply of goods — Supply of cytostatic drugs for the treatment of outpatients — Services provided by different taxable persons — Article 13A(1)(c) — Provision of medical care — Drugs prescribed by a doctor working in an independent capacity in a hospital — Closely related activities — Services ancillary to the provision of medical care — Activities physically and economically indissociable)

In Case C-366/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decision of 15 May 2012, received at the Court on 1 August 2012, in the proceedings

**Finanzamt Dortmund-West**

v

**Klinikum Dortmund gGmbH,**

THE COURT (Third Chamber),

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

Advocate General: E. Sharpston,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 13 June 2013,

after considering the observations submitted on behalf of:

- Klinikum Dortmund gGmbH, by G. Ritter, Rechtsanwältin,
- the German Government, by K. Petersen, acting as Agent,
- the European Commission, by W. Mölls and C. Soulay, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2013,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns 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), as amended by Council Directive 2005/92/EC of 12 December 2005 (OJ 2005 L 345, p. 19, ‘the Sixth Directive’).

2 The request has been made in proceedings between Klinikum Dortmund gGmbH (‘KD’) and Finanzamt Dortmund-West (tax authorities of Dortmund-West, ‘the Finanzamt’) concerning the latter’s refusal to exempt from value added tax (‘VAT’) the production and dispensing of cytostatic drugs (‘cytostatics’) in the context of cancer treatment provided within the hospital managed by KD.

## **Legal context**

### *EU law*

3 Article 5(1) of the Sixth Directive is worded as follows:

“Supply of goods” shall mean the transfer of the right to dispose of tangible property as owner.’

4 Article 6(1) of that directive provides that:

“Supply of services” shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

...’

5 Under Article 12(3)(a) of that directive:

‘The standard rate of [VAT] shall be fixed by each Member State as a percentage of the taxable amount and shall be the same for the supply of goods and for the supply of services. ...

...

Member States may also apply either one or two reduced rates. These rates shall be fixed as a percentage of the taxable amount, which may not be less than 5%, and shall apply only to supplies of the categories of goods and services specified in Annex H.

...’

6 Article 13A(1)(b) and (c) of the Sixth Directive provide as follows:

‘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 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 13A(2)(b) of that directive provides that:

‘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 [VAT].’

8 Category 3 of Annex H to that directive, containing the list of supplies of goods and services which may be subject to reduced rates of VAT, includes, inter alia, pharmaceutical products of a kind normally used for health care, prevention of diseases and treatment for medical purposes.

### *German law*

#### The Law on turnover tax 2005

9 The first sentence of point 1 of Paragraph 1(1) of the Law on turnover tax 2005 (Umsatzsteuergesetz 2005, BGBl. 2005 I, p. 386, ‘the UStG’) provides that ‘supplies of goods and other services which a trader, in the course of his business, makes for consideration within Germany’ are to be subject to VAT.

10 According to Paragraph 3(1) of the UStG, a trader’s supplies of goods are ‘supplies by which he or a third party authorised by him entitles the recipient or a third party authorised by him to dispose of goods in his own name (transfer of the power of disposal)’.

11 Paragraph 3(9) of the UStG states that other services are ‘transactions which do not constitute a supply of goods’.

12 Paragraph 4(14) of the UStG provides that the following are exempt from VAT:

‘Transactions arising from the practice of the profession of doctor, dentist, naturopath, physiotherapist or midwife or a similar professional medical activity for the purposes of Paragraph 18(1), point 1, of the [Law on income tax (Einkommensteuergesetz)], or from the practice of the profession of clinical chemist. Services provided by associations whose members belong to the professions specified in the first sentence of this paragraph to their members shall also be exempt from tax, in so far as those services are used directly for the purpose of performing the transactions exempt in accordance with the first sentence of this paragraph ...’

13 Pursuant to Paragraph 4(16)(b) of the UStG, the following are also exempt from VAT:

‘transactions closely related to ... the operation of hospitals, if ...

(b) in the case of hospitals, the conditions laid down in Paragraph 67(1) or (2) of the Tax Code are fulfilled in the previous calendar year ...’.

14 Paragraph 67 of the Tax Code (Abgabenordnung, BGBl 2002 I, p. 3866 and BGBl 2003 I, p. 61), referred to in Paragraph 4(16)(b) of the UStG, concerns activities granted tax reductions (‘Steuerbegünstigte Zwecke’), namely, activities which have a public, charitable or religious purpose. Commercial undertakings pursuing such aims are, in certain circumstances, considered to be undertakings carrying on economic activity for a particular purpose conferring entitlement to

tax benefits ('Zweckbetrieb'). Paragraph 67 of the Tax Code defines the conditions under which that scheme applies to hospitals.

15 Under Section 100 of the Guidelines on turnover tax 2005 (Umsatzsteuerrichtlinien 2005, BGBl. 2004 I, special edition 3/2004), the Guidelines provide, in particular, concerning 'transactions closely related' to hospital and medical care, as follows:

'(1) Transactions that, in accordance with practice, are characteristic and indispensable, are performed regularly and generally in the course of day-to-day operation and are directly or indirectly related thereto shall be deemed to be closely related to the operation of establishments referred to in Paragraph 4(16) of the UStG ... The essential purpose of those transactions must not be to obtain additional income for those establishments through activities performed in direct competition with those of commercial enterprises liable for VAT. Consequently, such services are no longer exempt from the tax under Paragraph 4(16) of the UStG, given that a comparable service is liable to tax under Paragraph 4(14) of the UStG.

...

(3) The following, in particular, shall be excluded from closely linked transactions:

...

3. the provision of drugs by a hospital pharmacy to an institution other than that which manages the hospital ... and the provision for consideration of drugs to the hospital's approved outpatient services, to polyclinics, to institutions for the treatment of outpatients, to socio-paediatric centres — provided that they do not involve, in those cases, internal transactions not liable to tax within the institution managing the hospital pharmacy at issue — and to public pharmacies.

4. the dispensing of drugs to patients by authorised hospital outpatient services, intended to be used directly during outpatient care, and the dispensing of drugs by hospital pharmacies to patients in the course of outpatient care in hospital.

...'

#### The Social Security Code

16 Paragraph 116 of Book V of the Social Security Code ('the SGB V') provides that:

'Hospital doctors who have successfully completed further training may be authorised by the Accreditation Committee (Paragraph 96) to provide medical care under the statutory sickness insurance scheme ...'

17 Paragraph 116a of SGB V provides as follows:

'The Accreditation Committee may, at their request, authorise accredited hospitals specialising in the relevant field to deploy their doctors in the provision of medical care under the statutory sickness insurance scheme in the planning areas in which the Regional Committee for Doctors and Health Insurance Funds [(Landesausschuss der Ärzte und Krankenkassen)] has identified a shortfall in healthcare provision, in so far as and for as long as this is necessary to cover the shortfall.'

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

18 KD is a non-profit-making limited liability company which manages a hospital. During 2005

and 2006, under Paragraph 116a of the SGB V, it held accreditation authorising it to provide outpatient care as well as in-patient care. Doctors employed by KD who provided outpatient care within that hospital worked under an individual authorisation granted under Paragraph 116 of the SGB V.

19 During 2005 and 2006, that hospital admitted patients suffering from cancer who were treated with chemotherapy. The cytostatics that were administered to those patients were prepared individually for them, on the basis of a medical prescription, within the hospital pharmacy. Where the cytostatics were used for in-patient hospital and medical care on the hospital premises, it is not contested that their supply was exempt from VAT.

20 During those same years, KD was of the opinion that the use of cytostatics prepared in its hospital pharmacy was also exempt from VAT where outpatient care was provided by doctors working in an independent capacity in the hospital managed by it. In contrast, the Finanzamt took the view that the dispensing of drugs for consideration in the course of outpatient care for cancer patients was subject to VAT from 2005, the date that Section 100(3) of the 2005 Guidelines on turnover tax, an administrative provision not binding on the courts, entered into force. Consequently, the Finanzamt amended KD's VAT assessments by making the dispensing of those drugs prepared within the pharmacy of that hospital subject to VAT but granting KD the right to deduct input tax.

21 KD's challenge lodged against those VAT assessments was unsuccessful. In contrast, the Finanzgericht upheld its action, which led the Finanzamt to lodge an appeal on a point of law before the Bundesfinanzhof against the decision of the Finanzgericht.

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

'(1) Must a closely related activity be a service in accordance with Article 6(1) of [the Sixth Directive ...]?

(2) If question 1 is to be answered in the negative, is an activity closely related to hospital or medical care only if it was performed by the same taxable person as also provides the hospital or medical care?

(3) If question 2 is to be answered in the negative, is an activity closely related even if the care is exempt from tax not under Article 13A(1)(b) of the Sixth ... Directive ... but under Article 13A(1)(c) of that directive?'

### **Consideration of the questions referred**

#### *The third question*

23 By its third question, which should be considered first, the referring court asks, in essence, whether Article 13A(1)(c) of the Sixth Directive must be interpreted as meaning that a supply of goods, such as the cytostatics at issue in the main proceedings, prescribed in the course of outpatient cancer treatment by doctors acting in an independent capacity within a hospital, may be exempt from VAT as an activity closely linked to the provision of medical care.

24 Applied to the case in the main proceedings, the question raised seeks to ascertain whether the supply of cytostatics by KD in the course of outpatient cancer treatment may be exempt from VAT as an activity closely linked to the provision of medical care, when those drugs are provided by doctors acting in an independent capacity within the hospital premises managed by KD.

25 In that regard, it is apparent from the file before the Court and the information provided by the parties during the hearing that the care provided by the doctors in question in the main proceedings, acting independently of that hospital but within it, is itself exempt from VAT under Article 13A(1)(c) of the Sixth Directive.

26 It should be borne in mind at the outset that, as the German Government maintains, the exemptions envisaged in 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 (see, *inter alia*, Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 20; Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 28; and Case C-45/01 *Dornier* [2003] ECR I-12911, paragraph 42). However, the interpretation of the terms used in that provision must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT (see *Kügler*, paragraph 29, and *Dornier*, paragraph 42).

27 In addition, that requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 13 should be construed in such a way as to deprive the exemptions of their intended effect (see by analogy, *inter alia*, Case C-86/09 *Future Health Technologies* [2010] ECR I-5215, paragraph 30 and the case-law cited).

28 Thus it is apparent from the case-law of the Court that the objective of reducing the cost of medical care and making that care more accessible to individuals is common to both the exemption provided for in Article 13A(1)(b) of the Sixth Directive and that in letter (c) of the same provision (see Case C-76/99 *Commission v France* [2001] ECR I-249, paragraph 23; *Kügler*, paragraph 29; and *Dornier*, paragraph 43). It must also be borne in mind that the principle of fiscal neutrality precludes, *inter alia*, economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned (see *Kügler*, paragraph 30, and *Dornier*, paragraph 44).

29 Furthermore, the concepts of 'medical care' in Article 13A(1)(b) of the Sixth Directive and of 'the provision of medical care' in Article 13A(1)(c) of that directive are both intended to cover services that have as their aim the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders (see *Dornier*, paragraph 48 and the case-law cited; Case C-106/05 *L.u.P.* [2006] ECR I-5123, paragraph 27; and Case C-262/08 *CopyGene* [2010] ECR I-5053, paragraph 28).

30 It follows that medical services effected for the purpose of protecting, of maintaining or of restoring human health benefit from the exemption under Article 13A(1)(b) and (c) of the Sixth Directive (see, to that effect, Case C-212/01 *Unterpertinger* [2003] ECR I-13859, paragraphs 40 and 41; Case C-307/01 *D'Ambrumenil and Dispute Resolution Services* [2003] ECR I-13989, paragraphs 58 and 59; and *L.u.P.*, paragraph 29).

31 Therefore, although the provisions of Article 13A(1)(b) and (c) of the Sixth Directive have separate fields of application, the scope of those provisions is intended to regulate all exemptions of medical services in the strict sense (see *Kügler*, paragraph 36; *L.u.P.*, paragraph 26; and *CopyGene*, paragraph 27).

32 However, contrary to the wording of Article 13A(1)(b) of the Sixth Directive, the wording of Article 13A(1)(c) thereof does not contain any reference to activities closely linked to the provision of medical care, despite the fact that that provision immediately follows that of Article 13A(1)(b). It must therefore be concluded that, in principle, that article does not refer to activities closely linked to the provision of medical care and that that concept is not relevant to the interpretation of Article 13A(1)(c) of the Sixth Directive.

33 As regards the possibility of exempting a supply of services under that latter provision, the Court has held that, apart from minor provisions of goods which are strictly necessary at the time when the care is provided, the supply of drugs and other goods is physically and economically dissociable from the provision of the service and cannot therefore be exempted under Article 13A(1)(c) of the Sixth Directive (see, to that effect, Case 353/85 *Commission v United Kingdom* [1988] ECR 817, paragraph 33).

34 It is clear from this that unless it is strictly necessary at the time when the care is provided, the supply of drugs and other goods cannot benefit from the exemption laid down in Article 13A(1)(c) of the Sixth Directive.

35 In that regard, as the Advocate General noted in points 46 and 47 of her Opinion, it cannot be denied that, in circumstances such as the case in the main proceedings, the provision of medical care in the exercise of the medical and paramedical professions, within the meaning of Article 13A(1)(c) of the Sixth Directive, and the supply of cytostatics, are part of a therapeutic continuum. The supply of drugs, such as the cytostatics at issue in the main proceedings, is in fact essential at the time of providing the care during the outpatient treatment of cancer, given that otherwise, such a provision of care would have no purpose.

36 Nevertheless, despite that therapeutic continuum, the interested parties confirmed during the hearing that the treatment at issue in the case in the main proceedings comprises a series of activities and steps, which, although interrelated, are individually distinct. As the Advocate General noted at points 48 and 49 of her Opinion, the patient appears to receive more than one supply, namely, first, the medical care from the doctor and healthcare staff, and second, drugs from the hospital pharmacy managed by KD, which prevents their being considered indissociable, physically and economically.

37 However, it is not clear from the information provided to the Court whether, in the case in the main proceedings, the dispensing of drugs may be considered to be physically and economically indissociable from the provision of care in the context of that treatment. Such a finding would require a detailed assessment of the therapeutic continuum at issue. From that point of view, it is for the referring court, which alone is competent to assess the facts, to make the necessary determinations in that regard.

38 Subject to those determinations, the dispensing of cytostatic drugs in circumstances such as those at issue in the case in the main proceedings is not liable to be considered to be exempt from VAT.

39 That conclusion is supported by the fact that pharmaceutical products are themselves included in the list of supplies of goods and services which may be subject to reduced rates of VAT, listed in Annex H to the Sixth Directive and are accordingly, in principle, subject to a separate VAT scheme.

40 Contrary to what KD claims, the principle of fiscal neutrality cannot alter that conclusion. As the Advocate General noted at point 53 of her Opinion, that principle cannot extend the scope of

an exemption in the absence of clear wording to that effect. That principle is not a rule of primary law which can condition the validity of an exemption, but a principle of interpretation to be applied concurrently with the principle of strict interpretation of exemptions (see Case C-44/11 *Deutsche Bank* [2012] ECR, paragraph 45).

41 Therefore the answer to the third question raised is that a supply of goods, such as the cytostatic drugs at issue in the main proceedings, prescribed in the course of outpatient cancer treatment by doctors working in an independent capacity in a hospital may not be exempt from VAT under Article 13A(1)(c) of the Sixth Directive, unless that supply is physically and economically indissociable from the principal supply of medical care, which it is for the referring court to determine.

#### *The first and second questions*

42 In view of the answer given by the Court to the third question, it is unnecessary to answer the first two questions.

#### **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 (Third Chamber) hereby rules:

**A supply of goods, such as the cytostatic drugs at issue in the main proceedings, prescribed in the course of outpatient cancer treatment by doctors working in an independent capacity in a hospital, may not be exempt from value added tax under Article 13A(1)(c) of the 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, as amended by Council Directive 2005/92/EC of 12 December 2005, unless that supply is physically and economically indissociable from the principal supply of medical care, which it is for the referring court to determine.**

[Signatures]

\* Language of the case: German.