

Case C-620/21**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:**

6 October 2021

Referring court:

Varhoven administrativen sad (Bulgaria)

Date of the decision to refer:

27 September 2021

Appellant in cassation and respondent in the cross-appeal:

Momtrade Ruse OOD

Respondent in cassation and appellant in the cross-appeal:

Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite

Subject matter of the main proceedings

Appeal in cassation against the judgment of the Administrativen sad Ruse (Administrative Court, Ruse) of 26 June 2020. The tax audit notice of 4 October 2018 issued by the Revenue Department of the TD na NAP Varna (Regional Office of the National Revenue Agency, Varna) and upheld by the decision of 13 March 2019 of the Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Varna (Director of the 'Appeals and Tax and Social Security' Directorate, Varna) was annulled by judgment of the Administrative Court, Ruse, which established VAT debts against Momtrade Ruse for the tax period from 24 June 2014 to 31 December 2015 equal to the difference between BGN 264 027.60 and BGN 316 833.05 for the principal sum and the difference between BGN 89 315.83 and BGN 107 178.98 for associated default interest, and dismissed the action as to the remainder.

Subject matter and legal basis of the request

Interpretation of Article 132(1)(g) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive or Directive 2006/112).

Questions referred for a preliminary ruling

The referring court has referred the following questions for a preliminary ruling:

1. Can Article 132(1)(g) of the VAT Directive be interpreted as meaning that it allows a commercial company registered as a social service provider in one Member State (in this case, Bulgaria) to rely on that provision in order to obtain a tax exemption for the social services which it provides in the territory of other Member States to private individuals who are nationals of those States? Is the answer to that question affected by the fact that the recipients of the services were referred to the provider by commercial companies registered in the Member States in which the services are provided?
2. If Question 1 is answered in the affirmative, by what criteria and law (Bulgarian and/or Austrian and German law) is it necessary to assess, for the purposes of the interpretation and application of the aforesaid provision of EU law, whether the company audited is an 'organisation recognised as being devoted to social wellbeing' and whether it has been proven that the services are 'closely linked to welfare and social security work'?
3. Based on that interpretation, does the fact that a commercial company is registered as a provider of social services, as defined by national law, suffice in order for that company to be classed as an organisation 'recognised by the Member State concerned as being devoted to social wellbeing'?

Provisions of European Union law and case-law relied on

Article 132(1)(g) and Article 133(1)(a) to (d) of Directive 2006/112

Case-law of the Court of Justice:

Judgment of 12 March 2015, '*go fair*' *Zeitarbeit*, C-594/13, EU:C:2015:164, paragraph 17

Judgment of 14 June 2007, *Horizon College*, C-434/05, EU:C:2007:343, paragraph 16

Judgment of 25 March 2010, *Commission v Netherlands*, C-79/09, EU:C:2010:171, paragraph 49

Judgment of 15 November 2012, *Zimmermann*, C-174/11, EU:C:2012:716, paragraph 22

Judgment of 13 March 2014, *Klinikum Dortmund*, C-366/12, EU:C:2014:143, paragraphs 26 and 27

Judgment of 21 September 2017, *Commission v Germany*, C-616/15, EU:C:2017:721, paragraph 47

Judgment of 5 October 2016, *TMD*, C-412/15, EU:C:2016:738, paragraph 30 and the case-law cited

Judgment of 26 February 2015, *VDP Dental Laboratory and Others*, Joined Cases C-144/13, C-154/13 and C-160/13, EU:C:2015:116, paragraph 43

Judgment of 21 February 2013, *Město Žamberk*, C-18/12, EU:C:2013:95, paragraph 17

Judgment of 21 January 2016, *Les Jardins de Jouvence*, C-335/14, EU:C:2016:36, paragraph 46

The referring court considers that the judgment in '*go fair*' *Zeitarbeit* relied on by the court of first instance concerns a case that is substantially different from the present case, as the services were provided in a Member State in which both the provider and the recipient of the services were established.

Provisions of national law relied on

Danachno-osiguriteln protsesualen kodeks (Bulgarian Code of Fiscal and Social Security Procedure, 'the DOPK')

Article 122 of the DOPK states that the Revenue Department may determine the taxable amount in accordance with the procedure laid down in that article, especially where factually incorrect documents have been used in the accounts of the person audited (point 3) or where the taxable amount cannot be determined based on the accounts (paragraph 4).

Zakon za danaka varhu dobavenata stoynost (Bulgarian Law on Value Added Tax, 'the ZDDS')

According to Article 21 of the ZDDS, the place where the supplier has established its independent place of business is deemed to be the place of supply of a service provided to a non-taxable person.

Article 38 of the ZDDS states that intra-Community supplies that would be exempt if made within the national territory are exempt (paragraph 2). Article 40 of the ZDDS states that the provision of social services within the meaning of the

Zakon za sotsialното podpomagane (Bulgarian Law on Social Assistance) is an exempt supply.

Article 67(2) of the ZDDS states that the tax is deemed to be included in the agreed price unless expressly indicated.

Zakon za sotsialното podpomagane (Bulgarian Law on Social Assistance, ‘the ZSP’)

Article 16 of the ZSP states that social services are based on targeted social work to help people with their day-to-day activities or social integration, and are provided at the person’s choice and request based on a personal needs assessment.

Article 18 of the ZSP states that social services, including those provided by Bulgarian legal entities and legal entities incorporated under the law of another EU Member State, may be provided following registration with the Agentsia za sozialno podpomagane (Social Assistance Agency).

According to the legal definition in Article 1, point 6, of the supplementary provisions of the ZSP, ‘social services’ means activities to support people and increase their opportunities to lead an independent life and, according to point 7, ‘social services in the community’ are provided within a family or family environment.

Pravilnik za prilagane na ZSP (ZSP Implementing Regulations, ‘the PPZSP’)

Article 40 of the PPZSP states that persons wishing to avail themselves of social services provided by a legal entity must submit a written request to the managing body in the place where they are currently residing, accompanied by references in the form of a copy of an identity document, a copy of their personal medical file, if available, and a medical report, if available. The managing body conducts an assessment of the person’s need for social services and records the results in a standard-format report.

According to Article 40d of the PPZSP, the social services provider must prepare a personal plan based on the needs assessment, in which it formulates objectives and sets out the activities required to meet those needs, including day-to-day needs and needs in terms of healthcare, education, rehabilitation, etc.

Article 40e of the PPZSP requires social services providers to keep a client register containing data on the recipient and the service provided.

Succinct presentation of the facts and procedure in the main proceedings

- 1 Momtrade Ruse is a limited liability company which mainly provides outpatient social services and which registered voluntarily under the ZDDS on 24 June 2014.

- 2 The company is registered with the Agentsia ‘Sotsialno podpomagane’ (Social Assistance Agency) of the Ministerstvo na truda i sotsialnata politika (Ministry of Labour and Social Policy) as a provider of social services in the form of personal carers, social assistants and home help for elderly people.
- 3 During the course of the tax audit concluded by the tax audit notice of 4 October 2018, Momtrade Ruse produced contracts for the provision of services to various private individuals of German and/or Austrian nationality (clients). Based on those contracts, the company posted care workers and home help to the clients’ households. The various duties were detailed in a questionnaire attached to the contract, prepared by a placement agency registered in Germany or Austria, which referred clients to the company audited under a placement agreement.
- 4 Aside from home help, the duties listed include caring for elderly people with health problems who are unable to take care of themselves. Each contract states both the client’s name and the name of the placement agency. The payments made by the private individuals to the company are not disputed.
- 5 The German tax authorities initiated an exchange of information under Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (OJ 2010 L 268, p. 1). It was established further to that exchange that the services were not taxable in Germany, but were subject to tax in Bulgaria under the ZDDS.
- 6 Based on the documents produced by the company audited, the revenue authorities found that there was no agreement on the provision of ‘social services’, as clients’ personal needs were not listed. They held that German and Austrian law are relevant, in addition to the ZSP, as the service is provided in fact in another Member State, and that, in order for Momtrade Ruse to be exempt under Article 40, point 1, of the ZDDS, evidence must be adduced confirming that, under the law of the other Member State, the services provided in its territory are services devoted to social wellbeing.
- 7 The tax authorities conducting the audit also concluded that the original documents produced by the company on the supplies made were factually incorrect; that legal entities from Germany and Austria are registered as the recipients of the services, whereas the actual recipients are private individuals of German or Austrian nationality; that the services are recorded in the accounts as intra-Community supplies of services to legal entities, which are taxable at a rate of 0%, rather than supplies of services to private individuals; that, therefore, it should be assumed that the taxable amount cannot be determined from the accounts; and, moreover, that not all the documents and explanations expressly requested were provided. On that basis, the tax authorities decided that they had to determine the taxable amount from their own assessment in accordance with Article 122(2) of the DOPK.

- 8 The court of first instance in the case, the Administrativen sad Ruse (Administrative Court, Ruse), held that Article 40, point 1, of the ZDDS corresponds to Article 132(1)(g) of Directive 2006/112, and that, in order for the exemption provided for in Article 40, point 1, of the ZDDS to apply, the person audited must prove that the service is devoted to social wellbeing under both Bulgarian law and the law of the Member State in whose territory the services are provided. The court held that, as the social assessment of the person's needs required under those rules had not been carried out and documented for the foreign nationals, this had not been proven in accordance with the Bulgarian rules; that the person audited had simply produced the contracts and associated questionnaires and had failed to produce the social service requests, social assessments, proposals, personal plans and list of clients required under Bulgarian law; that, on the contrary, the statements by German nationals and the expert social opinions and expert opinions on care needs based on the Sozialgesetzbuch (German Social Code) and the invoices submitted to the court of first instance could not be correlated, temporally, with the persons to whom the contested invoices were issued; and that the invoices issued to private individuals and submitted in the court proceedings which, it was confirmed following review, corresponded to the invoices issued to the German placement agencies and produced during the tax audit, did not contain any specific details of the services and did not prove that they were services devoted to social wellbeing.
- 9 The court of first instance reduced the tax debts assessed by the difference between BGN 264 027.60 and BGN 316 833.05 for the principal sum and by the difference between BGN 89 315.83 and BGN 107 178.98 for associated default interest, in application of Article 67(2) of the ZDDS, and upheld the tax debt assessed in the tax audit notice as to the remainder.
- 10 The question that arises for the Cassation Chamber is whether it is necessary to assess the nature of the services provided by Momtrade Ruse. Based on the documentary evidence produced during the tax audit and the evidence adduced during the court proceedings (contracts, questionnaires and statements by the recipients of the services), the court finds that the private individuals who use the services provided by the company are elderly persons with health problems who require assistance due to their state of health, as well as home help in managing their household.
- 11 The Administrative Court, Ruse, found in its judgment that the fact that the company had failed to produce any official documents from the German or Austrian authorities confirming that the services are devoted to social wellbeing proves that they are not. It held that the services provided in connection with the care of elderly persons are not social services, as they simply provide help in connection with household management, and that the workers are not required to perform duties relating to the state of health of those persons and had not received any training that might suggest they are able to provide medical care.

- 12 In its judgment in *Les Jardins de Jouvence* cited above, the Court found that the exemption attaches importance to ‘the intrinsic nature of the transactions carried out and to the status of the operator providing the services or supplying the goods at issue’. The referring court therefore considers that, in order to deliver proper judgment in the dispute between the parties, it requires clarification of the criteria by which it must assess whether these activities are devoted to social wellbeing: should it do so on the basis of documents provided by the competent authorities of the State in which the activities were performed or does it suffice if it establishes the nature of the care provided?

Succinct presentation of the reasoning in the request for a preliminary ruling

- 13 The referring court observes that the exemptions envisaged in Article 132 of Directive 2006/112 are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. However, the interpretation of the terms used to specify the exemptions must be consistent with the objectives underlying the exemptions and must comply with the requirements of the principle of fiscal neutrality; it cannot deprive the exemptions of their intended effects (judgments in ‘*go fair*’ *Zeitarbeit*, *Horizon College*, *Commission v Netherlands*, *Zimmermann* and *Klinikum Dortmund* cited above).
- 14 The purpose of all the provisions of Article 132 of Directive 2006/112 is to exempt certain activities in the public interest from VAT with a view to facilitating access to certain services and the supply of certain goods by avoiding the increased costs that would result if those services and the supply of those goods were subject to VAT (judgments in *Commission v Germany*, *TMD* and *VDP Dental Laboratory and Others* cited above).
- 15 The Varhoven administrativen sad (Supreme Administrative Court) has already ruled in a comparable case on the interpretation of the provision of the directive cited. By its judgment 10652 of 3 August 2020 in administrative case 11597/2019, it found that EU law did not require the Member States to exempt social services provided to nationals of other Member States outside their own national territory. That judgment was based on Article 26(2) of the Constitution [of the Republic of Bulgaria], which states that only foreigners residing in the territory of the Republic of Bulgaria have all the rights and obligations conferred under the Constitution of Bulgaria, with the exception of the rights and obligations for which Bulgarian nationality is required.
- 16 The Chamber of the referring court seised of the present case considers that it is irrelevant for the stated purpose of Article 132 of Directive 2006/112 whether the parties to the services are located in the territory of a Member State or whether, as in the present case, the service provider is registered in one Member State and the recipients are nationals of another Member State, in which the services are provided. However, as the place of supply of a service is deemed to be the place

where the supplier has established its economic activity, suppliers of services devoted to social wellbeing established in Bulgaria would be treated differently for tax purposes, based on the above interpretation of EU law by the Supreme Administrative Court, depending on whether they supply services in the territory of Bulgaria or to foreign nationals in the territory of another Member State, an outcome which the referring court does not find acceptable.

- 17 For those reasons, the referring court requires interpretation of Article 132(1)(g) of Directive 2006/112, in order to be able to answer the question of whether that article allows a commercial company registered as a provider of social services in one Member State (in this case, Bulgaria) to rely on that provision in order to obtain a tax exemption for social services which it provides in the territory of other Member States to private individuals who are nationals of those Member States, and whether the answer to that question is affected by the fact that the recipients of the services were referred to the provider by commercial companies registered in the Member States in which the services are provided.
- 18 Next, if that question is answered in the affirmative and the services exempted under Article 132(1) of Directive 2006/112 are independent concepts of European law (judgment in *Žamberk* cited above), but the directive contains neither criteria for defining those concepts nor rules for proving legally relevant facts, the referring court requires clarification on the interpretation and application of that provision of EU law, including whether it is necessary to assess in each case, in accordance with Bulgarian and/or Austrian and German law, whether the company audited is an organisation ‘recognised as being devoted to social wellbeing’ and whether it has been proven that the services provided are ‘closely linked to welfare and social security work’.
- 19 Lastly, the referring court wishes to know, in that same context, whether the fact that a commercial company is registered as a provider of social services, as defined by national law, suffices in order for that company to be classed as an organisation ‘recognised by the Member State concerned as being devoted to social wellbeing’?