Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

12 March 2015*

(References for a preliminary ruling — VAT — Directive 2006/112/EC — Article 132(1)(g) — Exemption for supplies of services closely linked to welfare and social security work — Concept of 'bodies recognised as being devoted to social wellbeing' — Temporary-work agency — Hiring out of qualified care workers — Exemption not allowed)

In Case C-594/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decision of 21 August 2013, received at the Court on 21 November 2013, in the proceedings

'go fair' Zeitarbeit OHG

v

Finanzamt Hamburg-Altona,

THE COURT (Ninth Chamber),

composed of K. Jürimäe (Rapporteur), President of the Chamber, J. Malenovský and M. Safjan, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 8 October 2014,

after considering the observations submitted on behalf of:

— 'go fair' Zeitarbeit OHG, by L. Gause, Rechtsanwalt,

— the German Government, by T. Henze and K. Petersen, acting as Agents,

— Ireland, by E. Creedon and G. Hodge and by M. Heneghan and N.J. Travers, acting as Agents,

— the European Commission, by A. Cordewener, C. Soulay and B.-R. Killmann, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 132(1)(g) and Article 134(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, corrigendum OJ 2007 L 335, p. 60).

2 The request has been made in proceedings between 'go fair' Zeitarbeit OHG ('go fair') and the Finanzamt Hamburg-Altona (Tax Office, Hamburg-Altona) concerning the taxation of supplies of services made by the applicant (appellant on a point of law in the main proceedings) by way of value added tax for the fiscal year 2010.

Legal context

Directive 2006/112

3 The first subparagraph of Article 9(1) of Directive 2006/112 provides:

'"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.'

4 Article 10 of that directive provides:

'The condition in Article 9(1) that the economic activity be conducted "independently" shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.'

5 Chapter 2 of Title IX of that directive is entitled 'Exemptions for certain activities in the public interest'. That chapter comprises Articles 132 to 134.

6 In accordance with Article 132(1)(g) of the directive, Member States are to exempt the following transactions:

'the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing'.

7 Article 134 of that directive provides:

'The supply of goods or services shall not be granted exemption, as provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1), in the following cases:

(a) where the supply is not essential to the transactions exempted;

(b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to [value added tax ("VAT")].'

German law

8 Under Paragraph 4, point 16 of the Law on turnover tax (Umsatzsteuergesetz, in the version thereof resulting from the Law of 19 December 2008, BGBl. 2008 I, p. 2794 ('the UStG'), the following are VAT exempt:

'services closely connected with the operation of establishments engaged in the provision of care and assistance to persons in need of physical, mental or psychological help, which are provided by

...

(k) establishments in the case of which the nursing and care costs have been reimbursed, in full or to a large extent, in at least 40 per cent of cases by the statutory social security or social welfare authorities in the preceding calendar year.

Services within the meaning of the first sentence which are provided by establishments as defined in letters (b) to (k) shall be exempt in so far as they are by definition services to which the recognition, contract or agreement under social law or the reimbursement of costs relates in each case.'

9 Paragraph 12(1) of the Law on the contracting out of labour (Gesetz zur Regelung der Arbeitnehmerüberlassung, BGBl. 1995 I, p. 158, in the version thereof resulting from the Law of 23 December 2002, BGBl. 2002 I, p. 4607), provides:

'The contract between the hiring-out agency and the user undertaking must be drawn up in writing. In that document, the hiring-out agency must indicate whether it is in possession of the licence provided for in Paragraph 1. The user undertaking must set out in that document the specific characteristics of the activity planned for the temporary agency worker, the professional qualifications required for that activity and the essential conditions of employment, including remuneration, which are applicable to a comparable worker in the user undertaking who is employed by the user ...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 'go fair' is a business in the form of a general partnership ('offene Handelsgesellschaft' (OHG)), the object of which is to contract out labour on the basis of the Gesetz zur Regelung der Arbeitnehmerüberlassung (Law regulating the contracting out of labour) (AÜG).

11 As a temporary-work agency, it hired out in the year 2010 care workers it employs (nurses and geriatric nursing assistants) to inpatient and outpatient care establishments within the meaning of Paragraph 4, point 16, of the UStG. The employees of 'go fair' formed part of the organisational structure of the relevant care establishments. They performed the care services in accordance with the remit given to them by those establishments and were to that extent bound by their instructions. The care establishments in question were also responsible for the general and specialist supervision of the activities carried out by the temporary agency workers.

12 By notice of 18 October 2010 determining the prepayment of turnover tax for September 2010, the Finanzamt Hamburg-Altona subjected the turnover derived from the supply of services by 'go fair' to the standard rate of tax. The action brought by 'go fair' against that decision was dismissed by the Finanzgericht Hamburg (Finance Court, Hamburg).

13 The Bundesfinanzhof (Federal Finance Court), before which an action in 'revision' (appeal on a point of law) was brought by 'go fair', observes that that company does not fulfil the conditions laid down in Paragraph 4, point 16(k) of the UStG, because it does not operate an establishment involved in nursing and caring for persons in need of physical, mental or psychological help, but a temporary-work agency. Its income is therefore not tax exempt under that provision.

14 The Bundesfinanzhof takes the view, however, that 'go fair' did provide services which are 'closely linked to welfare and social security work', within the meaning of Article 132(1)(g) of Directive 2006/112 and that the possibility cannot be ruled out that it may rely directly on that provision to claim the benefit of the exemption provided for therein.

15 In those circumstances, the Bundesfinanzhof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) On the interpretation of Article 132(1)(g) of Directive 2006/112:

(a) Can a Member State exercise the discretion it enjoys in the context of recognising a body as being devoted to social wellbeing in such a way that, while it recognises persons who provide their services to social security funds and care funds, it does not also recognise State-examined care workers who provide their services directly to persons in need of care?

(b) If State-examined care workers are to be recognised as being devoted to social wellbeing, does the recognition of a temporary-work agency which hires out State-examined care workers to recognised care establishments (host establishments) follow from the recognition of the staff hired out?

(2) On the interpretation of Article 134(a) of Directive 2006/112:

Is the supply of State-examined care workers, as a transaction closely linked to welfare and social security work, essential to the provision of care services to the host establishment (user undertaking), if the host establishment cannot operate without staff?'

Consideration of the questions referred

The first question

16 By its first question, the referring court asks, in essence, whether Article 132(1)(g) of Directive 2006/112 must be interpreted as meaning that State-examined care workers who provide their services directly to persons in need of care and/or a temporary-work agency which supplies such workers to establishments recognised as being devoted to social wellbeing come within the definition of 'bodies recognised as being devoted to social wellbeing' within the meaning of that provision.

17 It must be borne in mind at the outset that the terms used to specify the exemptions in Article 132 of Directive 2006/112 are to be interpreted strictly, as they are a departure from the general principle that VAT is to be paid on each supply of services made for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives underlying the exemptions and must comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Accordingly, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 must be construed in such a way as to deprive the exemptions of their intended effects (see judgments in *Horizon College*, C-434/05, EU:C:2007:343,

paragraph 16; *Commission* v *Netherlands*, C-79/09, EU:C:2010:171, paragraph 49; *Zimmermann*, C-174/11, EU:C:2012:716, paragraph 22; and *Klinikum Dortmund*, C-366/12, EU:C:2014:143, paragraphs 26 and 27).

18 It follows from the wording of Article 132(1)(g) of Directive 2006/112 that the exemption provided for therein applies to goods and services which are closely linked to welfare and social security work and supplied by bodies governed by public law or by other organisations recognised as charitable by the Member State concerned (see judgments in *Kingscrest Associates and Montecello*, C-498/03, EU:C:2005:322, paragraph 34, and *Zimmermann*, C-174/11, EU:C:2012:716, paragraph 21).

19 Regarding the latter condition in particular, which is the subject of the first question referred, it is in principle for the national law of each Member State to lay down the rules in accordance with which that recognition may be granted to organisations seeking it. Member States have a discretion in that respect (see judgment in *Zimmermann*, C-174/11, EU:C:2012:716, paragraph 26).

20 However, it follows from consistent case-law that it is for the national authorities, in accordance with EU law and subject to review by the national courts, to take into account a number of factors in order to determine which bodies must be recognised as 'devoted to social wellbeing' within the meaning of Article 132(1)(g) of Directive 2006/112. Such factors include the existence of specific provisions, be they national or regional, legislative or administrative, or tax or social security provisions, the general interest of the activities of the taxable person concerned, the fact that other taxable persons carrying on the same activities already have similar recognition, and the fact that the costs of the supplies in question may be largely met by health insurance schemes or other social security bodies (see, to that effect, judgments in *Kügler*, C-141/00, EU:C:2002:473, paragraphs 57 and 58; *Kingscrest Associates and Montecello*, C-498/03, EU:C:2005:322, paragraph 53; and also *Zimmermann*, C-174/11, EU:C:2012:716, paragraph 31).

21 It is apparent from the order for reference that the German legislature has not recognised temporary-work agencies such as 'go fair', which supply workers to care establishments, as bodies devoted to social wellbeing within the meaning of Article 132(1)(g) of Directive 2006/112.

22 In that context, the referring court seeks, firstly, to ascertain whether the recognition by a Member State of bodies devoted to social wellbeing, as required under Article 132(1)(g) of Directive 2006/112 in order to claim the benefit of the exemption provided for by that provision, also covers State-examined care workers who provide their services directly to persons in need of care without the costs thereof being borne by bodies devoted to social wellbeing and whether the restriction provided for under national law is therefore contrary to EU law.

23 It must be borne in mind in that regard that under Article 9 of that directive, a 'taxable person' is understood to mean any person who, independently, carries out any economic activity. Accordingly, under Article 10 of that directive, the requirement that it be carried out 'independently' excludes employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of subordination as regards working conditions, remuneration and the employer's liability.

24 Consequently, the exemption provided for in Article 132(1)(g) of Directive 2006/112 cannot be applied directly to the staff of a temporary-work agency such as 'go fair'.

25 In any event, as rightly pointed out by the European Commission, the only relevant supplies in the circumstances of the main proceedings are not the services provided by the workers employed by 'go fair' in the context of a relationship of subordination with care establishments to persons in need of nursing or care, but rather those offered by that temporary-work agency, namely the supply of those workers.

26 However, although that temporary-work agency is not recognised under the German legislation as a body devoted to social wellbeing, the referring court seeks, secondly, to ascertain whether such a company may, by virtue of its activity of supplying qualified care staff, rely on Article 132(1)(g) of Directive 2006/112 in order to be recognised as a 'body devoted to social wellbeing'.

27 As regards the term 'body' in that provision, the case-law is clear that that term is sufficiently broad to include private profit-making entities (see judgment in *Kingscrest Associates and Montecello*, C-498/03, EU:C:2005:322, paragraph 35 and the case-law cited). Accordingly, a general partnership such as 'go fair' may be considered a 'body' within the meaning of that provision.

28 On the other hand, as regards the terms 'devoted to social wellbeing', it is clear that the supply of workers is not, in itself, a supply of services of general interest carried out in the social sector. It is irrelevant in that regard that the staff members concerned are care workers or that they are supplied to recognised care establishments.

29 Accordingly, the answer to the first question is that Article 132(1)(g) of Directive 2006/112 must be interpreted as meaning that neither State-examined care workers who provide their services directly to persons in need of care nor a temporary-work agency which supplies such workers to establishments recognised as being devoted to social wellbeing come within the notion of 'bodies recognised as being devoted to social wellbeing' contained in that provision.

The second question

30 Given the answer to the first question, there is no need to answer the second question.

Costs

31 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Article 132(1)(g) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that neither State-examined care workers who provide their services directly to persons in need of care nor a temporary-work agency which supplies such workers to establishments recognised as being devoted to social wellbeing come within the scope of 'bodies recognised as being devoted to social wellbeing' contained in that provision.

[Signatures]