JUDGMENT OF THE COURT (Fifth Chamber)

14 September 2000 *

In Case C-384/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Landesgericht St. Pölten (Austria) for a preliminary ruling in the proceedings pending before that court between

D.

and

W.,

intervener:

Österreichischer Bundesschatz,

on the interpretation of Article 13A(1)(c) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member States

* Language of the case: German.

relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1),

THE COURT (Fifth Chamber),

composed of: L. Sevón (Rapporteur), President of the First Chamber, acting for the President of the Fifth Chamber, P.J.G. Kapteyn, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: A. Saggio,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Austrian Government, by C. Stix-Hackl, Gesandte in the Federal Ministry of Foreign Affairs, acting as Agent,

— the Netherlands Government, by M.A. Fierstra, Head of the European Law Department in the Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom Government, by M. Ewing, of the Treasury Solicitor's Department, acting as Agent, and N. Paines QC,

— the Commission of the European Communities, by E. Traversa, of the Legal Service, and A. Buschmann, a national civil servant seconded to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the United Kingdom Government, represented by M. Hall, Barrister, and the Commission, represented by A. Buschmann, at the hearing on 18 November 1999,

after hearing the Opinion of the Advocate General at the sitting on 27 January 2000,

gives the following

Judgment

1 By order of 2 September 1998, received at the Court on 26 October 1998, the Landesgericht St. Pölten (Regional Court, St. Pölten) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Article 13A(1)(c) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) ('the Sixth Directive').

2 The two questions have been raised in proceedings concerning the treatment, for the purposes of value added tax ('VAT'), of the fee for a genetic test carried out by a medical expert appointed by the court dealing with a paternity dispute between D. and W.

Applicable legislation

3 Article 13A(1)(c) of the Sixth Directive provides:

'1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

...

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

4 In Austria, Paragraph 6(1)(19) and (27) and 6(3) of the Umsatzsteuergesetz (Law on Turnover Taxes) 1994 provide:

'1. The following turnover falling within Paragraph 1, first and second lines, shall be exempt from tax:

...

(19) turnover from activity as a doctor...

...

(27) transactions of small undertakings, namely undertakings resident or established in Austria whose transactions do not exceed ATS 300 000 in the period of assessment on the basis of Paragraph 1(1), first and second lines...

...

3. An undertaking whose turnover is exempt from tax under Paragraph 6(1)(27) may waive, until the decision is definitive, application of Paragraph 6(1)(27) by a declaration in writing to the tax authorities.'

5 In Austria, when an expert is instructed by a court to contribute to its finding of facts, he is entitled to a fee and, in so far as his services are subject to turnover tax, to reimbursement of the tax on his fee.

6 The court determines the expert's fee by an order which is open to appeal. In the same order, the court orders the fee to be paid out of monies provided on account of costs by one of the parties and, where those monies are insufficient to cover the fee, out of public funds, in other words by the Österreichischer Bundesschatz (Austrian Federal Treasury).

Facts and questions referred to the Court

7 The Bezirksgericht St. Pölten (District Court, St. Pölten) appointed Dr Rosenmayr as a medical expert and instructed her to establish, on the basis of a genetic test, whether the plaintiff in the main proceedings could be the child of the defendant.

8 With a view to deducting the input VAT she had paid in purchasing the materials necessary for the tests and in paying her assistants, Dr Rosenmayr opted to have her activity charged to tax and claimed from the Austrian State, besides payment of her fee, the sum of ATS 14 108.60 by way of turnover tax.

9 When the Bezirksgericht granted that claim in full, the Auditor at the Bundesschatz appealed to the Landesgericht St. Pölten against the order

determining the expert's fee, as he is entitled to do in order to protect public funds, on the ground that the exemption from VAT for medical activities could not be regarded as optional.

10 The Landesgericht considered that an expert, acting in the exercise of his profession, had to be regarded as a trader within the meaning of Paragraph 1(1)(1) of the Umsatzsteuergesetz 1994, so that his fees were in principle subject to turnover tax. Since, however, Paragraph 6(1)(19) of that Law provided that turnover from activity as a doctor was to be exempt from tax, the court raised the question whether that exemption also covered medical services provided by a doctor acting as a court expert and, more particularly, genetic tests carried out in the context of a paternity dispute.

11 In those circumstances, the Landesgericht St. Pölten decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 13A(1)(c) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes to be interpreted as meaning that the exemption from turnover tax laid down by that provision extends to medical services which a doctor in his capacity as a court expert provides on the instructions of the court, in particular by carrying out genetic examinations in the context of a paternity dispute?

2. If Question 1 is answered in the affirmative: Does that provision of the directive preclude application of a provision of national law which, under certain conditions, allows doctors also effectively to waive the said exemption from turnover tax?'

The questions for the Court

12 By its first question, the national court is essentially asking, first, whether Article 13A(1)(c) of the Sixth Directive is to be interpreted as applying to the provision of medical services which do not consist in providing medical care, by diagnosing and treating a disease or any other health disorder, but in establishing the genetic affinity of individuals through biological tests and, second, whether the fact that the doctor acting as an expert has been instructed by a court is relevant in that regard.

13 The Austrian, Netherlands and United Kingdom Governments contend that the exemption from VAT provided for in Article 13A(1)(c) of the Sixth Directive applies to medical services irrespective of the purpose for which they are provided, whether as a technical step, such as a laboratory test, or to treat a disease, or whether they are carried out at the request of an individual or on instructions from a public authority. Thus, where it involves the exercise of a medical or paramedical activity, a genetic test carried out in the context of a paternity dispute by a doctor appointed by a court is a provision of medical care exempt from VAT.

14 The Commission, on the other hand, submits that, in order to be covered by the exemption, the medical service must consist in care actually provided to a person. The purpose of genetic tests for establishing paternity is neither to prevent nor to diagnose or treat a disease. There is therefore no reason why such activities carried out by a doctor should be treated differently for tax purposes from the activities of court experts in other disciplines, such as accountants, engineers or psychologists. Although the activity of an expert instructed by a court may be regarded as being in the general interest, that characteristic cannot in itself suffice

to exempt from VAT, on the basis of Article 13A(1)(c), the services provided by that expert.

15 First of all, it should be borne in mind that the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive are to be interpreted strictly, since they constitute exceptions to the general principle that turnover tax is to be levied on all services supplied for consideration by a taxable person (see, in particular, Case 348/87 *Stichting Uitvoering Financiële Acties* v *Staatssecretaris van Financiën* [1989] ECR 1737, paragraph 13, and Case C-149/97 *Institute of the Motor Industry* v *Commissioners of Customs and Excise* [1998] ECR I-7053, paragraph 17).

16 In order to determine whether a genetic test carried out by a doctor to establish the paternity of a child constitutes the 'provision of medical care' within the meaning of Article 13A(1)(c) of the Sixth Directive, it is necessary to compare the various language versions of that provision, as the uniform interpretation of Community law requires. Where there is a difference between the language versions, the provision in question must then be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, *inter alia*, Case C-372/88 *Milk Marketing Board of England and Wales* v *Cricket St Thomas Estate* [1990] ECR I-1345, paragraph 19, and Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraph 42).

17 In that regard, as the Advocate General observes in point 16 of his Opinion, apart from the Italian version, all the versions of Article 13A(1)(c) of the Sixth Directive refer only to medical care concerning the health of persons. It should be pointed out, in particular, that the German, French, Finnish and Swedish versions use the concept of therapeutic treatment or of care provided to the person.

18 Clearly, therefore, the concept of 'provision of medical care' does not lend itself to an interpretation which includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders.

19 So, services not having such a therapeutic aim must, having regard to the principle that any provision establishing an exemption from VAT is to be interpreted strictly, be excluded from the scope of Article 13A(1)(c) of the Sixth Directive and are therefore subject to VAT.

20 That interpretation cannot be invalidated by the fact that the expert activities in question may be in the general interest. Article 13A of the Sixth Directive does not provide exemption from VAT for every activity performed in the public interest, but only for those listed and described in detail (judgment in *Institute of the Motor Industry*, cited above, paragraph 18).

21 Since, owing to their intrinsic nature, those expert activities cannot be exempted from VAT, it is irrelevant that they were ordered by a court.

22 In view of the foregoing, the answer to the first question must be that Article 13A(1)(c) of the Sixth Directive is to be interpreted as meaning that it does not apply to medical services consisting, not in providing care to persons by diagnosing and treating a disease or any other health disorder, but in establishing the genetic affinity of individuals through biological tests. The fact that the doctor acting as expert was instructed by a court is irrelevant in that regard.

23 Having regard to the answer given to the first question, there is no need to answer the second question.

Costs

24 The costs incurred by the Austrian, Netherlands and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Landesgericht St. Pölten by order of 2 September 1998, hereby rules:

Article 13A(1)(c) of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover

taxes — Common system of value added tax: uniform basis of assessment is to be interpreted as meaning that it does not apply to services consisting, not in providing care to persons by diagnosing and treating a disease or any other health disorder, but in establishing the genetic affinity of individuals through biological tests. The fact that the doctor acting as expert was instructed by a court is irrelevant in that regard.

Sevón Kapteyn Jann

Ragnemalm Wathelet

Delivered in open court in Luxembourg on 14 September 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber