Case C-228/20

Request for a preliminary ruling

Date lodged:

2 June 2020

Referring court:

Niedersächsisches Finanzgericht (Germany)

Date of the decision to refer:

2 March 2020

Applicant:

I GmbH

Defendant:

Finanzamt (Tax Office) H

Niedersächsisches Finanzgericht

(Finance Court, Lower Saxony)

Order

[…]

In the case

I GmbH, […]

– applicant –

[…]

v

Finanzamt H

– defendant –

concerning turnover tax for the period 2009 to 2012

the 5th Chamber of the Niedersächsische Finanzgericht, on 2 March 2020, made the following order:

> I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:
>
> 1. Is Paragraph 4, point 14(b), of the Umsatzsteuergesetz (Law on Turnover Tax) (UStG) compatible with Article 132(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'), in so far as hospitals which are not bodies governed by public law qualify for exemption from tax on condition that they are approved within the meaning of Paragraph 108 of the Sozialgesetzbuch (SGB) V (Social Security Code, Book V)? **[Or. 2]**
>
> 2. If Question 1 is to be answered in the negative: When do hospitals governed by private law provide hospital care under social conditions comparable with those applicable to bodies governed by public law within the meaning of Article 132(1)(b) of the VAT Directive?
>
> II. The proceedings are staid until such time as the Court of Justice of the European Union gives a ruling.

Grounds

I.

The issue is whether turnover from the operation of a hospital is exempt from tax under Paragraph 4, point 14, of the UStG and Article 132(1)(b) of the VAT Directive.

The applicant, a company incorporated in the form of a GmbH (private limited liability company) was established in … . The founding member and medical director, Professor …, who initially held a 51% share in the company, now has a 13.33% share in the applicant following a capital increase in … (and thus in the years at issue, 2009 to 2012). Further shareholders in the years at issue were K GmbH, B GmbH, Beteiligungskapital H GmbH & Co. KG und, initially, … AG, whose shareholding in the applicant company was taken over by K GmbH. Management of the business is entrusted to K GmbH.

The object of the business, according to Paragraph 2 of the memorandum and articles of association, is the planning, establishment and operation of a … in … in which all areas of … neurology … are represented. The applicant provides hospital services within the meaning of Paragraph 2 of the Bundespflegesatzverordnung (Federal Regulation on Hospital Fees) (BPflV) and Paragraph 2 of the Krankenhausfinanzierungsgesetz (Law on the Financing of Hospitals) (KHG). Its operation is State-approved within the meaning of

Paragraph 30 of the Gewerbeordnung (Regulation on Trade, Commerce and Industry) (GewO). However, because it was not included in the hospital requirements plan for the *Land* of Niedersachsen (Lower Saxony), the applicant is not a plan-listed hospital within the meaning of Paragraph 108, point 2, of the SGB V. Applications to be so listed which the applicant made on 8 April 1999 and 11 July 2008 have not as yet been decided upon. What is more, the applicant is not a hospital contracted to supply care to a statutory health insurance fund (a 'contracted hospital' within the meaning of Paragraph 108, point 3, of the SGB V) and it is not one of the establishments funded under the KHG. It therefore has no care supply contracts with the statutory health insurance funds (in their current or previous manifestations in Germany).

The applicant's patients consist of self-funding persons who pay for their treatment in advance (known as 'pre-pay patients'), privately insured persons and/or persons entitled to financial assistance, known as 'embassy patients', for whom the embassy of a foreign State issues a cost of treatment guarantee, members of the federal armed forces, patients affiliated to occupational insurance associations and patients covered by statutory health insurance. Patients benefiting from private or statutory health insurance were each treated following the issue of a cost of treatment guarantee provided by a financial assistance body, a health insurance fund or a private health insurance establishment. In the case of embassy patients, costs were borne by foreign social security institutions acting through the embassies concerned. **[Or. 3]**

According to information supplied by the applicant, the patient categories break down as follows:

2009	**Cases**	**Occupancy days**
Pre-pay	391	5.052
Privately insured	534	4.771
-including financially assisted	67	677
Statutorily insured	143	1.309
Federal armed forces	9	44
Occupational insurance	1	2
Embassy	64	1.716
total	**1.132**	**12.838**

2010	**Cases**	**Occupancy days**
Pre-pay	362	5.043
Privately insured	456	3.755
-including financially assisted	68	562
Statutorily insured	150	1.312
Federal armed forces	13	83
Occupational insurance	0	0
Embassy	50	1.743
total	**1.017**	**11.853**

2011	**Cases**	**Occupancy days**
Pre-pay	420	5.784
Privately insured	434	3.327
-including financially assisted	67	430
Statutorily insured	150	1.324
Federal armed forces	22	99
Occupational insurance	1	22
Embassy	57	2.708
total	**1.060**	**13.143**

First six months of 2012	**Cases**	**Occupancy days**
Pre-pay	218	2.922
Privately insured	193	1.477
-including financially assisted	23	169
Statutorily insured	74	606
Federal armed forces	16	90
Occupational insurance	0	0
Embassy	34	1.647
total	**465**	**6.652**

[Or. 4] Initially, the applicant charged for its hospital and medical care services and closely related activities on the basis of fixed-rate daily fees, in accordance with Paragraph 13 of the BPflV, as was the usual practice among the hospitals provided for in Paragraph 108 of the SGB V. Patients accommodated in single or double rooms were charged a supplement. Elective medical services were charged separately in accordance with the Gebührenordnung für Ärzte (Regulation on Doctors' Fees) (GOÄ). Over the course of time, the applicant gradually switched its charging system to the Diagnosis Related Group (DRG) System). At the hearing of 13 February 2020, the applicant stated that, in 2011, only 15% to 20% of treatment days had been charged on the basis of the DRG system.

On 28 June 2012, the applicant concluded with the … accident insurance fund, in its capacity as provider of statutory accident insurance, a framework agreement, within the meaning of Paragraph 4, point 14(b), second sentence, letter (cc), of the UStG, which came into effect on 1 July 2012.

In its turnover tax returns for the period 2009 to 2012, the applicant treated the hospital services charged on the basis of fixed-rate daily fees and the user fees charged to non-resident doctors as being exempt from tax. […]

In the course of a special turnover tax audit conducted by the Finanzamt (Tax Office) […], the auditor formed the view that the vast majority of the applicant's turnover was not exempt from tax. In accordance with Paragraph 4, point 14(b), second sentence, letter (aa), of the UStG, only turnover generated by approved hospitals within the meaning of Paragraph 108 of the SGB V are exempt from tax. The applicant, however, is not an approved hospital.

Article 132(1)(b) of the VAT Directive does not indicate otherwise. Hospital care is provided under social conditions comparable with those applicable to bodies governed by public law only in the case where a substantial proportion of patients are entitled to have their medical expenses reimbursed under Paragraph 13 of the SGB V. In the case at issue, the share of occupancy days represented by patients falling into those categories is only 10.2% (2009), 11.1% (2010), 10.10% (2011) and 9.1% (first six months of 2012) and is not therefore substantial. The turnover at issue must therefore be treated as being subject to tax. That contested turnover did not become exempt from tax under Paragraph 4, point 14(b), second sentence, letter (cc), of the UStG until the entry into force of the agreement with the … accident insurance fund on 1 July 2012.

The view thus taken following the tax audit was endorsed by the defendant in its decision of 6 September 2017 on the objection to the outcome of the audit, and in the action brought [against that decision].

The applicant considers that the contested turnover is exempt from tax under Article 132(1)(b) of the VAT Directive. It operates a hospital recognised under Paragraph 30 of the GewO which provides hospital and medical care services in the same way as a body governed by public law. The applicant's activities are pursued in the public interest, since it offers a range of services comparable with that provided by public hospitals or those included in the hospital plan. The public interest it serves also follows from the fact that it is one of the world's leading specialist neurosurgery hospitals and provides its services in principle to anyone, whether statutorily insured, privately insured or not insured at all. Treatment costs are to a large extent [borne] by social security institutions, including not only statutory health insurance funds but also the federal armed forces, occupational insurance associations, financial assistance bodies and embassies. Thus, 33.08% (2009), 34.31% (2010), 38.15% (2011) and 40.30% (2012) of occupancy days are attributable to patients whose medical expenses are covered by social security bodies. **[Or. 5]**

II.

The Chamber refers to the Court of Justice of the European Union ('the Court of Justice') the questions on the interpretation of the VAT Directive which are set out in the operative part of this order and stays the proceedings pending the Court's ruling.

1. Legal provisions relevant to the ruling

a) National law

Paragraph 4, point 14(b), of the UStG:

Paragraph 4, point 14(b), of the UStG, in the version in force since 1 January 2009, provides that, of the transactions falling within the scope of Paragraph 1(1), point 1, of the UStG the following shall be exempt from tax: hospital and medical

care including diagnostics, assessment, prevention, rehabilitation, obstetrics and hospice services and closely related activities undertaken by bodies governed by public law. The services described in Paragraph 4, point 14(b), of the UStG shall also be exempt from tax in the case where they are provided by

aa) approved hospitals within the meaning of Paragraph 108 of the SGB V

(…)

cc) bodies which have been engaged to supply care by providers of statutory accident insurance within the meaning of Paragraph 34 of the SGB VII […]

Paragraph 108 of the SGB V — Approved hospitals

Health insurance funds may procure hospital care only from the following hospitals (approved hospitals):

1. University hospitals […],

2. Hospitals which are included in a *Land*–level hospital plan (plan-listed hospitals), or

3. Hospitals which have concluded a care supply contract with the *Land* health insurance fund associations.

Paragraph 109 of the SGB V — Conclusion of care supply contracts with hospitals

(…)

(2) There shall be no right to conclude a care supply contract as referred to in Paragraph 108, point 3, of the SGB V

(3) A care supply contract as referred to in Paragraph 108, point 3, of the SGB V must not be concluded in the case where the hospital

1. does not offer a guarantee of efficient and cost-effective hospital care, **[Or. 6]**

2. […] [does not meet certain quality requirements] or

3. is not necessary for the purposes of providing need-based hospital care for insured persons.

(…)

Paragraph 1 of the Law on the financing of hospitals (KHG) — Principle

(1) The purpose of this Law to provide economic security for hospitals in order to ensure high-quality, patient-centred and need-based care for the population through efficient, high-quality and independently operated hospitals and to contribute towards socially sustainable healthcare charges.

Paragraph 6 — Hospital planning and investment programmes

(1) The *Länder* shall draw up hospital plans and investment programmes aimed at attaining the objectives set out in Paragraph 1; the costs associated with these, in particular their impact on healthcare charges, shall be taken into account.

b) EU law

Article 132(1) of the VAT Directive

In accordance with Article 132(1) of the VAT Directive, Member States are to 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.

2. The legal position under national law; Question 1

The applicant is not a body governed by public law, with the result that its turnover is not exempt from turnover tax under Paragraph 4, point 14(b), first sentence, of the UStG. What is more, the applicant has not concluded a care supply contract with the *Land* health insurance fund associations, and it has not (so far) been included in the hospital plan for the *Land* of Lower Saxony. It follows, by extension, that the conditions for exemption from turnover tax under Paragraph 4, point 14(b)(aa), of the UStG are not met. Since the framework contract which the applicant concluded with the … accident insurance fund did not take effect until 1 July 2012, it can claim a tax exemption under Paragraph 4, point 14(b), letter (cc), of the UStG only from that date onwards.

Both the Fifth Chamber of the Bundesfinanzhofs (Federal Finance Court) (BFH) and the Eleventh Chamber of the BFH assume that Paragraph 4, point 14(b)(aa), of the UStG is not consistent with the requirements of Article 132(1)(b) **[Or. 7]** of the VAT Directive because it makes the exemption from tax for services provided in hospitals operated by undertakings which are not bodies governed by public law subject to a reservation of need under social insurance law […].

This Chamber is inclined to agree with the view of the Fifth and Eleventh Chambers of the BFH. Since the *Land* health insurance fund associations may conclude a care supply contract with a hospital only where this is necessary in order to provide need-based care for insured persons (Paragraph 108, point 3, of

the SGB V in conjunction with Paragraph 109(3), point 3, of the SGB V), and cost effectiveness criteria (‘contribute towards socially sustainable healthcare charges’) apply even if a hospital is included in a hospital plan in accordance with Paragraph 1 of the KHG, a closed shop is effectively in operation; accordingly, a (non-listed) hospital has no prospect of being included in the hospital plan for the *Land* in which it is located, or, therefore, of concluding care supply contracts with the statutory health insurance funds, if enough hospital beds for a particular specialty are already available within the *Land* in question. The consequence of this, if true, would be that similar services in different hospitals are treated differently for the purposes of turnover tax, the advantage enjoyed by some hospitals over others being based solely on the fact that the former were founded earlier and were the first to be included in the relevant hospital plan or to conclude care supply contracts. In accordance with the case-law of the Court of Justice, the interpretation by the national legislature of the conditions governing the application [of the exemptions provided for in] the VAT Directive 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 (Court of Justice, judgment of 10 June 2010 — C-262/08, *CopyGene*, [2010] ECR I-5053). This Chamber considers a provision such as that in Paragraph 4, point 14(b)(aa), of the UStG, which effectively operates a quota system for tax exemptions and reserves these for those hospitals that are the first to be included in a hospital plan, to be incompatible with the principle of the competitive neutrality of turnover tax.

For that reason, this Chamber asks the Court of Justice, in Question 1, to indicate whether the provision contained in Paragraph 4, point 14(b)(aa), of the UStG is compatible with Article 132(1)(b) of the VAT Directive. This question is relevant to the judgment to be given not least because, if the national rule were incompatible with EU law, the action in this case would have to be dismissed, and the question as to whether the applicant provides hospital services under social conditions comparable with those applicable to bodies governed by public law would be immaterial.

3. Legal position under Community law; Question 2

If Question 1 is to be answered in the negative, the applicant could rely directly on Article 132(1)(b) of the VAT Directive. The issue relevant to the judgment to be given would then be whether the applicant undertook hospital care and closely related activities under social conditions comparable with those applicable to bodies governed by public law.

The Eleventh Chamber of the BFH, which, at the outset, also assumes that Paragraph 4, point 14(b)(aa) of the UStG misinterprets Community law, refers to the introductory sentence of Article 132 of the VAT Directive and notes that it is for each Member State, within the framework of its discretion, to lay down the rules for granting the necessary recognition […]. In its view, the German legislature exceeded its discretion only in so far as, in referring to Paragraph 108

of the SGB V **[Or. 8]**, for the purposes of recognition of the tax exemption provided for in Paragraph 4, point 14(b)(aa), of the UStG, it made the inclusion of a hospital in a hospital plan or the conclusion of a care supply contract subject to the reservation of need and thus infringed the principle of neutrality. It regards as unobjectionable, on the other hand, the fact that the chain of reference from Paragraph 4, point 14(b)(aa) of the UStG, via Paragraph 108, points 2 and 3, of the SGB V, to Paragraphs 1 and 6 of the KHG and Paragraph 109 of the SGB V makes recognition of the tax concession provided for in Paragraph 4, point 14(b)(aa), of the UStG conditional upon the hospital's efficiency in terms of personnel, space and equipment and the cost effectiveness of its management; to take no account whatsoever of the conditions laid down by the national legislature would be to deprive the Member States of the discretion granted to them […].

The adjudicating Chamber is uncertain whether, in a case in which the national tax legislation refers to a complex system of non-tax rules and the application of the entirety of those non-tax rules gives rise to an interpretation of the tax exemption provision which is incompatible with Community law, it is possible to preserve the discretion granted to the national legislature by refraining from applying only those conditions governing the application of the non-tax rules which directly render the national tax exemption provision contrary to Community law, while continuing to apply the other conditions of application. For, in the opinion of the adjudicating Chamber, it is open to question whether it is in fact in keeping with the national legislature's intention, and operates to preserve its discretion in transposing the VAT Directive into national law, for the recognition of the tax concession to be made subject not to an assessment of each hospital on the basis of need — which is incompatible with Community law — but to other criteria for making that decision which the national legislature — even if it had recognised the aforementioned incompatibility with Community law — might not have taken into account at all.

This Chamber is uncertain whether the interpretation of whether a hospital operates under 'comparable social conditions' for the purposes of Article 132(1)(b) of the VAT Directive should include an assessment of its cost-effectiveness […]. In this regard, it is also important to note that a specialist hospital such as the applicant, which performs particularly complex and difficult neurosurgical procedures, must necessarily charge more for its services than a hospital which largely but not exclusively performs simple medical procedures that do not require expensive medical equipment. This Chamber does not therefore consider a hospital's costs to be a suitable criterion for assessing whether that hospital offers its services under social conditions comparable with those applicable to a public hospital. It is also to be noted, finally, that an excessive burden would be placed on both the tax authority and the tax courts if they had to carry out a comprehensive cost effectiveness and efficiency assessment in every case in order to be able to decide whether a hospital's activities are exempt from tax.

The adjudicating Chamber therefore considers it appropriate, in a case in which the national legislature has incorrectly transposed the provisions of Community law into national law, to allow direct reliance to be placed on Community law and to interpret the relevant provision of Community law autonomously in its own right. In this particular case, the adjudicating Chamber therefore considers it relevant to the judgment to be given to determine whether the applicant offers its hospital services under social conditions comparable with those applicable to a hospital governed by public law; this Chamber is inclined to answer the question as to the comparability of social conditions not by reference to a hospital's operating procedures and cost structures but from the point of view of its patients; on that basis, the social conditions under which it operates would be comparable if the treatment costs of the majority of its patients were covered by social security institutions. **[Or. 9]**

The relevance of Question 2 to the judgment to be given follows from the fact that, in interpreting Article 132(1)(b) of the VAT Directive, the adjudicating Chamber would like to employ interpretative criteria different from those applied by the BFH in its appellate jurisdiction.

III.

The legal basis for the reference to the Court of Justice is the second paragraph of Article 267 of the Treaty on the Functioning of the European Union.

IV.

Procedural matters