Case C-513/20

Request for a preliminary ruling

Date lodged:

13 October 2020

Referring court:

Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal)

Date of the decision to refer:

1 July 2020

Appellant:

Autoridade Tributária e Aduaneira (Tax and Customs Authority)

Respondent:

Termas Sulfurosas de Alcafache, S.A.

Supremo Tribunal Administrativo

(Supreme Administrative Court)

[…]

ORDER OF THE TAX LITIGATION CHAMBER OF THE SUPREMO TRIBUNAL ADMINISTRATIVO (SUPREME ADMINISTRATIVE COURT)

I. Background

I.1. By judgment of 14 June 2018, the Tribunal Administrativo e Fiscal de Viseu (Administrative and Tax Court, Viseu) upheld the administrative action brought by Termas Sulfurosas de Alcafache, S.A., and, accordingly,

a. partially annulled the contested assessments (relating to VAT and default interest for the 2010, 2011 and 2012 tax years), in so far as they do not recognise the exemption from VAT applicable to the amounts charged for '*thermal registration*' and the provision of '*traditional*

thermal cure' services, and made a reverse pro rata correction to the amount of deductible VAT;

b. annulled the implied decisions dismissing the administrative appeals processed under Nos […];

c. annulled the decisions dismissing the applications in the reconsideration proceedings Nos […].

1.2. Being in disagreement with that judgment, the representative for the Fazenda Pública (Public Treasury) brought an appeal before the Supremo Tribunal Administrativo (Supreme Administrative Court) in which she made a number of allegations culminating in the following conclusions:

A – This appeal is directed against the judgment delivered on 14 June 2018, more specifically, against that part of it which finds to be contrary to law, in particular Article 9 of the CIVA (Portuguese VAT Code), the corrections for VAT purposes made on the ground that thermal registration is subject to, and not exempt from, VAT, and accordingly annuls the contested assessments (*ex officio* assessments to VAT and default interest for the tax years 2010, 2011 and 2012).

B – The fundamental legal question which must be answered in this case is whether certain supplies of services effected by the applicant fall within the scope of the exemption from value added tax (VAT) provided for in Article 9(2) of the Portuguese VAT Code, in particular on the ground that these are 'supplies closely related to the supply of medical and healthcare services'.

C – In order to be able to answer that question, it is necessary, first, to interpret the provision establishing that exemption, by attempting to define its terms in so far as this is possible and necessary, and, secondly, to interpret the substance of the facts, with a view to determining whether they may be brought within the scenario envisaged in that provision.

D – The reasons for this appeal have to do with both of the abovementioned issues: the interpretation of the provision and the interpretation of the facts.

E – Article 9(2) of the Código do IVA (Portuguese VAT Code) ('the CIVA') (the provision establishing the exemption in question) must be interpreted in accordance with EU law and with the relevant case-law of the Court of Justice of the European Union ('the Court of Justice').

F – That statutory provision transposes into domestic law 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').

G – The abovementioned provision of the CIVA must be interpreted in accordance with the interpretation of the corresponding provision of EU law which has been adopted by the Court of Justice: it is a long-standing principle of

EU law that the courts of the Member States have a duty to interpret their domestic law in accordance with EU law (judgment of the Court of Justice of 4 July 2006, C-212/04, *Adeneler and Others*).

H – It follows from the very wording of Article 132 of the VAT Directive that the exemptions for which it provides are binding on the Member States from the point of view of their scope. Member States may not — other than in exceptional cases which are expressly specified — refrain from regarding as exempt the activities referred to in that article and may exempt those activities only to the extent laid down in that article. So states the Court of Justice in the judgment in *Skatteverket* [judgment of the Court of Justice of 21 March 2013, C-91/12, *PFC Clinic AB*].

I – According to the settled case-law of the Court of Justice, the exemptions provided for in Article 132 of the VAT Directive constitute independent concepts of EU law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another [judgment of 25 February 1999, C-349/96, *CPP*, paragraph 15; judgment of 15 June 1[9]89, 348/87, *Stichting Uitvoering Financiële Acties* v *Staatssecretaris van Financiën*, paragraph 11, and judgment of 28 January 2010, C-473/08, *Eulitz*, paragraph 25].

J – It follows from settled case-law that the exemptions provided for in Article 132 of the VAT Directive do not exempt every activity performed in the general interest but only those listed and described in great detail in that provision (see, in particular, the judgments of 11 July 1985, *Commission* v *Germany*, 107/84, paragraph 17; of 20 November 2003, *d'Ambrumenil and Dispute Resolution Services*, C-307/01, paragraph 54, and *Eulitz*, paragraph 26).

K – However, 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 inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132(2) should be construed in such a way as to deprive the exemptions of their intended effect (see, in particular, the judgment of 14 June 2007, *Haderer*, C-445/05, paragraph 18 and the case-law cited, and the abovementioned judgment in *Eulitz*, paragraph 27 and the case-law cited).

L – Consequently, the concept of 'medical care', contained in Article 132(1)(b) of the VAT Directive [and the concept of 'the provision of medical care', referred to in Article 132(1)(c) of that directive,] both cover services that have as their purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders (see the judgments of 21 March 2013, C-91/12, *PFC Clinic*, paragraph 25, and of 10 June 2010, C-86/09, *Future Health Technologies*, paragraphs 37 and 38).

M – Article 132(1)(b) must be interpreted restrictively: the terms used to designate the exemptions contained in Article 132 of the [VAT] Directive must be

interpreted strictly given that they are exceptions to the general principle that VAT is levied on each supply of services effected for consideration by a taxable person.

N – On the other hand, the way in which that article was applied by the Court of Justice in *De Fruytier* (judgment of 2 July 2015, C-334/14, *De Fruytier*), and even more so in *Klinikum Dortmund* (judgment of 13 March 2014, C-366/12, *Klinikum Dortmund*), both relating to healthcare services, shows that the Court currently adopts a restrictive interpretation of the provisions that exempt medical and healthcare services from VAT.

O – The Court of Justice could not have been clearer: the provision in question is intended to exempt medical services in a strict sense.

P – What may be inferred from the judgment of the Court of Justice is that, while there is no need for a particularly restrictive interpretation of the 'therapeutic purpose' of a supply, the provision in question must the subject of a restrictive interpretation such that only medical services in a strict sense and those 'closely related' to these are to be regarded as falling within the scope of the exemption.

Q – The contested provision — Article 9(2) of the CIVA — envisages two scenarios or situations: i) 'medical and healthcare services'; and ii) 'supplies closely related' to those services. There would not appear to be any further doubt that, in the factual circumstances that gave rise to the present case, the only matter open to debate is the classification [of the services in question] as 'supplies closely related to the supply of medical and healthcare services'.

R – The corresponding expression contained in Article 132(1)(b) of the VAT Directive is 'hospital and medical care and closely related activities'.

S – The VAT Directive does not contain, either in Article 132 or elsewhere, a definition of the concept of 'hospital and medical care and closely related activities'.

T – So far as concerns the amount charged for thermal registration, the lower court confines itself to establishing that, '… since this amount is charged for the provision of thermal treatments, already regarded as being exempt from VAT, this too should be regarded as being exempt, since it is charged only after a medical consultation has been conducted and on condition that a qualified doctor has prescribed the thermal treatment in question'. With all due respect, which must not prevent this matter from being opened up to debate, the question must asked whether the lower court's position is vitiated by its failure to discharge its obligation to adopt a restrictive interpretation of the provisions in question.

U – Let us return to the judgment in *De Fruytier* and let us ascertain whether, in that judgment, the Court of Justice properly applied the concept of hospital and medical care and closely related activities: are we dealing with a 'supply, effected at a point in time prior or subsequent to a (diagnostic) service to which that supply

is linked or related in the sense that it contributes towards the delivery of that service', with the result that the supply may be regarded as being ancillary to, or instrumental in, the principal service? Are we dealing with a supply which, 'although it does not represent a purpose in itself for the customer, serves to ensure that the principal service is of better quality or is provided under better conditions? (the text in inverted commas reflects the conceptual approach to this issue which has been taken in legal literature, in particular, LAIRES, Rui (2012), *O IVA nas Atividades Culturais, Educativas, Recreativas, Desportivas e de Assistência Médica ou Social*, Coimbra: Almedina I IDEFF, pp. 133-4, and NEVES, Filipe Duarte (2010), *Código do IVA e Legislação Complementar, Comentado e Anotado*, Oporto: Vida Económica, p. 178).

V – In both cases the answer is obviously in the affirmative. And yet, for the Court of Justice, the supply in question is still not a supply closely related to a healthcare service. This highlights the fact that the definitions provided in legal literature are not consistent with the recent case-law of the Court of Justice.

X – In support of that position, regard must be had to another judgment of the Court of Justice, in Case C-366/12 (judgment of 13 March 2014, C-366/12, *Klinikum Dortmund*), in which the Court held, by way of final conclusion, that the provision by a hospital pharmacy of cytostatic drugs to cancer patients in the course of outpatient treatment did not qualify for the exemption from VAT. While it true that that case was not concerned with 'closely related [activities]', the discussion of that concept is nonetheless useful for the purpose of highlighting how restrictive the Court's interpretation of the exemptions applicable to medical services was in 2015.

Y – It is not possible, on the basis of the abovementioned cases of the Court of Justice, to define '[activities] closely related' to the supply of medical and healthcare services, but what *can* be said is that the Court of Justice requires the provision in question to be interpreted restrictively.

Z – On the other hand, the only valid dividing line drawn to date can be found in *De Fruytier*: activities which exhibit with the 'principal' supply of medical care a connection as direct as, or less direct than, that which was present in that case cannot be regarded as 'supplies closely related to medical or healthcare services'.

AA – It may be inferred from the foregoing that the amount charged by the applicant for thermal registration cannot be classified as a 'supply closely related to' the supply of medical or healthcare services.

AB – […] The judgment under appeal, in reference to the tax inspection document and its various annexes, states the following: the amount charged by the taxable person (the applicant) for 'thermal registration' is paid only once a year; its payment does not entail the provision of treatments, since payment for registration entitles users only to purchase the treatments they wish to take but not to receive them.

AC – Accordingly […]: '… in the case at issue, it is clear that the payment made by "thermal registration" users does not amount to payment for medical services, does not therefore constitute [payment for] an actual supply of medical care, or the protection, prevention or reinstatement of health, and does not qualify for the exemption provided for in Article 2([1]) of Article 9 of the CIVA'.

AD – Furthermore, […] the information contained in the draft dismissal of the application for reconsideration […] supports the inference that Decree 15401 of 20 April 1928 (legislation governing thermal spas), provided for a 'registration fee' as follows: registration could take place only after the user had been examined by the medical director or by a doctor specialising in hydrology who was authorised to practise medicine in the thermal spa; registration took place after the doctor responsible for conducting the examination had duly completed the patient's file; [registration] involved the payment of a fee without which the user could not begin thermal treatments. Decree 15401 of 20 April 1928 was repealed by Decree-Law No 142/2004 of 11 June 2004, which no longer provides for a registration fee and this, therefore, is no longer prescribed by law.

AE – On the other hand, 'references to documents which are already contained in the case file must not be regarded as an allegation of fact, since all procedural vicissitudes must be known *ex officio*'; see Jorge Lopes de Sousa, *CPPT anotado e comentado*, 6th edition, p. 225, which refers to the judgments of the STA (Supreme Administrative Court) […].

AF – The payment by users of a variable sum for registration does not equate to payment for medical services provided in hospital following hospitalisation or provided by doctors, dentists, midwives, nurses or paramedics, but it does equate to the right to enjoy a number of services. According to the applicant, 'it is the route by which users have access either to a medical consultation or to the treatments prescribed'. As such, it does not constitute an actual supply of medical care, or of a service for the protection, prevention or reinstatement of health, and does not therefore qualify for the exemption provided for in Article 2(1) of the CIVA.

AG – The lower court reached the contrary conclusion: in its view, as that amount is charged for the provision of thermal treatments, which are already regarded as being exempt, this too must be regarded as being exempt, since it is charged exclusively after a medical consultation and on condition that a qualified doctor prescribes the abovementioned treatments. This is the only ground on which that conclusion is based.

AH – The judgment [under appeal] does not put forward the slightest argument to demonstrate how the activities at issue fall (even implicitly) within the scope of the concept of 'supplies closely related to [medical services] provided by hospitals, clinics, health centres and other such establishments'.

AI – Neither is it apparent how the [lower] court arrived at that conclusion, given that this does not follow from the legislation, the court does not put forward any kind of interpretative argument and makes no reference to legal literature or case-law to support its interpretation.

AJ – As has already been noted, case-law has not yet defined the concept of 'hospital and medical care and closely related activities'. The most reliable information available with respect to its application in a particular case is the interpretation of that concept which the Court of Justice adopted in *Fruytier*. Even then, the Court of Justice held that the transport of blood to laboratories did not constitute a related activity.

AK – As a result, the view must be taken that thermal registration cannot be classified as a supply 'closely related to the supply of medical and healthcare services', and that there has been no reasoned demonstration of the opposite position.

AL – Since there are serious doubts about the issue under consideration, it is necessary to submit a request for a preliminary ruling to the Court of Justice, and, therefore, to stay the appeal proceedings pending a ruling from the Court.

In the light of all the foregoing, it is requested that the present appeal be upheld and the judgment under appeal set aside, and that the legal consequences arising therefrom be brought to bear.

I.3. The respondent submitted a response in which it made a number of submissions to the effect that 'the appeal should be dismissed and the judgment under appeal confirmed'.

I.4. The prosecutor attached to this court issued an opinion in which he concluded that:

'The judgment under appeal must be censured in relation to that part of it which has been challenged.

The appeal should be upheld and the judgment under appeal set aside in relation to that part of it which has been challenged, or, in the event that it is found that the question at issue raises serious doubts, a request for a preliminary ruling should be made to the Court of Justice, and the present proceedings should be stayed.

II. Subject matter of the appeal

In so far as the appeal is directed against that part of the judgment under appeal that is unfavourable to the Autoridade Tributária (Tax Authority), the appeal seeks a determination as to whether the amounts charged for '*thermal registration' do not qualify for exemption from VAT since they are not 'supplies closely related to supplies of medical and healthcare services*', in accordance with the provisions of

Article 9(2) of the Portuguese VAT Code and of Article 132(1)(b) of Council Directive 2006/112/EC of 28 November 2006 (VAT Directive).

In the event that the application of the latter provision raises doubts, it will be necessary to determine whether the abovementioned question should be submitted for assessment by the Court of Justice by way of a reference for a preliminary ruling, and whether the present proceedings should be stayed.

III. Grounds

III. 1. Grounds of fact

From the facts presented as established in the judgment under appeal, it follows in particular that the applicant charged users of the Alcafache thermal baths, which is regarded as being a primary care unit not forming part of the National Health Service and not capable of providing hospitalisation, amounts for '*thermal registration*' which, during 2010, 2011 and 2012 amounted in total to EUR 87 003.00, EUR 72 654.00 and EUR 55 627.50 respectively, as detailed in the tax inspection document forming the basis of the assessments to VAT on those amounts, at a rate of 23% plus default interest, which were issued *ex officio* by the Autoridade Tributária (Tax Authority).

That document further states […]:

'… Where a user approaches the reception desk and informs the receptionist of the service he is looking for, two procedures may be applied:

1. If the customer is looking for a 'traditional thermal cure' service, he must compulsorily undergo a prior medical consultation, conducted by one of the doctors specialising in hydrology within the thermal spa facilities, in order to receive a prescription for the treatments to be performed.

At that point, the user pays for the consultation, plus an amount for 'thermal registration' (described on the company's website as "thermal waters registration"), valid for the entire year, and for the treatments prescribed (which he may undergo at that time or later, given that the prescription is valid until 31 December of the year in which it is issued), to which the taxable person applies the VAT exemption by mentioning on the invoice Article 9(2) of the CIVA.

[Treatments] are paid for before they start.

The company's official website contains the following warning: '*please bear in mind that all registrations are individual and personal and are made with a view to the arrangement of a medical appointment. The treatments to be performed will be prescribed at a later date by our doctor specialising in hydrology*'.

[…]

2. If the customer wishes to book a 'thermal spa' service, the medical consultation is optional in the case of treatments of up to three days […]

The user does not have to pay anything for 'thermal registration', whether or not a medical consultation takes place'.

The […] same document goes on to say:

'… in order to be able to take advantage of the treatments included in the 'traditional thermal cure' package, users not only have to undergo a medical consultation but must also register.

At the time of registration, the user pays an amount, described by the taxable person as being for 'thermal registration', which, in the years 2011 and 2012, was EUR 30, EUR 33 and EUR 36 respectively, and without which users cannot start hydrological treatments […]'.

That […] document later states:

1. [The Authority] has established the existence of an item charged to the customer on the 'thermal invoice/receipt' or the 'thermal advance' for 'thermal registration'.

2. As has already been shown, on 18 May 2014, the company made the following written statement […]:

   '"Thermal registration" includes the service of opening and annually updating each spa user's individual file, which, inter alia, includes his clinical history (it being noted that the Alcafache Spa does not allow users to take thermal treatments unless they have first attended a medical consultation), and falls within the scope of Article 9(2) [of the CIVA], in the light of circular […]. *It is valid for one spa season, which is to say that it is valid until the last day of the year in which the thermal baths are in operation'.*

3. The consideration for the compulsory payment of the abovementioned amount is the ability to take advantage of hydrological treatments, which may or may not be performed.

4. So far as concerns the amount charged to the taxable person for 'thermal registration':

   a. it is paid only once a year;

   b. its payment does not entail the performance of treatments;

   c. the 'registration' payment entitles users only to buy the treatments they are looking for, but not to have those treatments performed.

The judgment under appeal also regards it as established that the services known as '*traditional thermal cures*', which include a number of treatments (ENT/respiratory tract and rheumatology), perform a therapeutic function which is not present in other types of service by the name of 'thermal wellbeing' or 'thermal spa', which are also provided in the abovementioned thermal baths.

III. 2. Grounds of law

In accordance with Article 9(2) of the Código sobre el IVA (Portuguese VAT Code), the following, in particular, are to be exempt from VAT:

— '*the supply of medical and healthcare services and closely related supplies effected by hospitals, clinics, health centres and other such establishments*'.

That provision transposes into domestic law Article 132(1)(b) of Council Directive 2006/112/EC of 28 November 2006 (VAT Directive), which also provides that '*hospital and medical care and closely related activities*' are to be exempt from VAT.

According to the abovementioned provision of the CIVA, the VAT exemption is to apply to transactions closely related to 'the supply of medical and healthcare services' where these are provided in 'hospitals' and other such establishments.

As regards the necessary assessment of whether there is a direct relationship between 'thermal registration' and medical care (or the supply of healthcare services, to use the wording of the CIVA), it is not clear, in the light of the criteria already defined by the Court of Justice, whether the abovementioned amounts charged for 'thermal registration' are to be regarded as closely related to medical care.

Certain considerations may support the conclusion that this is the case, such as, for example, the fact that ['thermal registration'] includes the service of opening each user's individual file, which sets out the clinical history entitling the user to purchase treatments forming part of the package by the name of 'traditional thermal cures', the nature of which as a supply of services and as an activity exempt from VAT is not in issue.

There are doubts, however, about whether the abovementioned amounts paid for 'thermal registration' may be included within the framework of the supply of medical care services referred to in Article 132(1)(b) of the VAT Directive.

Furthermore, a consultation of the 'www.curia.europa.eu/juris/' website will show that there is nothing to indicate that the Court of Justice has already adjudicated in its case-law on whether amounts paid for 'thermal registration' are subject to VAT. Neither did it refer to that question in particular in its judgment in *De Fruytier*, cited above.

Finally, in the light of the requirements arising from the principles of the primacy of EU law and conform interpretation, in connection with [the observance of] which the reference for a preliminary ruling is an essential instrument — inasmuch as it ensures the desired uniformity of interpretation and application of EU law in all the Member States, as well as the cohesion of the EU system of judicial protection and the principle of effective judicial protection for the rights of individuals —, it is considered useful and necessary to ask the Court of Justice to give a preliminary ruling, in accordance with Article 267 TFEU, on the following question concerning the interpretation of Article 132(1)(b) of the VAT Directive:

— May payments made in return for the service of opening, for each user, an individual file setting out the clinical history entitling the user to purchase 'traditional thermal cure' treatments be included within the concept of 'closely related activities', provided for in Article 132(1)(b) of the VAT Directive, and may they, as such, be regarded as being exempt from VAT?

[…]