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Opinion of Mr Advocate General Saggio delivered on 27 January 2000. - D. v W.. - Reference for a preliminary ruling: Landesgericht St. Pölten - Austria. - Sixth VAT Directive - Exemption for medical care provided in the exercise of the medical and paramedical professions - Supply by a doctor approved as a court expert of an opinion in a paternity dispute. - Case C-384/98.

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Opinion of the Advocate-General

1 In this preliminary reference, the Landesgericht St. Pölten (Austria) asks the Court whether a genetic investigation carried out by a court-appointed medical expert in the context of a paternity dispute falls within the scope of the exemption provided for by 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 (hereinafter `the Sixth Directive') (1) and, if so, whether the beneficiary of that exemption is entitled to waive exemption.

Community and national law

2 Article 13A(1) of the Sixth Directive lists the services and activities `in the public interest' which Member States must exempt, under conditions which they are to lay down, from value added tax (hereinafter `VAT'). These include, under Article 13A(1)(c), `the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned'.

3 In Austria, Paragraph 6(1) of the Umsatzsteuergesetz 1994 (Law on Turnover Taxes, hereinafter `the UStG') (2) provides: `the following turnover falling within Paragraph 1, first and second lines, shall be exempt from tax: ... turnover from activity as a doctor' (point 19) and `transactions of small undertakings, namely undertakings resident or established in Austria whose transactions do not exceed ATS 300 000 in the period of assessment on the basis of Paragraph 1(1), first and second lines' (point 27). Paragraph 6(3) of the UStG provides: `an undertaking whose turnover is exempt from tax under Paragraph 6(1)(27) may waive, until the decision is definitive, application of Paragraph 6(1)(27) by a declaration in writing to the tax authorities'. Court-appointed experts' fees are fixed by the court to which the expert provides his services. That court orders the payment of experts' fees out of money paid into court on account of costs by one of the parties or, failing that, from Federal Treasury funds.

Facts, procedure and the questions referred for a preliminary ruling

4 In the main proceedings the plaintiff sought to establish that she was the daughter of the defendant. The judge hearing the case in the Bezirksgericht St. Pölten (District Court, St. Pölten) appointed Dr Rosenmayr as a medical expert with a remit to establish, on the basis of a genetic

investigation, whether the applicant could be the daughter of the defendant. In respect of that technical investigation, Dr Rosenmayr claimed, in addition to her fee, (3) VAT in the sum of ATS 14 108.60, having opted for taxation. (4) Dr Rosenmayr asserts that it was only the payment of VAT on her fee that enabled her to deduct VAT which she had had to pay on purchasing the materials necessary for her analyses and on remunerating her assistants. By order of 29 May 1998, the Bezirksgericht paid Dr Rosenmayr ATS 84 653, covering both her fee and the VAT. This sum was paid out of public funds. The auditor of the Bundesschatz (Federal Treasury) (5) initiated proceedings against that order before the Landesgericht St. Pölten, arguing that the exemption provided for by Paragraph 6(1)(19) of the UStG relating to medical services must also be applied to the professional fees of medical experts. Consequently, the auditor asked for the contested order to be amended to exclude the amount of VAT from the total sum paid.

5 Those were the circumstances in which the Landesgericht St. Pölten decided to refer the following questions to the Court:

`(1) Is 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 to be interpreted as meaning that the exemption from turnover tax laid down by that provision extends also to medical services which a doctor in his capacity as a court expert provides on the instructions of the court, in particular by genetic investigations in the context of a paternity dispute?

(2) If Question 1 is answered in the affirmative: Does that provision of the directive preclude application of a provision of national law which, under certain conditions, allows doctors to waive the said exemption from turnover tax?'

Admissibility

6 As a preliminary point, the Austrian Government mentions the judicial authority of the body making the reference for a preliminary ruling. In this connection, it states that, according to Austrian law, the measure by which court-appointed experts' fees are paid is, as a rule, inextricably linked with the final decision in the principal proceeding (being, in the present case, the proceedings to establish paternity). Fees must necessarily be paid before the court hands down final judgment ruling, not only on the merits, but also as to which party must pay the costs of the proceedings including, in particular, any costs relating to any technical investigations. Accordingly, in the instant case, there can be no doubt that the body making the reference can be regarded as a `court or tribunal' within the meaning of Article 177 of the EC Treaty (now Article 234 EC) and that the reference by the Landesgericht St. Pölten is therefore admissible.

The first question

7 By its first question the national court asks whether the exemption for medical care provided in the exercise of the medical and paramedical professions laid down in Article 13A(1)(c) of the Sixth Directive also covers services provided by a doctor acting as a court-appointed expert, such as genetic investigations designed to establish paternity.

Arguments of the parties

8 All of the governments which have intervened propose that the first question be answered in the affirmative. The Austrian Government observes that the medical services which gave rise to the dispute in the main proceedings are different from normal medical services in two respects: firstly, the expert in this case provided her services on the instructions of the court, rather than in the context of a contractual relationship as is normally the case; secondly, her work was limited to establishing a technical fact, pure and simple, and had no connection with the provision of medical care or treatment. In relation to the first point in particular, the Austrian Government also submits that the fact that an expert is instructed by a court does not alter in any way the substance of the

services he provides and that, consequently, there is no reason to treat such services any differently from ordinary medical services or to make them subject to different and less favourable tax treatment. As far as the second point is concerned, namely the absence of any functional connection between providing expert opinion and curing sickness, the Austrian Government maintains that the directive should be interpreted as meaning that investigatory work done by an expert at the request of a court (such as the conduct of laboratory tests) which is necessary for resolving a dispute should also be regarded as medical care for the purpose of applying the exemption from VAT. (6) The fact that such services are not connected with medical treatment is irrelevant in this specific context.

9 Similarly, and again with reference to the first question, the Netherlands Government maintains that medical work requested by a court should be regarded in the same way as the provision of medical care and thus also attract exemption from VAT, because the concept of medical care covers all activities performed in the exercise of the medical and paramedical professions, and thus also experts' investigations, because work carried out by a doctor acting as a court-appointed expert is, like the provision of medical care, in the general interest and therefore worthy of more favourable tax treatment, and finally because the work of a court expert cannot be characterised differently from that of an expert appointed by private parties simply because it came about by the decision of a judge and not by a contract. Finally, the Netherlands Government stresses that to exclude the work of a court-appointed expert from the scope of the exemption relating to medical services referred to in Article 13 of the Sixth Directive would be detrimental to free competition, which is the objective pursued by the harmonisation of laws relating to VAT.

10 The United Kingdom Government approaches the first question in two ways. It firstly queries whether paternity examinations fall within the scope of `medical care' and expresses the opinion that medical care ought to cover every type of activity that requires medical expertise, the reason being that Article 13 of the Sixth Directive gives a very broad definition of the work carried out in the medical profession. On that premiss, it asserts that medical care includes not only patient care but also all activities in areas which are not closely connected with protecting or restoring health, such as the preparation of reports on the general state of health of patients, family planning, sterilisation and cosmetic surgery. The common factor in all these activities is that they require particular medical knowledge and skill. The United Kingdom Government reinforces that point by asserting that referring to the purpose to which services are directed in order to identify which of them should not be exempt would be to use an ambiguous criterion that would be difficult to apply. (7) For example, a person could be given the same blood test either for the purpose of identifying an illness or in the context of a paternity dispute; the medical service could be identical in both cases although the applicable tax treatment would be different.

In addition, the United Kingdom Government emphasises that, whilst the exemptions laid down by the Sixth Directive must be construed narrowly inasmuch as they create exceptions to the general applicability of VAT, it is also true that those exceptions ought not to be construed in such a way as to limit their scope, unless, of course, there is an express indication to that effect.

The United Kingdom Government also argues, in support of its view that the exemption applies generally, that any other interpretation would also be incompatible with the need for tax exemptions to apply simply and with certainty. This requirement is mentioned in the introductory part of Article 13A(1) of the directive where it is expressly stated that Member States shall exempt certain activities `under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions ...'. It would not, in fact, be compatible with the objective of simplicity (straightforwardness) if doctors were obliged to apply different VAT schemes according to the different activities which they may be called upon to carry out in the exercise of their profession.

Secondly, the United Kingdom Government queries whether any relevance should be attached to the fact that it is a public authority that commissions the medical investigatory work and maintains that the exemption covers all forms of medical work and that the status, public or private, of the party commissioning the work, having no bearing on the nature of the activity, cannot be taken as a criterion for identifying possible exceptions to the general application of the exemption.

11 Unlike the intervening States, the Commission maintains that the first question should be answered in the negative. It reaches this conclusion on the basis of the assumption that the exemption at issue concerns exclusively medical services which consist in providing individuals with medical care or medical treatment. Investigations intended solely to establish paternity do not fall within that description and consequently cannot benefit from exemption from VAT.

Next, the Commission observes that the work done by a doctor appointed to produce a medical expert's report is no different from that done by experts in other professions (accountants, engineers or psychologists), which certainly is not exempt from VAT. In other words, the reasons which justify the levying of VAT on the fees of other experts must necessarily also apply to the fees of doctors where they act as experts.

According to the Commission, in assessing the scope of the exemption, the fact should not be overlooked that a fundamental principle of the Sixth Directive is that all supplies of goods and services for consideration are subject to VAT. (8) The fact that services provided by a doctor acting as a court-appointed expert are in the general interest, like the provision of medical care, cannot lead to the application of the exemption to experts' work because the general interest is not the same in the two cases. In the first it is linked to the arguments of the parties to legal proceedings; in the second to the protection of people's health.

Lastly, the Commission emphasises that the exemptions laid down by the directive are exceptions to the general principle set out in Article 2, mentioned above, and thus must necessarily be interpreted narrowly.

Substance

12 In order to answer the question under consideration it is necessary first to establish whether genetic tests fall within the concept of `the provision of medical care in the exercise of the medical and paramedical professions' used in Article 13A(1)(c) of the Sixth Directive. Only if that question is answered in the affirmative shall I proceed to consider whether the exemption must also be applied where, as in the present case, the expert provides his professional services on the instructions of a judicial authority or court.

13 As regards the first aspect, namely whether genetic tests may be included within the concept of medical care as defined in the Sixth Directive, I would point out that Article 13 of the directive refers to the drawing up of `a common list of exemptions ... so that the Communities' own resources may be collected in a uniform manner in all the Member States'. (9) The exemption on which the present case turns is included amongst the exemptions designed to reduce the cost of certain activities which are in the public interest. (10) These are specific activities with purposes that are of benefit to society (the postal service, children's education, school education, social assistance, etc.), activities of organisations with aims of a political, trade-union or religious nature, as well as services provided by doctors or paramedics such as dental technicians. (11)

14 The Court of Justice has already had occasion to consider the exemption in question several times. Beginning with its decision in Stichting Uitvoering Financiële Acties, (12) it has, in general terms, repeatedly held that `the terms used to specify the exemptions envisaged by Article 13 of the Sixth Directive are to be interpreted strictly since they constitute exceptions to the general principle that turnover tax is levied on all services supplied for consideration by a taxable person'.

The Court has also stated that exemptions cannot be construed broadly in the absence of `factors relating to interpretation' which make it possible to go beyond the letter of the provisions laying down the exemptions. (13)

Furthermore, in two other judgments the Court has considered the very exemption laid down by Article 13A(1)(c), upon which the present case turns, defining its meaning and scope. In Commission v Italy, (14) the Court held that the exemption for medical services must be understood in the sense that it covers only `care administered "to persons" and that that limitation unambiguously excludes care administered to animals from the scope of Article 13A(1)(c)'. In Commission v United Kingdom, the Court held that it follows from the position of the provision in question, that is to say `directly following the indent concerning hospital care' (indent (b)) `and from its context, that the services involved are provided outside hospitals and similar establishments and within the framework of a confidential relationship between the patient and the person providing the care'. (15) On that premiss, the Court held that the exemption for medical care laid down in indent (c), with the exception of minor provisions of goods which are inextricably linked to the medical care, did not cover the supply of medicines and other goods, such as corrective spectacles prescribed by a doctor or by another authorised person, which is physically and economically dissociable from the provision of the service. (16)

15 What emerges most clearly from the case-law cited above is that it is possible to limit the exemption for medical care to services provided by doctors to persons to the exclusion of supplies of medicines or other goods (unless the supply of goods is inextricably linked with the service provided). Having said that, in order to answer the first question, it remains to be established whether, as the Commission maintains, medical services which are not linked to the prevention, diagnosis or treatment of illness must also be exempted. Falling within this category are genetic tests designed solely to establish paternity, which are the express concern of the first question of the Austrian court.

16 The literal wording of the provision gives it to be understood that the exemption does not cover this last category of services. With the exception of the Italian version which uses the broad expression `prestazioni mediche' (or medical services), all of the other versions, albeit using different words, refer in a quite explicit way exclusively to the provision of services in relation to the health of persons. Thus, the German version, which refers to `Heilbehandlungen' (17) (therapeutic treatment), and the French version, which uses the expression `prestations de soins a la personne' (providing care to persons), expressly refer to the provision of medical help to individuals. Furthermore, expressions having the same meaning are to be found in the English, Danish, Dutch, Greek, Finnish, Swedish, (18) Spanish and Portuguese versions. (19) The Italian version is different from all the others by the generic formulation (`prestazioni mediche') which it employs, a formula of words which, however, precisely because of its general nature, does not preclude a narrow interpretation of the exemption. (20)

Next, if one considers the reasons why the provision of medical care is exempt from VAT, the references to care of the person which feature in the provision at issue make it fairly clear that the exemption is justified by the need to reduce medical costs and thus to promote access to health-care. Were a different approach to be taken, if, in other words, the exemption were to be considered applicable to all professional activities carried out by doctors, the scope of application of the provision would broaden in favour of activities which have no connection with the health of human beings and quite different situations and interests would be treated in the same way without good reason. As the legal representative of the United Kingdom Government rightly observes, the interest of protecting the health of persons is one thing, that of ensuring the technical assistance of doctors to a court in the context of a specific dispute is another. On close consideration, the latter is no different from the technical advice of professionals who operate in areas other than medicine, such as engineers, accountants and psychologists. It would therefore be unjust to apply the exemption to the expert evidence of doctors and not to the analogous

activities of other professionals. The exemptions are exceptions to the rule that VAT applies generally and they must therefore be interpreted narrowly.

Furthermore, it should be remembered that the case-law of the Court of Justice provides precise dicta in favour of a restrictive interpretation of the exemption. In Commission v United Kingdom, cited above, in which the scope of the exemption provided for by Article 13A(1)(c) was under consideration, the Court in fact held (21) that exempt services were those which were provided `within the framework of a confidential relationship between the patient and the person providing the care', thereby implying that other professional services proper to doctors, such as medical/legal tests, are not covered by the exemption to the extent that they are provided outside the scope of that relationship and do not involve the provision of medical care to persons.

I do not think that that conclusion can be influenced by the fact that, because the exemption is centred on the therapeutic function of the medical care, restrictive interpretation of the exemption requires the nature of the service to be established on a case by case basis for the purpose of levying VAT. It is true that, in fiscal matters, the existence of clear and objective criteria for the levying or non-levying of tax must be taken into account and it is also true that this requirement is reflected in the introductory part of Article 13A(1) which emphasises the need for `correct and straightforward application of such exemptions'. It does not, however, seem to me that restrictive interpretation of the exemption gives rise to practical difficulties if one takes the provision of medical care to persons as the criterion for distinguishing exempt medical services from all of the other services provided by doctors in the exercise of their profession. In any event, any such difficulty cannot result in extending the exemption beyond the limits within which the Community legislature has manifestly set it: it should be remembered that the general principle underlying the Sixth Directive is that VAT applies generally and this principle should be observed unless the persons concerned show that there are specific reasons justifying a broad interpretation of the exemption. The provision laying down the exemption, it should be recalled, creates an exception and so, in the absence of specific indications to the contrary, it must be construed narrowly.

Next, as regards that part of the first question which specifically mentions the fact that the professional providing the medical services was acting as a court-appointed expert as a possible ground for application of the exemption, once it has been decided that genetic tests designed to establish paternity, to which the question explicitly refers, do not fall within the category of medical care to persons, it becomes meaningless to express a view on whether or not the public nature of the body which commissions the expert has any bearing on the application of the exemption. In any event, I do not think that this factor can have any influence in establishing the scope of the exemption. In that regard, only the nature and purpose of the service are decisive, as I have already explained at some length.

17 To summarise, I take the view that the exemption provided for by Article 13A(1)(c) of the Sixth Directive must be interpreted as meaning that it does not cover medical services consisting in genetic tests carried out by a doctor acting as court-appointed expert instructed to conduct the tests necessary to establish paternity.

The second question

18 It may be recalled that, by its second question, the Austrian court asks whether Article 13A(1)(c) of the Sixth Directive precludes application of a provision of national law which allows doctors to waive the exemption provided for by that provision.

I would begin by saying that, having answered the first question in the negative, I shall express a view on the second only in the alternative, that is to say, in the event that the Court answers the first question in the affirmative.

Arguments of the parties

19 The Austrian Government maintains that the second question is devoid of purpose and therefore inadmissible because a national measure, namely a ministerial circular dated 9 January 1998, has exempted from VAT experts' reports in matters of genetics, including those intended to establish paternity, (22) with the result that, at present, there is no possibility of choosing between exemption and taxation. The Austrian Government also points up the fact that there is no provision for any such election in the relevant Community texts either, and that assertion is also made by the Netherlands and United Kingdom Governments as well as the Commission.

The United Kingdom Government argues, in particular, that the exemptions laid down by the directive are mandatory in all of the Member States and that only specific Community provisions, which in any event do not exist in this case, are capable of authorising derogations and, in particular, permitting the exemption under Article 13A(1)(c) to be waived. The United Kingdom Government also observes that, in this instance, to give the Member States a choice (or to allow interested parties a choice) as to whether or not the tax should be applied would be incompatible with the objective of the Sixth Directive, inasmuch as one of its purposes is to prevent consumers from paying VAT on exempt services.

Admissibility

20 The plea of inadmissibility put forward by the Austrian Government on the ground that the question is devoid of purpose is unfounded. It is well known that it is a matter for the national court to define the scope of the national provisions in point and to assess, in light of the particular circumstances of the case, whether it needs to refer a question for a preliminary ruling in order to give its judgment. It follows that there is no justification for asserting that a given question submitted for a preliminary ruling has become devoid of purpose simply because one particular national provision has been replaced by another. (23)

Substance

21 As regards the substance of the question, I take the view that the exemptions contained in Article 13A are mandatory in the sense that the Member States are obliged to incorporate them in their respective legal systems. The literal wording of the provision confirms that interpretation. In the first part it in fact provides that: `... 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 ...'. If one then looks at the purpose of the provision, further confirmation of that interpretation is to be found. Clearly, if each Member State were allowed the option of quite independently introducing derogations from the exemptions, the contribution of each Member State to Community revenues could thereby unjustly be thrown out of balance. In this context, it is significant that the 11th recital in the preamble to the Sixth Directive states that `a common list of exemptions should be drawn up so that the Communities' own resources may be collected in a uniform manner in all the Member States'. There can therefore be no derogation from the exemptions at issue unless the Community legislature expressly provides for that possibility.

22 The answer to the second question must therefore be that the mandatory nature of the exemptions precludes the application of a national provision which, under certain conditions, allows doctors to waive the exemption laid down by the provision in question.

Conclusion

23 In the light of all the foregoing considerations, I propose that the Court answer the questions put by the Landesgericht St. Pölten as follows:

(1) Article 13A(1)(c) of the Sixth Directive is to be interpreted as meaning that the exemption laid down therein does not apply to genetic tests carried out by a doctor acting in the capacity of expert appointed by a court in proceedings for establishing paternity.

(2) The exemption laid down by Article 13A(1)(c) precludes the application of a national provision which, under certain conditions, allows doctors to waive the exemption laid down by that provision.

(1) - OJ 1977 L 145, p. 1.

(2) - BGBl. No 633.

(3) - The level of experts' fees in Austria is governed by the Gebuhrenanspruchsgesetz of 1975.

(4) - Dr Rosenmayr asserts that whilst, in a circular dated 9 January 1998, the Minister for Finance had maintained that any work done by a medical expert fell, in principle, within the exemption provided for by Paragraph 6(1)(19) of the UStG, this did not preclude a medical expert from opting voluntarily for the payment of VAT or from making an associated deduction of input tax. She bases her argument on Paragraph 6(1)(27) and Paragraph 6(3) of the UstG.

(5) - The auditors are authorised to bring an action against court orders for the payment of fees.

(6) - The stance of the Austrian authorities on the question has in fact varied. A circular from the Federal Ministry of Finance dated 9 January 1998 specifically excluded experts' reports concerning genetics from the scope of medical services exempt from VAT. However, a second circular amended the earlier one, stating that this specific work was exempt pursuant to Article 6(1)(19) of the UStG.

(7) - The United Kingdom Government also stressed during the oral procedure that if the Community legislature had really wanted to define exempt activities by reference to their purpose it would have expressly so provided. The Sixth Directive adopts that approach for the activities referred to in Article 13A(1)(k) and (p), specifically for the secondment of personnel by religious or philosophical institutions for purposes of social welfare and social security, the protection of children, education and spiritual welfare.

(8) - See Article 2(1) of the directive.

(9) - Eleventh recital in the preamble to the Sixth Directive. The content of this recital implies a wish to ensure that the scope of application of the exemptions does not differ from one Member State to another.

(10) - Article 13A in fact bears the heading `Exemptions for certain activities in the public interest'.

(11) - The following are also exempted under Article 13A(1)(d): supplies of human organs, blood and milk.

(12) - Case 348/87 Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën [1989] ECR 1737, paragraph 13. See also the judgment in Case C-2/95 SDC [1997] ECR I-3017, paragraphs 20 and 21.

(13) - See Case 107/84 Commission v Germany [1985] ECR 2655, paragraph 20.

(14) - Case 122/87 Commission v Italy [1988] ECR 2685, paragraph 9.

(15) - Case 353/85 Commission v United Kingdom [1988] ECR 817, paragraph 33.

(16) - Commission v United Kingdom, cited above, paragraphs 33, 34 and 35.

(17) - More precisely `Heilbehandlungen im Bereich der Humanmedizin' (therapeutic treatment in the field of human medicine).

(18) - The English version uses the following formula of words: `the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned'. The Danish version uses the term: `behandling af personer', the Dutch version: `gezondheidskundige verzorging van de mens', the Greek version: `iatrikis perithalpsios', the Finnish version: `lääketieteellisen hoidon antaminen henkilölle' and the Swedish version: `sjukvårdande behandling'.

(19) - Respectively: `asistencia a personas fisicas' and `prestaçòes de servicios de assistencia'.

(20) - Case 173/88 Henriksen [1989] ECR 2763, paragraphs 10 and 11, and SDC, cited above, paragraph 22. In the latter judgment, this approach was followed in the interpretation of Article 13B(d)(3) of the Sixth Directive, which provides for VAT exemption for various banking transactions. More generally, in Case C-449/93 Rockfon [1995] ECR I-4291, paragraph 28, the Court, referring to the judgment in Case 30/77 Bouchereau [1977] ECR 1999, paragraph 14, held that, where there was divergence between the various language versions, `the provision in question must ... be interpreted by reference to the purpose and general scheme of the rules of which it forms part'.

(21) - See paragraph 33.

(22) - The circular in question replaced a previous circular dated 4 December 1996 which excluded genetic tests from the list of exempt activities.

(23) - Case C-194/94 CIA Security International [1996] ECR I-2201, paragraph 20.