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JUDGMENT OF THE COURT (Sixth Chamber)
March 5, 2020 (*)
(Reference for a preliminary ruling - Taxation - Value added tax (VAT) - Directive 2006/112 / EC - Article 132 (1) (b) - Exemptions - Hospitalization and medical care - Hospital establishments - Services provided under social conditions comparable to those which apply to bodies governed by public law - Articles 377 and 391 - Derogations - Faculty to opt for taxation - Continuation of taxation - Modification of the conditions of exercise of the activity "

In Case C - 211/18,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa) [Tax Arbitration Tribunal (Administrative Arbitration Center), Portugal], by decision of 19 February 2018, received at the Court on March 26, 2018, in the proceedings

Idealmed III - Serviços de Saúde SA

against

Autoridade Tributária e Aduaneira,

THE COURT (sixth chamber),

me

composed of M. Safjan, President of the Chamber, L. Bay Larsen (Rapporteur) and C. Toader, Judges,

Advocate General: M. M. Szpunar,

Ms.

Clerk: M. Ferreira, Senior Administrator,

having regard to the written procedure and further to the hearing on 17 June 2019,

considering the observations presented:

es

dealmed III - Serviços de Saúde SA, by M J. P. Lampreia and F. Antas, advogados,

my

he Portuguese Government, by MM. L. Inez Fernandes, Mr Figueiredo and R. Campos Laires and M MJ Marks and P. Barros da Costa, acting as Agents,

my

European Commission, by M. Afonso and N. Gosse, acting as Agents,

having heard the Advocate General in his conclusions at the hearing on October 10, 2019,

makes the present

Stop

This reference for a preliminary ruling concerns the interpretation of Article 132 (1) (b) and Articles 377 and 391 of Council Directive 2006/112 / EC of 28 November 2006 on the system common value added tax (OJ 2006, L 347, p. 1).

This request was made in the context of a dispute between Idealmed III - Serviços de Saúde SA (hereinafter "Idealmed") and the Autoridade Tributária e Aduaneira (Tax and Customs Administration, Portugal) concerning the decision of the latter imposing on Idealmed the payment of a sum corresponding to the value added tax (VAT) deducted in the framework of the medical services which it provided between the year 2014 and the year 2016 as well as the payment compensatory and moratorium interest relating thereto.

The legal framework

Directive 2006/112

Recital 7 of Directive 2006/112 states:

'The common system of VAT should, even if the rates and exemptions are not fully harmonized, lead to competitive neutrality, in the sense that in the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution circuit. "

Article 132 (1) of that directive provides:

'Member States shall exempt the following transactions:

[...]

spitalization and medical care as well as the operations which are closely linked to them, provided by public law bodies or, under social conditions comparable to those which apply to the latter, by hospital establishments, care centers medical and diagnostic and other duly recognized establishments of the same nature;

vices and supplies of goods closely linked to social assistance and social security, including those provided by retirement homes, carried out by bodies governed by public law or by other bodies recognized as having a social status by the Member State concerned;

Article 133 of that directive provides:

"Member States may, on a case-by-case basis, grant to bodies other than those governed by public law each of the exemptions provided for in Article 132 (1) (b), (g), (h), i), l), m) and n), if one or more of the following conditions are met:

organizations in question must not have as their goal the systematic search for profit, any profits should never be distributed but must be used to maintain or improve the services provided;

se bodies must charge prices which are approved by the public authorities or do not exceed such prices or, for operations which are not subject to price approval, prices lower than those required for similar operations by commercial enterprises subject to VAT ;

Under Article 377 of the same directive:

'Portugal may continue to exempt the transactions set out in Annex X, Part B, points 2), 4), 7), 9), 10) and 13), under the conditions which existed in that Member State on the 1st January 1989. "

Article 391 of Directive 2006/112 is worded as follows:

'Member States which exempt transactions referred to in Articles 371, 375, 376 and 377, Article 378 (2), Article 379 (2) and Articles 380 to 390 may grant taxable persons the option opt for the taxation of said operations. "

Annex X to that directive, entitled 'List of transactions subject to the derogations referred to in Articles 370 and 371 and in Articles 375 to 390', mentions in point 7 of Part B thereof, which lists transactions that States members may continue to exempt, "transactions carried out by hospitals not covered by Article 132 (1) (b)".

Portuguese law

Article 9 (2) of the Código do IVA (VAT code) provides that VAT is exempt from 'medical and health services and operations closely related to them carried out by hospitals, clinics , dispensaries and other similar establishments ".

Article 12 of the Code, in the version of Decreto-Lei n° 102/2008 (Legislative Decree n° 102/2008) of 20 June 2008, provides:

y waive the exemption and opt for the taxation of their operations

[...]

spitals, clinics, dispensaries and other similar establishments, not belonging to legal persons under public law or to private institutions integrated into the national health system, which provide medical services and sanitary and related operations;

right of option is exercised by depositing, with any tax authority or other legally authorized place, the declaration of commencement of activity or modification thereof, as the case may be, and this shall take effect from its filing date.

right of option having been exercised in accordance with the preceding paragraphs, the taxable person is bound to remain under the regime for which he has opted for at least five years and, after this period has elapsed, if he wishes to return under the exemption regime he must:

in the month of January of one of the years following that in which he has completed the period of the option plan, the declaration referred to in section 32, which takes effect from the 1st January of the year of its filing;

The lei n° 7-A / 2016 (law n° 7-A / 2016) of 30 March 2016, amended Article 12, paragraph 1 of the Code, which now reads as follows:

"May waive the exemption and opt for the taxation of their operations

[...]

xable persons, referred to in Article 9 (2) who are not legal persons under public law, with regard to the provision of medical and health services and the operations closely related to them which do not result from 'agreements concluded with the State, within the framework of the health system, in accordance with the law on the bases of the relevant health'.

The main proceedings and the questions referred

Idealmed is a company that manages and operates, for profit, five health establishments, which offer medical services, nursing care as well as diagnostic services, clinical analyzes and physiotherapy.

In its declaration of start of activity, filed on January 6, 2012, this company expressed its wish to opt for the normal VAT taxation regime.

As of September 2012, Idealmed has concluded agreements and conventions with public authorities, providing in particular for the provision of healthcare services at predefined prices.

During an audit, the tax and customs administration noted that, between April 2014 and June 2016, a large part of Idealmed's medical activity was carried out within the framework of of these agreements and conventions. This administration deduced from this that this activity should have been exempted, without Idealmed being able to give up the benefit of such an exemption, and that this company had therefore unduly deducted the VAT paid in the context of the exercise of said activity.

As a result of this control, the Tax Administration and Customs has adopted a Decision amending statutory quality Idealmed under the VAT with effect from 1st October 2012 requiring the company to pay a sum corresponding to the amount of VAT unduly deducted, namely 2,009,944.90 euros, plus interest thereon.

On June 27, 2017, Idealmed submitted a request for the establishment of an arbitral tribunal in tax matters, for the purpose of establishing the illegality of this decision.

It is in this context that the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa) [Arbitral Tribunal in Tax Matters (Center for Administrative Arbitration), Portugal] decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling :

oes Article 132 (1) (b) of Directive [2006/112] preclude an interpretation according to which a hospital establishment belonging to a commercial company governed by private law, which has concluded agreements for the provision of medical care services with the State and legal persons under public law, is considered to act under social conditions comparable to those which apply to bodies under public law, in accordance with this provision, when the following conditions are met :

e than 54.5% of invoicing, including the amounts invoiced to beneficiary patients, is carried out with State services and public health subsystems, at prices fixed in the agreements and conventions concluded with those -this ;

e than 69% of patients benefit from public health subsystems or services provided under agreements concluded with state services;

e than 71% of medical procedures were performed under agreements concluded with public health subsystems and state services and,

activity carried out is of great public interest in general?

e Portuguese Republic having continued, under Article 377 of Directive [2006/112], to exempt from VAT operations carried out by hospitals not mentioned in Article 132 (1) (b) , of this directive and having granted these taxable persons, under article 391 of the directive [2006/112], the faculty to opt for the taxation of said operations, accompanied by the obligation to remain under the regime of taxation for at least five years, and having provided for the possibility of returning to the exemption regime only if they manifest the intention, this article 391 and / or the principles of the protection of acquired rights, of confidence legitimate, equality, non-discrimination,the neutrality and non-distortion of competition with regard to patients and taxable persons governed by public law do they object to the tax authority imposing the exemption regime before the expiry of this period, from the period when, according to her, the taxable person began to provide services under social conditions comparable to those which apply to bodies governed by public law?

Article 391 of Directive [2006/112] and / or the abovementioned principles preclude new legislation imposing the exemption regime on taxable persons who previously opted for the taxation, before the expiration of the said five-year period?

Article 391 of Directive [2006/112] and / or the abovementioned principles oppose a regulation according to which a taxable person who has opted for the application of the taxation system, because he does not did not provide health services under social conditions comparable to those which apply to public law bodies at the time when he opted for this scheme, may remain under this scheme if he begins to provide these services under social conditions comparable to those that apply to public law bodies? "

The questions referred

On the first question

As a preliminary point, it should be recalled that, according to Article 132 (1) (b) of Directive 2006/112, the Member States exempt hospitalization and medical care and operations which are closely related to them linked, insured by bodies governed by public law or, under social conditions comparable to those which apply to the latter, by hospitals, medical care and diagnostic centers and other establishments of the same nature duly recognized.

It is apparent from the wording of this provision that the exemption from the provision of care provided by private hospitals is subject to the condition that these services are provided under social conditions comparable to those which apply to bodies governed by public law.

Since this requirement relates to the services provided and not to the service provider concerned, the proportion of care services provided under comparable social conditions, within the meaning of that provision, in relation to the total activity of this service provider is not relevant for the application of the exemption provided for in Article 132 (1) (b) of that directive.

In those circumstances, it must be held that, by its first question, the national court asks, essentially, whether Article 132 (1) (b) of Directive 2006/112 is to be interpreted as meaning that the competent authorities of a Member State may take into account, with a view to determining whether the care services provided by a private hospital establishment, which are of a general interest nature, are provided under social conditions comparable to those which apply to bodies governed by public law, within the meaning of the same provision, the fact that these services are provided in the framework of conventions concluded with public authorities of that Member State,at prices fixed by these conventions and the costs of which are borne in part by social security institutions of the said Member State.

In that regard, it should be noted at the outset that Article 13A (1) (b) and (g) of Sixth Council Directive 77/388 / EEC of 17 May 1977 on harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis (OJ 1977, L 145, p. 1), and Article 132 (1) (b)) and g) of Directive 2006/112, the wording of which is essentially identical to that of the first of those provisions, must be interpreted in the same way and that, therefore, the case-law of the Court relating to that first provision is relevant for the purpose of answering questions relating to the interpretation of the second (see, to that effect, judgment of 10 June 2010, Future Health Technologies, C - 86/09, EU: C: 2010: 334, point 27).

As regards the concept of 'comparable social conditions', within the meaning of Article 132 (1) (b) of Directive 2006/112, it should be noted that that provision does not precisely define the aspects of the care provision concerned which must be compared in order to assess its applicability.

In that regard, it should be borne in mind, first, that the provisions of Article 132 (1) of Directive 2006/112, as a whole, are intended to exempt certain business activities from VAT general interest, with a view to facilitating access to certain services as well as the supply of certain goods, avoiding the additional costs which would arise from their being subject to VAT (see, to this effect, judgment of 20 November 2019, Infohos, C- 400/18, EU: C: 2019: 992, point 37 and the case-law cited).

The general interest nature of the services therefore constitutes a relevant element to be taken into account in order to determine whether the care services of a private hospital establishment fall within the exemption provided for in Article 132 (1) (b) , of this directive.

Secondly, it follows from the first paragraph of Article 133 (c) of that directive that the Member States may make the exemptions provided for in particular in Article 132 (1) (b) and (g) conditional.), of the same directive to bodies other than those of public law respecting the condition that these bodies must charge prices approved by the public authorities or not exceeding such prices or, for operations not liable to approval of prices, prices lower than those required for similar operations by commercial enterprises subject to VAT.

Since the Union legislature has made the element relating to the fixing of the prices of services by an agreement concluded with the public authorities of a Member State an optional condition which the Member States may choose to apply or no to the exemption provided for in Article 132 (1) (b) of Directive 2006/112, the absence of such an element cannot be such as to exclude the benefit of that exemption (see, for analogy, judgment of 26 May 2005, Kingscrest Associates and Montecello, C - 498/03, EU: C: 2005: 322, paragraph 40).

However, such an element remains relevant in order to determine whether care services from a private hospital establishment are provided under social conditions comparable to those which apply to bodies governed by public law, within the meaning of Article 132 (1), (b) of Directive 2006/112 (see, by analogy, judgment of 21 January 2016, Les Jardins de Jouvence, C - 335/14, EU: C: 2016: 36: 38).

In those circumstances, it must be held that the element relating to the fixing of the prices of services by an agreement concluded with the public authorities of a Member State constitutes an element which can be taken into account in order to determine whether The healthcare services provided by a private hospital establishment are provided under social conditions comparable to those which apply to bodies governed by public law, within the meaning of Article 132 (1) (b) of Directive 2006/112.

Thirdly, it appears from the case-law of the Court that the arrangements for the payment of benefits by social security institutions of a Member State are relevant in the context of examining the comparability of the conditions under which these services are provided within the meaning of this provision (see, to that effect, judgment of 10 June 2010, CopyGene, C - 262/08, EU: C: 2010: 328, points 69 and 70).

In the light of the foregoing, the answer to the first question is that Article 132 (1) (b) of Directive 2006/112 must be interpreted as meaning that the competent authorities of a Member State may take into account, with a view to determining whether healthcare services provided by a private hospital establishment, which are of a general interest nature, are provided under social conditions comparable to those which apply to bodies governed by public law, within the meaning of the same provision, the fact that these services are provided within the framework of conventions concluded with public authorities of this Member State, at prices fixed by these conventions and whose costs are partly assumed by social security institutions of this State member.

On the second to fourth issue s

By its second to fourth questions, which must be examined together, the referring court essentially asks whether Article 391 of Directive 2006/112, read in conjunction with Article 377 thereof and the principles of legitimate expectations, legal certainty as well as fiscal neutrality, must be interpreted as meaning that it opposes the exemption from VAT of the care services provided by a private hospital establishment which fall under the article 132 (1) (b) of that directive on account of a change in the conditions for the exercise of his activities which has occurred since he opted for the system of taxation provided for by the national rules of the Member State concerned , which provides for the obligation, for any taxable person making such a choice,to remain subject to the said regime for a certain period, when such a period has not yet expired.

It should be recalled that the common system of VAT is the result of a progressive harmonization of national laws within the framework of Articles 113 and 115 TFEU. As the Court has noted on several occasions, this harmonization, as it has been achieved by successive directives and, in particular, by Directive 77/388, is still only a partial harmonization (see, in this sense, judgment of 26 February 2015, VDP Dental Laboratory and Others, C - 144/13 and C - 160/13, EU: C: 2015: 116, point 60 and the case-law cited).

Indeed, Directive 2006/112, by virtue of its article 370, authorized the Member States to continue to maintain certain provisions of their national legislation prior to this directive which would be, without that authorization, incompatible with it (judgment of February 26, 2015, VDP Dental Laboratory and Others, C - 144/13 and C - 160/13, EU: C: 2015: 116, point 61 and cited case law).

In that context, Article 377 of that directive, read in conjunction with point 7 of Part B of Annex X to that directive, authorizes the Portuguese Republic to continue to exempt operations carried out by hospitals not covered by Article 132, paragraph 1 b) of the Directive, under the conditions applying in that member State on 1st January 1989.

In addition, Article 391 of Directive 2006/112 authorizes Member States which exempt transactions covered by the provisions which it cites, including Article 377 of that directive, to grant the taxable persons concerned the option of '' opt for the taxation of said operations.

It therefore follows from a combined reading of Articles 377 and 391 of that directive and of Annex X, Part B, point 7 thereof, that the option to opt for the taxation provided for in Article 391 of the same directive concerns only the operations of hospitals not covered by Article 132 (1) (b) of Directive 2006/112. However, the latter provision requires Member States to exempt services which fall under it (see, to that effect, judgment of 10 June 2010, CopyGene, C - 262/08, EU: C: 2010: 328, point 56).

It follows that, from the moment when a private hospital establishment provides services covered by Article 132 (1) (b) of the same directive, it must be subject to the exemption regime for these benefits, even if he had opted for the system of taxation for activities which were not covered by that provision.

Consequently, the Member States cannot rely on Articles 377 and 391 of Directive 2006/112 to justify the continued taxation of the transactions of a taxable person, if that would have the consequence that his operations

will not then be exempt they fall under the exemption provided for in Article 132 (1) (b) of that directive.

Furthermore, with regard to the principle of fiscal neutrality, recalled in recital 7 of that directive, according to which similar services, which therefore compete with each other, cannot be treated differently from the point of view of VAT (see, to that effect, judgment of 5 September 2019, Regards Photographiques, C - 145/18, EU: C: 2019: 668, point 36 and the case-law cited), the fact that, in the past, the taxable person concerned concerned has performed other services for which he has benefited from a special tax regime, is not intended, in principle, to modify the tax treatment of the services which he subsequently provided under different social conditions.

Likewise, the fact that the national legislation providing for such a possibility of option for the scheme for the taxation of activities obliges the taxable person to remain subject to that scheme for a certain period, which has not yet expired, is without impact on the tax treatment of benefits covered by Article 132 (1) (b) of Directive 2006/112, since such a possibility only applies to transactions not covered by this provision.

Furthermore, such an interpretation is not called into question by the principles of legitimate expectations or legal certainty.

With regard to the principle of legitimate expectations, it should be recalled that the right to invoke that principle extends to any person subject to whom an administrative authority has given rise to founded hopes on account of specific assurances that 'it would have provided him (judgment of 21 February 2018, Kreuzmayr, C - 628/16, EU: C: 2018: 84, paragraph 46 and the case-law cited).

However, the fact that the national legislation which enabled a taxable person to opt for the taxation of his activities conditions the exercise of such an option by the obligation for the latter to remain subject to the regime chosen for a certain period cannot create a legitimate expectation of this taxable person in the maintenance, by the competent authorities, of this regime in the event of modification of the conditions under which it carries out its activities.

With regard to the principle of legal certainty, the Court has held that it does not prevent the tax authorities from proceeding, within the limitation period, to an adjustment of VAT relating to the tax deducted or to services already performed, which should have been subject to this tax (judgment of 12 October 2016, Nigl and Others, C - 340/15, EU: C: 2016: 764, paragraph 48).

Such a principle does not therefore preclude the tax administration from assessing the situation of a taxable person who had opted for the taxation of his activities and that, after that assessment, that administration proceeds to an adjustment of the VAT relating to the tax deducted for services which this taxable person has provided after having exercised his right of option, since it comes to the conclusion that these services fall under Article 132 (1) , under (b), of that directive and should have been exempted in accordance with that provision.

It follows that the second to fourth questions must be answered as Article 391 of Directive 2006/112, read in conjunction with Article 377 thereof and the principles of legitimate expectations, of legal certainty as well that tax neutrality must be interpreted as meaning that it does not oppose the exemption from VAT of care services provided by a private hospital establishment which fall under Article 132 (1) (b) , of this directive due to a modification of the conditions for the exercise of its activities which has occurred since he opted for the system of taxation provided for by the national regulations of the Member State concerned, which provides for the obligation, for any taxable person making such a choice, to remain subject to this regime for a certain period,when such a period has not yet expired.

Costs

ıce the proceedings are, in relation to the parties to the main proceedings, the nature of an incident raised before the referring court, it is for that court to rule on the costs. Costs incurred in submitting observations to the Court, other than those of the parties, are not recoverable.

For these reasons, the Court (Sixth Chamber) said for the right:

Article 132 (1) (b) of Council Directive 2006/112 / EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the competent authorities of 'a Member State may take into account, with a view to determining whether healthcare services provided by a private hospital establishment, which are of a general interest nature, are provided under social conditions comparable to those which apply to legal bodies public, within the meaning of the same provision, the fact that these services are provided under agreements concluded with public authorities of that Member State, at prices fixed by those agreements and the costs of which are partly borne by social security of that Member State.

Article 391 of Directive 2006/112, read in conjunction with Article 377 thereof and the principles of legitimate expectations, legal certainty and fiscal neutrality, must be interpreted as meaning that it does not object to the exemption from value added tax from the provision of care provided by a private hospital establishment falling under Article 132 (1) (b) of that directive by reason of an amendment the conditions for the exercise of his activities which have occurred since he opted for the taxation system provided for by the national regulations of the Member State concerned, which provides for the obligation, for any taxable person making such a choice, to remain subject said regime for a certain period, when such a period has not yet expired.

Signatures

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* Language of the case: Portuguese.