

Case C-846/19**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:**

21 November 2019

Referring court:

Tribunal d'arrondissement (Luxembourg)

Date of the decision to refer:

20 November 2019

Applicant:

EQ

Defendant:

Administration de l'Enregistrement, des Domaines et de la TVA

1. Subject matter and facts of the dispute:

- 1 EQ is a lawyer in Luxembourg and has, since 2004, exercised powers of representation under schemes for the protection of adults lacking legal capacity (primarily as a curator and as a guardianship manager).
- 2 Persons exercising powers of representation are appointed by a guardianship judge who may award those agents remuneration, the amount or the method of calculation of which is determined by the judge, taking into account the financial position of the person lacking legal capacity.
- 3 The règlement grand-ducal du 23 décembre 1982 fixant les conditions de désignation d'un gérant de la tutelle (Grand-Ducal Regulation of 23 December 1982 laying down the conditions for the appointment of a guardianship manager) (see below) applies in practice to all types of powers of representation conferred under schemes for the protection of adults lacking legal capacity.
- 4 Up until 2013, the Administration de l'Enregistrement, des Domaines et de la TVA (Registration, Land and VAT Authority) ('the tax authority') took the view

that that activity was not subject to VAT. By two tax notices of 19 January 2018, the tax authority has now made those activities subject to VAT and claimed from EQ more than EUR 70 000 in VAT for the years 2014 and 2015.

- 5 EQ challenges those additional assessments to VAT and brought the matter before the tribunal d'arrondissement (District Court).

2. Legal context:

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

- 6 Article 9 provides:

‘1. “Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity. ...’

- 7 Article 132 provides:

‘1. Member States shall exempt the following transactions:

...

(g) the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people’s homes, by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing; ...’

Grand-Ducal Regulation of 23 December 1982 laying down the conditions for the appointment of a guardianship manager

- 8 Article 3 reads as follows:

‘The guardianship judge may award to the guardianship manager remuneration, the amount or the method of calculation of which he shall determine, by reasoned decision, taking into account the financial position of the person lacking legal capacity.

That remuneration shall consist of either a fixed amount, a percentage of the income of the person lacking legal capacity or a fee fixed according to the duties performed.’

3. Positions of the parties:

EQ

- 9 The supplies of services at issue are not economic activities subject to VAT.
- 10 The 'allowance' paid in respect of the exercise of powers of representation is of a different nature from that of lawyer's 'fees'. Such consideration for the exercise of powers of representation is flat-rate compensation which does not correspond to the real value of the services provided. In order to fall within the scope of VAT, a service must be performed for consideration, that is to say the remuneration must constitute the value actually given in return for the service provided or, in other words, its real value.
- 11 EQ further argues that the fact that the activity is carried out for consideration means that the amount of the allowance must be determined in advance and in accordance with established criteria which guarantee that the taxable person's operating costs are covered. Those conditions are not satisfied in the present case, since the Grand-Ducal Regulation of 23 December 1982 provides only for the possibility of remuneration (and not a right to remuneration) for the guardianship manager, makes that remuneration subject to an individual decision made by the guardianship judge, requires the guardianship judge to take account of the protected adult's financial position and leaves to the guardianship judge the ability to determine that remuneration either in the form of a fixed amount or a percentage of the protected adult's income or according to the duties performed.
- 12 EQ adds that, where the remuneration is determined according to the duties performed, the hourly rate awarded by the guardianship judge does not equate to the hourly rates usually applied by lawyers to the legal services which they provide.
- 13 EQ is asking, at the very least, to be granted an exemption from VAT. He argues that agents working in the field of the protection of adults lacking legal capacity perform a social function for four reasons:
 - 1/ the cost of those agents is borne by the adult lacking legal capacity, or otherwise by the State if the adult lacking legal capacity does not have sufficient financial means;
 - 2/ the Grand-Ducal Regulation specifies that the remuneration of the agent is determined on the basis of a reasoned decision made by the judge according to the financial position of the adult concerned;
 - 3/ the allowance paid is most often a flat-rate allowance and equates only rarely to services provided; and
 - 4/ the ministère de la Justice (Ministry of Justice) does not add VAT to the compensation paid to the agent so as not to increase the cost charged to society.

- 14 An activity either has or does not have a social character by its very nature and not according to the person who carries out that activity or the profession of that person.
- 15 The grant of the exemption is not limited to public bodies but extends to ‘other similar private-sector institutions’, and a particular legal form is neither required nor excluded. Furthermore, a natural person carrying on the profession of lawyer can therefore be covered.
- 16 Lastly, EQ alleges that the tax authority infringed the principle of the protection of legitimate expectations by having decided with effect from the year 2014 to make his activities in the field of the protection of adults subject to VAT, whereas it refrained from so doing over the ten previous years.

The tax authority

- 17 The VAT system does not require that the price received equates to the economic value of the service provided. There need only be a relationship between the price and the service, and the price does not have to be proportionate to the value of the service. The tax authority observes that the grant of a price discount on a supply of services does not exclude that supply from the scope of VAT, and that there are other examples, in particular in the context of lawyer’s fees, where the financial consideration is not proportionate to the value of the service provided without that service falling outside the scope of VAT (it cites in this regard flat-rate fees, contingency fees, fees which vary according to the client or the case). The variable nature of the allowance at issue is therefore incapable of excluding the supplies of services from the scope of VAT.
- 18 Furthermore, the lack of correlation between the financial consideration for the activity connected with the protection of adults and the fees for the legal services performed as a lawyer should have no bearing on the classification of the activity connected with the protection of adults as economic activity, since there is no scale for supplies of legal services and lawyer’s fees are subject to variation, as is the remuneration paid to the agent under the scheme for the protection of adults.
- 19 With regard to the exemption sought, the tax authority points out that EQ’s citation of the legal provision concerned is incomplete and that that provision covers only other similar private-sector institutions ‘recognised by the competent public authorities as being devoted to social wellbeing’. It follows from that fact that the exemption is to apply only to a restricted list of certain persons and entities. The exemption may not be applied to a person carrying on the profession of lawyer who does not satisfy the condition of being a body having a social character. Such a person is not covered by the exemption which, since it derogates from the application of VAT to any economic activity, must be interpreted and applied restrictively.

- 20 It is for EQ to show that he is a body having a social character and that the competent public authorities have recognised him as having that character. It is not enough to point to an activity that has a social character. In addition, the scale of the income derived by EQ from his activity connected with the protection of adults (EUR 239 46[0.00] in 2014 and EUR 302 033.50 in 2015) is such as to demonstrate that his activity lacks a social character.
- 21 Finally, with regard to the protection of legitimate expectations, the tax authority argues that that principle does not apply in the present case because failing to levy VAT on the services connected with the protection of adults would amount to committing an unlawful act, and that it has no leeway in the implementation of VAT legislation.

4. Findings of the court:

The nature of the activity

- 22 EQ cites the case-law of the Court of Justice to the effect that ‘a supply of services is taxable only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient’ (judgments of 2 June 2016, *Lajvér*, C-263/15, EU:C:2016:392, paragraph 26; of 18 January 2017, *SAWP*, C-37/16, EU:C:2017:22, paragraphs 25 and 26; and of 2 May 2019, *Budimex*, C-224/18, EU:C:2019:347, paragraph 30) and incorrectly concludes from that case-law that the words ‘the value actually given in return’ requires an equivalence in value between the service provided and the remuneration paid. On the basis of the facts of the case-law cited, the view should in fact be taken that the concept of ‘the value actually given in return’ (‘actually’ in the sense of ‘in reality’) requires that value is given in return, without consideration being given to the amount of that value or its financial correlation to the service provided. In that context, the court observes that other judgments specify that ‘the possibility of classifying a supply of services as a “transaction for consideration” which, as a general rule, is subject to VAT ..., requires only that there be a direct link between that supply and the consideration actually received by the taxable person’ (emphasis added) (judgment of 22 February 2018, *Nagyszénás Településszolgáltatási Nonprofit Kft.*, C-182/17, EU:C:2018:91, paragraph 32), thus stressing the reality of the consideration rather than its quantitative significance in absolute or relative terms.
- 23 Two other points are, however, less clear.
- 24 First, with regard to the legal relationship within the context of which the supply of services is performed, the court asks about the scope in the present case of the Court of Justice’s assessment that ‘a supply of services is taxable only if there is a legal relationship between the provider of the service and the recipient pursuant to

which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient’, since the scheme for the protection of adults is characterised by a triangular relationship between, firstly, the service provider, secondly, the recipient of the services (the protected adult who is often, by definition, incapable of entering into a legal relationship validly and with whom the service provider therefore has no legal relationship), and, thirdly, the judicial authority which appointed the service provider to perform a management role and with which that provider therefore has a legal relationship. The court further asks about the effect of the finding that, in certain circumstances, the remuneration of the service provider is borne by the protected adult, whereas — if that adult’s financial position does not so allow — that remuneration is borne by the State.

- 25 Second, with regard to the amount of the financial remuneration, the court notes that, although it follows from the case-law of the Court of Justice ‘that the fact that the price paid for an economic transaction is higher or lower than the cost price, and, therefore, higher or lower than the open market value, is irrelevant for the purpose of establishing whether it was a transaction effected for consideration (see, to that effect, judgments of 20 January 2005, *Hotel Scandic Gåsabäck*, C-412/03, EU:C:2005:47, paragraph 22; of 9 June 2011, *Campsa Estaciones de Servicio*, C-285/10, EU:C:2011:381, paragraph 25; and of 27 March 2014, *Le Rayon d’Or*, C-151/13, EU:C:2014:185, paragraphs 36 and 37)’ (judgment of 2 June 2016, *Lajvér*, C-263/15, EU:C:2016:392, paragraph 45), the Court of Justice further explains that ‘the direct nature of that link [between the supply of services and the financial remuneration] could not be called into question by the fact ... that that amount [of the compensation] was fixed at a level lower than the open market value, provided that the amount of compensation was determined in advance on the basis of well-established criteria which ensured that it was sufficient to cover the operating costs of [the service provider] (see, to that effect, judgments of 29 October 2015, *Saudaçor*, C-174/14, EU:C:2015:733, paragraph 38, and of 2 June 2016, *Lajvér*, C-263/15, EU:C:2016:392, paragraphs 45 and 46)’ (judgment of 22 February 2018, *Nagyszénás Településszolgáltatási Nonprofit Kft*, C-182/17, ECLI:EU:C:2018:91, paragraph 38). The Court of Justice appears to require in this way that the amount of the remuneration is foreseeable and can cover the service provider’s operating costs. The court asks about the scope of those conditions, given the arrangements for determining the remuneration of a service provider working in the field of the protection of adults, as laid down in the Grand-Ducal Regulation of 23 December 1982 laying down the conditions for the appointment of a guardianship manager.
- 26 Although the services provided in the present case by EQ are akin in all aspects to an economic activity, the court therefore considers it necessary to clarify that assessment in the specific context of the circumstances of the present case which is characterised by

1/ a triangular relationship in which the entity which appoints the service provider is not the same person as the recipient of the service and where, depending on the

situation, the service provider's remuneration is borne either by the recipient of the services or by the State; and

2/ by a mechanism for determining the service provider's remuneration which

- (a) is based on a case-by-case assessment made by the court;
- (b) is always dependent on the financial position of the recipient of the services; and
- (c) uses a fixed amount or a percentage of the income of the recipient of the services or has regard to the services performed.

On the basis of that mechanism for determining the remuneration, the view should be taken that the remuneration cannot be determined in advance and does not necessarily ensure in all circumstances that the operating costs incurred by the service provider are covered.

The exemption scheme

- 27 The court asks, first of all, whether the activity carried out in the field of the protection of adults falls within the concept of 'welfare or social security work' within the meaning of the VAT Directive.
- 28 Furthermore, the court asks how 'bodies recognised by the Member State concerned as being devoted to social wellbeing' are to be defined. EQ focuses on the nature of the activity carried out regardless of the legal status of the service provider, whereas the tax authority argues that the legal status of the person concerned must be taken into account and, without expressly saying so, that service providers operating for profit must be excluded.
- 29 Finally, in order to apply those provisions, it is necessary to clarify what is meant by the '*recognition*' of the social character of the body concerned. Although the Directive simply refers to recognition '*by the Member State concerned*', it does not explain the recognition process or specify the body authorised for the purposes of recognition. The facts of the present case raise inter alia the questions whether the authority concerned can be a judicial authority and whether recognition can be carried out on a case-by-case basis.

The principle of the protection of legitimate expectations

- 30 The court recalls the principle of fiscal neutrality underlying the VAT system. VAT is ultimately payable by the end consumer and the taxable person collects the VAT on behalf of the State. VAT is collected individually on each economic transaction and it is remitted periodically by the taxable person to the State. It follows from the foregoing that the taxable person could collect VAT only on the transactions which he knew or ought to have known came under the scope of VAT

when they were carried out. Where, as in the present case, the VAT authority informs the taxable person after the transactions in question have been carried out that it intends to depart from its earlier position of not subjecting those transactions to VAT, the taxable person is in a position where he could not charge VAT to the recipient of those supplies, whilst having to remit it to the State. The taxable person would thus be required, contrary to the fiscal neutrality of VAT, to pay the amounts claimed by the State in respect of VAT from its own funds.

5. The questions referred for a preliminary ruling:

- 31 The District Court submits the following questions to the Court of Justice:
1. Is the concept of ‘economic activity’ within the meaning of the second subparagraph of Article 9(1) of Directive 2006/112/EC to be interpreted as including or excluding supplies of services provided in the context of a triangular relationship in which the provider of the services is appointed to provide those services by an entity which is not the same person as the recipient of the supplies of services?
 2. Is the answer to the first question different according to whether the supplies of services are provided in the context of a role entrusted to the provider by an independent judicial authority?
 3. Is the answer to the first question different according to whether the remuneration of the service provider is borne by the recipient of the services or by the State, an entity of which appointed the service provider to provide those services?
 4. Is the concept of ‘economic activity’ within the meaning of the second subparagraph of Article 9(1) of Directive 2006/112/EC to be interpreted as including or excluding supplies of services where the remuneration of the service provider is not a legal requirement and the amount of the remuneration, where it is awarded, (a) is based on a case-by-case assessment, (b) is always dependent on the financial position of the recipient of the services and (c) is calculated by reference to a fixed amount, a percentage of the income of the recipient of the services or the services performed?
 5. Is the concept of ‘the supply of services and of goods closely linked to welfare and social security work’ contained in Article 132(1)(g) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax to be interpreted as including or excluding services performed in the context of a scheme for the protection of adults established by law and subject to the control of an independent judicial authority?
 6. Is the concept of ‘bodies recognised ... as being devoted to social wellbeing’ contained in Article 132(1)(g) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax to be interpreted, in view of the

recognition of the social character of the body, as laying down certain requirements vis-à-vis the way in which the service provider operates or as regards the not-for-profit or profit-making objective of the activity of the service provider, or more generally as restricting by other criteria or conditions the scope of the exemption provided for in Article 132(1)(g), or is the performance of services 'linked to welfare and social security work' alone sufficient to give the body at issue a social character?

7. Is the concept of 'bodies recognised ... as being devoted to social wellbeing' contained in Article 132(1)(g) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax to be interpreted as requiring a recognition process based upon a pre-defined procedure and pre-determined criteria, or is ad hoc recognition possible on a case-by-case basis, where appropriate by a judicial authority?

8. Does the principle of legitimate expectations as interpreted by the case-law of the Court of Justice of the European Union allow the authority responsible for recovering VAT to require that a person liable to VAT pays the VAT on economic transactions relating to a period which had ended when the authority's decision to apply VAT was made after that authority has, for an extended time prior to that period, accepted VAT returns from that taxable person which do not include economic transactions of the same kind in its taxable transactions? Is that possibility on the part of the authority responsible for recovering VAT subject to certain conditions?

WORKING DOCUMENT