Case C-581/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

30 July 2019

Referring court:

Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Portugal)

Date of the order for reference:

22 July 2019

Applicant:

FRENETIKEXITO — UNIPESSOAL

Defendant:

Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal)

Subject matter of the main proceedings

The proceedings concern whether the nutrition service supplied by the applicant is ancillary to its fitness service, comprising a single supply, or whether, on the contrary, they are independent distinct supplies. If it is found that the nutrition service supplied by the applicant is ancillary to the fitness service, that nutrition service will be treated for tax purposes in the same way as the fitness service and will therefore be subject to VAT. If, in contrast, it is found that the nutrition service is in fact an independent distinct supply, it will be treated for tax purposes as a provision of medical care in the exercise of the medical and paramedical professions, that is to say, it will be exempt from VAT.

In that latter case (of an independent nutrition service), it will be necessary to examine whether, in order for the possible VAT exemption under Article 9(1) of the Código do Imposto sobre o Valor Acrescentado (Value Added Tax Code, 'CIVA') to apply, the service must actually be supplied, or whether it is sufficient that it is merely made available.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of Articles 2(1)(c) and 132(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax; Article 267 TFEU.

Questions to be referred

1. Where, as occurs in this case, a company

   (a) carries on, principally, fitness and physical well-being activities and, on a secondary basis, human health activities, which include nutrition services, nutrition/dietary advice, fitness assessment services and massages; and

   (b) offers its customers plans that include only fitness services and plans that include nutrition services in addition to fitness services,

for the purposes of Article 2(1)(c) of Directive 2006/112/EC of 28 November 2006, must the human health activity, and the nutrition service in particular, be regarded as ancillary to the fitness and physical well-being activity, with the effect that the ancillary supply must be given the same tax treatment as the principal supply, or, on the contrary, must the human health activity, and the nutrition service in particular, be regarded as independent of and distinct from the fitness and physical well-being activity, with the effect that the tax treatment established for each of those activities will apply to that activity?

2. For the purposes of applying the exemption under Article 132(1)(c) of Directive 2006/112/EC of 28 November 2006, must the services listed in that article actually be supplied, or is it sufficient in order for that exemption to apply that they are merely made available, so that use of those services depends solely on the wishes of the customer?

Provisions of EU law relied upon

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

‘Article 2

1. The following transactions shall be subject to VAT:

(a) …

(b) …

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such'.

'Article 132

1. Member States shall exempt the following transactions:

(a) …

(b) …

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

Provisions of national law relied upon

Value Added Tax Code (CIVA)

'Article 9

Exemptions on internal transactions

The following will be exempt from tax:

(1) supplies of services made in the exercise of the professions of doctor, dentist, midwife, nurse and other paramedical professions'.

Brief description of the facts and the main proceedings

1 FRENETIKEXITO — UNIPESSOAL, a company having its registered office at Espinho, Portugal ('the applicant'), applied for a tax arbitration tribunal to be set up and for arbitration proceedings, under Articles 2(1)(a) and 10(1)(a) of Decreto-Lei n.° 10/2011, de 20 de janeiro (Regime Jurídico da Arbitragem em Matéria Tributária) (Decree Law No 10/2011 of 20 January 2011 (legal regime governing tax arbitration)) ('RJAT'), seeking a declaration that the VAT assessments by the tax authority relating to the tax periods 201406T to 201512T together with the corresponding default interest, totalling EUR 13 253.05, be declared unlawful and, as a result, be annulled, and that the Autoridade Tributária (Portuguese Tax Authority, 'AT' or 'the defendant') be ordered to repay the sums paid, and also claimed default interest.

2 The applicant is engaged in the management and operation of sports facilities, fitness and physical well-being activities; the retail and online sale of beauty, food and dietary products, in particular nutrition products, food supplements, water, clothing, ornaments and costume jewellery, merchandising products; human healthcare services, which include nutrition, nutrition advice, physical fitness assessment and massages.

3 In 2014 and 2015 it supplied nutrition/dietary services, through a duly authorised and certified professional, at its premises, without charging VAT.

4 The nutritionist/dietary adviser employed by the applicant was available to serve customers one day a week.

5 The applicant registered with the Entidade Reguladora da Saúde (Portuguese Health Regulatory Authority) in August 2014, and that registration remained in place at least throughout 2015.

6 The applicant offered plans that included fitness plans only and plans that included, in addition, nutrition/dietary monitoring, and it was for customers to choose the plan they wished and to decide whether to use all the services available under the plan chosen.

7 Where a customer subscribed to the nutrition service, that service was charged for independently of whether or not the customer used it and of the number of consultations he or she made.

8 Nutrition services could be purchased individually and separately from any other service, on payment of a given amount, which varied depending on whether or not the customer was a member of the applicant.

9 In the invoices it issued the applicant specified the amounts corresponding to the fitness service and those corresponding to the nutrition/diet monitoring service.

10 There is no correlation between the nutrition services charged for and the nutrition consultations.

11 By email of 24 July 2017, the AT requested submission of the accounting documents before and after the 2014 and 2015 adjustments and the payment schedule for those years, relating to the applicant. Those documents were sent to the AT the same day.

12 The AT had access to the applicant's SAFT (Standard Audit File for Tax Purposes) for 2014 and 2015.

13 On 25 October 2017, the applicant was informed that inspection proceedings had been commenced.

14 The applicant was notified of the VAT assessments by the tax authority for the years 2014 and 2015 and the corresponding default interest, totalling EUR 13 253.05.

15 The applicant did not pay the assessments by the tax authority referred to in the preceding paragraph within the period for voluntary payment, and the corresponding procedures to enforce collection under those assessments were

therefore commenced, in the course of which the applicant agreed to pay in instalments.

16 The application to set up a tax arbitration tribunal and for arbitration proceedings was lodged on 9 October 2018.

Principal arguments of the parties in the main proceedings

17 The **applicant** submits the arguments set out in summary below.

18 It carries on its activity in the field of Fitness/Health Club services and nutrition services.

19 In 2014 and 2015 it supplied nutrition/dietary services, through a duly authorised and certified professional, at its premises, applying a VAT exemption.

20 The fitness services and nutrition services supplied by the applicant are distinct and independent.

21 The applicant offered plans that included fitness plans only and plans that included, in addition, nutrition monitoring.

22 In the invoices it issued the applicant specified the amounts corresponding to the fitness service and those corresponding to the nutrition monitoring service.

23 Although the AT commenced its inspections in July 2017, it did not inform the applicant that the inspection procedure had commenced until 25 October 2017.

24 Failure to conclude the inspection procedure within 6 months amounts to an infringement of essential procedural requirements, and thereby invalidates all subsequent acts, including the contested assessments.

25 The AT is acting contrary to Informação Vinculativa n.° 9215 (Binding Consultation Reply No 9215) of 19 August 2015, thereby infringing the principles of cooperation, substantive justice, legal certainty, equality and the rule of law.

26 The tax inspection report proposing the contested assessments is vitiated by a failure to state reasons.

27 The **defendant** filed a defence in which, in summary, it advanced the following arguments.

28 An analysis of the evidence submitted by the applicant indicates that the customer pays for the nutrition service even where he or she does not use it, which means that the nutritional monitoring is a service ancillary to engaging in physical exercise.

29 It can be inferred therefore that the nutritional monitoring service is ancillary in view of the small number of nutrition consultations compared with the amount charged for it.

30 The applicant has not demonstrated that any medical services are actually supplied.

31 Since the supply of the nutrition service is ancillary to the supply of the fitness service, the tax treatment of that principal supply should be applied to the nutrition service.

32 The applicant artificially breaks down the price, charging VAT on part of it and leaving the other part exempt from that tax.

33 Neither the tax inspection report nor the contested tax assessments are vitiated by a failure to state reasons.

34 The defendant claims that the application for arbitration proceedings should be dismissed or, if it is granted, that the two questions raised should be referred to the Court of Justice, in order to determine: (i) whether the invoicing method used by the applicant constitutes an artificial breakdown of the supply of services and (ii) whether the VAT exemption established for medical activities can be applied to nutrition advice services that were never supplied.

Brief description of the grounds for the request for a preliminary ruling

The main proceedings concern application of the VAT exemption under Article 9(1) CIVA to the nutrition service supplied by the applicant.

In order to establish whether that exemption can be applied to the nutrition service at issue it is necessary:

(i) to determine whether the nutrition service supplied by the applicant is ancillary to the fitness service, with the effect that they both comprise a single supply or whether, on the contrary, they are independent distinct supplies, and

(ii) to determine whether, in order for the VAT exemption under Article 9(1) CIVA to apply, the nutrition service must actually be provided, or whether it is sufficient that it is merely made available.

35 The provisions of Directive 2006/112, particularly Articles 2(1)(c) and 132(1)(c), must be borne in mind in that respect.

36 If it is found that the nutrition service supplied by the applicant is ancillary to the fitness service, that nutrition service will be treated for tax purposes in the same way as the fitness service and will therefore be subject to VAT.

37 If, in contrast, it is found that the nutrition service is in fact an independent distinct supply, it will be treated for tax purposes as a provision of medical care in the exercise of the medical and paramedical professions, that is to say, it will be exempt from VAT.

38 In that regard, as the defendant states, the case-law of the Court of Justice indicates that, where a transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine, firstly, if there were two or more distinct supplies or one single supply (judgment of 27 October 2005, *Levob Verzekeringen and OV Bank*, C-41/04, EU:C:2005:649).

39 As regards whether the nutrition service is ancillary to or independent of the fitness service, where the nutrition service is supplied at a gym, the referring court is of the view, notwithstanding the arguments advanced by the applicant and the defendant, that there is no Court of Justice case-law that can be regarded as uniform, since there is case-law supporting both positions, as emerges, moreover, even from the claims submitted by the parties.

40 Furthermore, if the nutrition service is found to be independent and, accordingly, not to be treated in the same way for tax purposes as the fitness service, it is necessary to examine whether, in order for the possible VAT exemption under Article 9(1) CIVA to apply, the service must actually be supplied, or whether it is sufficient that it is merely made available.

41 Here again, the referring court believes that the Court of Justice case-law is not uniform in terms of favouring one interpretation or the other.