Case C-262/08

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v

Skatteministeriet

(Reference for a preliminary ruling from the Østre Landsret)

(Sixth VAT Directive — Exemptions — Article 13A(1)(b) — Hospital and medical care — Closely related activities — Duly recognised establishments of a nature similar to hospitals or centres for medical treatment or diagnosis — Private stem cell bank — Services of collection, transportation, analysis and storage of umbilical cord blood of newborn children — Possible autologous or allogeneic use of stem cells)

Summary of the Judgment

1. *Tax provisions — Harmonisation of laws — Turnover taxes — Common system of value added tax — Exemptions provided for in the Sixth Directive — Exemption for hospital and medical care and closely related activities*

   (Council Directive 77/388, Art. 13A(1)(b))

2. *Tax provisions — Harmonisation of laws — Turnover taxes — Common system of value added tax — Exemptions provided for in the Sixth Directive — Exemption for hospital and medical care and closely related activities*

(European Parliament and Council Directive 2004/23; Council Directive 77/388, Art 13A(1)(b))

1. The concept of activities 'closely related' to 'hospital and medical care' within the meaning of Article 13A(1)(b) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes is to be interpreted as meaning that it does not cover activities consisting in the collection, transportation and analysis of umbilical cord blood and the storage of stem cells contained in it, when the medical care provided in a hospital environment to which those activities are merely potentially related has not been performed, commenced or yet envisaged.

Indeed, it is established that, whatever the precise figures derived from the current state of scientific knowledge may be, in the case of the majority of the recipients of the activities concerned, there is not and probably never will be a principal service coming within the concept of 'hospital and medical care' within the meaning of Article 13A(1)(b) of the Sixth Directive. It is only in the double eventuality that, first, the state of medical science enables or requires use of cord stem cells for the treatment or prevention of a given illness and, second, that illness presents or is likely to present in a specific case that a sufficiently close link would exist between, on the one hand, the hospital and medical care which would constitute the principal service and, on the other, the activities concerned. In those circumstances, even accepting that those activitiezs could have no purpose other than that of using the cord stem cells thus preserved in connection with medical care provided in a hospital environment and could not be diverted to other uses, those activities cannot be regarded as actually being supplied as services ancillary to the hospital or medical care received by the patients in question and constituting the principal service.

(see paras 47-49, 52, operative part 1)

2. If the services of stem cell banks are performed by professional medical

personnel, when such stem cell banks, although authorised by the competent health authorities of a Member State, within the framework of Directive 2004/23 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissue and cells, to handle human tissue and cells, do not receive any support from the public social security scheme and when the payment for those services is not covered by that scheme, Article 13A(1)(b) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes does not preclude the national authorities from deciding that such stem cell banks are not 'other duly recognised establishments of a similar nature' to 'hospitals [and] centres for medical care or diagnosis' within the meaning of Article 13A(1)(b) of Sixth Directive 77/388. Nor, however, can that provision be interpreted as requiring, in itself, the competent authorities to refuse to treat a private stem cell bank as an establishment 'duly recognised' for the purposes of the exemption in question. To the extent that it is necessary, it is for the referring court to determine whether the refusal of recognition for the purposes of the exemption provided for in Article 13A(1)(b) of Sixth Directive 77/388 is compatible with European Union law and, in particular, with the principle of fiscal neutrality.

It is, in principle, for the national law of each Member State to lay down the rules according to which recognition under Article 13A(1)(b) of Sixth Directive 77/388 may be granted to establishments that request it. When a taxable person seeks the status of an establishment duly recognised for the purposes of that article, it is for the competent authorities to observe the limits of the discretion conferred upon them by the latter provision in applying the principles of European Union law, in particular the principle of equal treatment which, in the field of value added tax, takes the form of the principle of fiscal neutrality. In that regard, in order to determine which establishments should be 'recognised' under that provision, the national authorities must, in accordance with European Union law and subject to review by the national courts, take into consideration a number of factors, including the public interest of the activities of the taxable person in question, the fact that other taxable persons carrying on the same activities already have similar recognition, and the fact that the costs incurred for the treatment in question may be largely met by health insurance schemes or other social security bodies.

In that regard, the mere fact that the services supplied by a taxable person are furnished by qualified health professionals does not in itself prevent the national authorities refusing to grant to that taxable person the recognition which would entitle it to the exemption under Article 13A(1)(b) of the Sixth Directive.

Also, the national authorities are entitled to take into account the fact that a taxable person's activities receive no support from and are not covered by the public social security scheme in order to determine whether an entity should be recognised. However, that does not mean that the exemption concerned must be systematically excluded when the services supplied are not reimbursed by the social security authorities. It is rather a factor which must be weighed in the balance, and which could be outweighed, for example, by the necessity to ensure equal treatment. If a taxable person's situation is comparable to that of other operators providing the same services in comparable situations, the mere fact that the cost of those services is not fully covered by the social security authorities does not justify a difference in the treatment of providers for valued added tax purposes. Finally, the fact that a taxable person has been authorised by the competent health authorities to handle cord stem cells under the national legislation implementing Directive 2004/23, may be a factor tending to support the argument that such service provider is, in any case, 'duly recognised' within the meaning of Article 13A(1)(b) of the Sixth Directive. However, if the national authorities are not to be deprived of the discretion which that provision confers upon them, the mere fact that they have authorised such activities, in accordance with the European Union's prescribed standards of quality and safety in the sector concerned, cannot lead, by itself and automatically, to recognition from the point of view of Article 13A(1)(b) of the Sixth Directive. Obtaining such authorisation is a necessary condition to carrying on the activity of a private stem cell bank. However, the granting of such authorisation is not, in itself, synonymous with recognition for the purposes of Article 13A(1)(b) of the Sixth Directive.

(see paras 63-65, 68, 69, 71, 74, 75, 81, operative part 2)