

**Case C-458/21**

**Request for a preliminary ruling**

**Date lodged:**

22 July 2021

**Referring court:**

Kúria (Hungary)

**Date of the decision to refer:**

17 June 2021

**Appellant:**

CIG Pannónia Életbiztosító Nyrt.

**Respondent:**

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága

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**KÚRIA (SUPREME COURT)**

[...]

**Decision**

[...]

**Subject matter of the proceedings:** Administrative-law appeal in tax matters.

**Appellant:** the defendant at first instance

**Cross-appellant:** the applicant at first instance

[...]

**Operative part**

The Kúria (Supreme Court) [...] is making a reference to the Court of Justice of the European Union for a preliminary ruling pursuant to point (b) of [the first paragraph of] Article 267 of the Treaty on the Functioning of the European Union,

concerning the interpretation of Article 132(1)(c) of Council Directive 2006/112/EC [of 28 November 2006 on the common system of value added tax].

The Supreme Court asks the Court of Justice to give a preliminary ruling on the following question:

Must Article 132(1)(c) of [Council] Directive 2006/112/EC [of 28 November 2006 on the common system of value added tax] be interpreted as meaning that a service used by [an insurance company] is exempt from VAT where the purpose of the service is:

- to verify the accuracy of a diagnosis of a serious illness with which the insured has been diagnosed; and
- to seek the best medical care available to treat the insured; and
- where included in the cover offered by the insurance policy and at the request of the insured, to arrange provision of the medical care abroad?

[...] [procedural aspect of national law]

## **Reasoning**

### **Facts of the main proceedings**

1. Since September 2012, the appellant insurance company has marketed a series of health insurance and life assurance products in which it undertakes to guarantee provision of medical care abroad, in certain circumstances, where the insured is suffering from any of the following five serious conditions: cancer, by-pass surgery, heart valve problems, neurosurgery and living donor organ and tissue transplants. The document entitled *Best Doctors® Health Insurance Special Policy Conditions* (‘the Special Conditions’) contains rules defining the specific conditions of the insurance policy. According to point 4(a) of the Special Conditions, use of InterConsultation (or ‘*a second medical opinion*’, as it is referred to in the Special Conditions; ‘IC’) is a precondition for obtaining medical care abroad. FindBestCare (‘FBC’) is part of the medical care provided abroad. Point 2(p) of the Special Conditions contains the description of IC, point 2(m) of the document contains the definition of FBC, and point 13 describes the stages of the procedure for requesting cover.
2. To enable it to provide the policy benefits, on 13 September 2012 the appellant entered into a cooperation agreement (‘the cooperation agreement’) with Best Doctors España, S. A. U. (‘the Spanish company’), which is the Spanish member of the Best Doctors® international business group, for use of the patented medical information service. Under that

agreement, what are termed the 'Best Doctors Services' comprise two elements: IC and FBC. Under IC, based on the documentation sent to them, doctors for Best Doctors® re-examine the insured's medical information in order to confirm that the insured is entitled to the policy benefits. Under the agreement, the benefits do not apply in cases of acute illness or where the illness has yet to be examined by a 'local' healthcare professional. Under the FBC service, where the insured's policy provides this cover, the Spanish company arranges an appointment with the medical service providers on behalf of the insured, organises the medical treatment (admission and appointments), hotel accommodation and travel, ensures that care is provided and checks that the medical treatment is appropriate. It also deals with processing and paying medical fees in accordance with the contracts with the medical service providers. It does not bear the travel and accommodation costs or the costs of the medical care provided. FBC cannot be used for care provided in Hungary (cooperation agreement, Schedule 'A', points 1 and 2).

3. Under the cooperation agreement, the appellant pays an annual premium for the Best Doctors Services for each person insured, making payments with the same frequency as the premium payments made by the insured persons to the appellant (cooperation agreement, point 'E').
4. During the period from October to December 2012, the Spanish company issued three invoices for payment for services, on which the appellant did not pay value added tax (VAT).
5. During the period to which the proceedings refer, the appellant had not yet made use of the Best Doctors® service provided by the Spanish company, but it was still required to pay the premiums, and did so.
6. By decision of 5 May 2016 [...], made following an inspection carried out by the Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága (National Tax and Customs Authority, Hungary; [...]) on the appellant, as the group's tax representative, to provide an *a posteriori* check on the VAT returns for the period from 1 May to 31 December 2012, the appellant was ordered to pay a difference in tax of HUF 1 059 000, a tax fine of HUF 529 000, late payment interest of HUF 178 000 and a fine for breach of tax obligations of HUF 20 000.
7. By decision of 14 November 2016 [...], the respondent, which heard the appeal lodged against the decision made at first instance, partially amended that decision, reducing the amount of the tax fine to HUF 376 000, and confirmed all other elements of [the decision under appeal].
8. The respondent based its decision on Article 132(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'); Article 37(1), Article 60(1) and (2), Article 65,

Article 82(1), Article 85(1)(c). Article 120(b) and Article 140(a) of the az általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law CXXVII of 2007 on value added tax, ‘the VAT Law’); and the judgments of the Court of Justice of the European Union in *D.*, C-384/98; *Kügler*, C-141/00; and *d’Ambrumenil and Dispute Resolution Services*, C-307/01.

9. According to paragraph 2 of the grounds, with which the proceedings are concerned, the service provided to the appellant by the Spanish company does not satisfy the requirements for exemption from value added tax in Article 85(1)(c) of the VAT Law, since the fees in the three invoices constitute a form of flat rate that did not directly reflect actual provision of healthcare, diagnostic treatment or curative services to the individual. The purpose of the re-examination of the prior medical documentation during the IC service is to confirm whether the insured is entitled to receive medical care abroad, for which the second medical opinion is a prerequisite. The Spanish [company] does not perform examinations in order to arrive at a diagnosis, and it does not provide medical treatment; instead, based on the prior medical documentation, it judges and assesses the results of such examinations and treatments in order to determine whether the risk insured by the client’s policy has occurred. The Spanish company examines, assesses, and at times organises medical care, but it does not provide care, nor does it treat or cure illnesses or health disorders, and the services — whether considered collectively or individually — cannot be classed as medical treatment. Having regard to the main purpose of the financial transaction recorded in the invoices, the services provided cannot be classed as human health services exempt from VAT, but are essentially expert opinions and organisational activities, and therefore the appellant must pay VAT of HUF 752 000.
10. In its administrative-law appeal against the decision of the tax authority, the appellant maintained that the authority had wrongly classified the services received from the Spanish company, because Best Doctors® not only assesses the medical documents but also performs supplementary examinations (for example, a histological analysis of the tissue samples sent to it), and its services also include seeking out the best foreign medical specialists and obtaining their opinion; the purpose of their services is therefore to treat the patient and ensure that the patient receives the most effective therapy possible. The IC is not an administrative requirement but an essential element of the service that forms part of its insurance benefits, in the context of which the doctor or medical team preparing the report performs a diagnosis. The most valuable element of the service provided by Best Doctors® is the diagnosis of health disorders and illnesses, which satisfies the concept of medical care in Article 132(1)(c) of the VAT Directive and is therefore exempt from VAT.
11. The court of first instance partially upheld the appeal brought by the appellant and ordered the tax authority to carry out new proceedings. Based

on the opinion of the forensic medical expert, which took into account the medical reports prepared and supplied by Best Doctors® at the end of the period under inspection, the court concluded that the purpose of the IC service provided as part of Best Doctors® is directly, unequivocally, and also in practice, not only to provide people with healthcare, but also to improve their health and to diagnose and treat illnesses. It also considered that the agreements and the Special Conditions did not support the tax authority's conclusions that the main purpose of the IC was to prepare an expert opinion in order to determine whether the insured was entitled to subsequent insurance benefits. The court of first instance ordered the tax authority to carry out additional checks as part of the new proceedings.

12. Both parties lodged appeals with the Supreme Court against the judgment given at first instance.
13. Citing the judgment of the Court of Justice in *Unterpertinger*, C-212/01, in its appeal the respondent argues that the Best Doctors® services are only indirectly linked to the therapeutic purpose, and therefore cannot be considered to be exempt from VAT. It maintains that the Spanish company did not diagnose individuals or care for them, and did not give them medical treatment or healthcare.
14. In its cross-appeal, the appellant maintains that the assessment of the evidence made by the court of first instance was not reasonable since, based on that evidence and having regard also to the judgments of the Court of Justice in *Verigen Transplantation Service International*, C-156/09, and *CopyGene*, C-262/08, the questions contained in the instructions for the new proceedings can be answered as follows:
  - (i) the expert evidence presented to the court confirms that the purpose of the IC is directly and unequivocally to perform a diagnosis; in other words, it has a therapeutic purpose and therefore satisfies the material requirement for human health services exempt from VAT;
  - (ii) from an interpretation of the cooperation agreement and the Special Conditions, together with the accompanying schedules, it is possible to identify the content of the legal relationship, under which Best Doctors® offers the insured the IC service as a policy benefit, while the FBC is provided after the diagnosis, as an optional element ancillary to the diagnosis, and a standard tariff is charged for the Best Doctors® services;
  - (iii) the information and data supplied by the appellant clearly show that the IC service is the defining element of the insurance service and, while the FBC is part of the service, its nature is purely ancillary. It can clearly be concluded from all of the foregoing that the IC is an essential element of the complex service provided by Best Doctors®

and directly and unequivocally fulfils a therapeutic purpose, and it therefore satisfies the requirements for human health services exempt from VAT. No further evidence is required by the tax authority.

## **15. Relevant provisions of EU law**

### **Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT Directive)**

#### CHAPTER 2

Exemptions for certain activities in the public interest

#### Article 132

1. Member States shall exempt the following transactions:

- (a) the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto;
- (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;
- (c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned;

## **16. Relevant provisions of national law**

### **2007.évi CXXVII. törvény – az általános forgalmi adóról (Law CXXVII of 2007 on value added tax)**

#### CHAPTER VI

#### EXEMPTION FROM VAT

Exemption from VAT on grounds of the public interest nature of the activity

#### Article 85(1)

The following shall be exempt from VAT:

[...] [provision not relevant to the case]

- (b) medical care, closely related care and transport services for the sick and wounded, and the supply of goods closely linked to such services, provided by public operators, acting as such;
- (c) services provided by healthcare providers, including naturopathy providers, acting as such, and care of the sick and wounded closely related to such services;

### **Proceedings before the Supreme Court**

17. In the appeals brought by the parties, the Supreme Court must decide whether the service the Spanish company provides to the appellant is a service exempt from VAT pursuant to Article 132(1)(c) of the VAT Directive.
18. According to the case-law of the Court of Justice, the VAT Directive (and the Sixth Directive, previously in force) confers a very wide scope on VAT, but exempts certain activities from the tax. These exemptions constitute independent concepts of EU law whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another. The purpose of these VAT exemptions is to exempt only those public interest activities listed and described in detail in the Directive. The terms used to specify those exemptions are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all goods and services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by the exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT, while also ensuring that the provisions on VAT exemptions can have effect.
19. It can be seen from the case-law of the Court of Justice of the European Union that Article 132(1)(b) of the VAT Directive [or Article 13A(1)(b) of the Sixth Directive, previously in force] refers to medical treatment provided as part of hospital care, while point (c) of the provision is concerned with healthcare provided outside that context, whether at the provider's private premises, the patient's home, or anywhere else. The concept of 'the provision of medical care' referred to in Article 132(1)(c) of the VAT Directive also relates to services which have as their purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders; however, it does not necessarily follow, according to the case-law, that the therapeutic purpose of a service must be confined within a particularly narrow compass.
20. According to the case-law, medical examinations of individuals for employers or insurance companies, the taking of blood or other bodily samples to test for the presence of viruses, infections or other diseases on behalf of employers or insurers, or certification of medical fitness, for example, as to fitness to travel, are exempt from VAT where those services

are intended principally to protect the health of the person concerned (*d'Ambrumenil and Dispute Resolution Services*, C-307/01). The provision of care of a therapeutic nature by a capital company running an out-patient service under which care, including home care, is provided by qualified nursing staff (excluding the provision of general care and domestic help) is exempt from VAT (*Kügler*, C-141/00), as are services provided by telephone consisting of giving advice regarding health and illnesses, provided that they have a therapeutic purpose [*X (VAT exemption for telephone consultations)*, C-48/19].

21. However, the Court of Justice of the European Union has ruled that the tax exemption does not apply to the preparation of medical reports or services provided by a doctor whose purpose is to examine whether a legal or contractual condition is satisfied, or which are required in order to assess claims that may be made by a particular individual in various proceedings (see, for example, *Finanzamt D*, C-657/19). The following are not exempt from VAT: giving certificates as to a person's medical condition for purposes such as entitlement to a war pension (*d'Ambrumenil and Dispute Resolution Services*, C-307/01) or invalidity pension (*Unterpertinger*, C-212/01), or whose purpose is not closely related to medical care (for example, *CopyGene*, C-262/08 — stem cell bank activities — or *PFC Clinic*, C-91/12 — plastic surgery and cosmetic treatments) or whose purpose is to determine liability and quantify damages for personal injury, or the preparation of medical opinions based on medical reports and examinations without conducting a medical examination, or [conducting] medical examinations with a view to the preparation of expert medical reports on professional negligence on the part of individuals involved in legal proceedings (*d'Ambrumenil and Dispute Resolution Services*, C-307/01). Nor are the following exempt: establishing the genetic affinity of individuals to certain diseases through biological tests (*D.*, C-384/98) or nutrition monitoring services (*Frenetikexito*, C-581/19).
22. In the case concerned in the present proceedings, the insured event is the serious illness of the insured, together with death and expiry of the policy. The liability borne by the insurance company (the appellant) comprises the medical care provided to the insured abroad and the organisational work required to obtain that care. The service which the appellant receives as a VAT-exempt service forms part of the insurance service it provides to the insured and, under the insurance policy, the ultimate objective of the service provided by the appellant is to enable the insured to receive medical care abroad organised by the Spanish company in the event of certain illnesses; ultimately, it serves to diagnose, treat and cure the insured's illness. The service received by the insurance company forms part of this complex web of different contracts and therefore, in the opinion of the members of the Supreme Court hearing the case, these must be taken into consideration in deciding whether the service is exempt from VAT.

23. Considering that the medical care received under the policy also serves to diagnose, treat and, in so far as possible, cure health disorders, and having regard in general to the case-law of the Court of Justice — *Unterpertinger*, C-212/01; *Verigen Transplantation Service International*, C-156/09; *CopyGene*, C-262/08; *D.*, C-384/98; *Kügler*, C-141/00; *d’Ambrumenil and Dispute Resolution Services*, C-307/01; *X (VAT exemption for telephone consultations)*, C-48/19; *Peters*, C-700/17; *Belgisch Syndicaat van Chiropraxie and Others*, C-597/17; *Frenetikexito*, C-581/19; *Finanzamt D*, C-657/19; ... *FC Clinic*, C-91/12; *Klinikum Dortmund*, C-366/12; *Solleveld and van den Hout-van Eijnsbergen*, C-443/04 and C-444/04, and *Future Health Technologies*, C-86/09 — the members of the Supreme Court hearing the case consider that a further interpretation of Article 132(1)(c) of the VAT Directive is needed in the context of the facts of the present case.
24. [...] [repetition of the question referred as set out in the operative part]
25. [...] [procedural aspect of national law]

Budapest, 17 June 2021.

[...] [signatures]

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