



Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 10 October 2019¹

Case C-211/18

Idealmed III — Serviços de Saúde SA
v
Autoridade Tributária e Aduaneira

(Request for a preliminary ruling from the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal))

(Reference for a preliminary ruling — Taxation — Value added tax — Directive 2006/112 — Article 132(1)(b) — Exemptions — Hospital and medical care — Services provided under social conditions comparable with those applicable to bodies governed by public law — Articles 377 and 391 — Derogations — Right to opt for a taxation scheme — Change in operating conditions)

1. Taxes are something that everyone usually tries to avoid as much as possible, although, according to a well-known saying, they are one of the two things that cannot ultimately be avoided (the other being death). Surprisingly, however, there are situations in which taxation is accepted as something positive and even desirable. This is the case, inter alia, with taxable persons who conduct activities subject to value added tax ('VAT'). This is because, as long as the activities in question are taxed, this tax is neutral for the taxable person, since its economic burden is passed on to further stages of marketing and is ultimately borne by consumers. However, if the transactions carried out by a taxable person are exempt from VAT, that taxable person bears the economic burden of input tax accrued at earlier stages of marketing. As a result, economic operators often wish to be subject to taxation rather than be exempt from it. However, if the exemption is compulsory, this is not possible: the entity in question cannot waive the exemption and be voluntarily subject to taxation. In the present case, the Court will have the opportunity to recall this principle.

Legal framework

EU law

2. Article 132(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax² provides that:

'Member States shall exempt the following transactions:

...

¹ Original language: Polish.

² OJ 2006 L 347, p. 1.

(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;

...'

3. Article 133(a) and (c) of the directive provides as follows:

'Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1) subject in each individual case to one or more of the following conditions:

(a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;

...

(c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;

...'

4. Article 377 of the same directive provides for the following derogation:

'Portugal may continue to exempt the transactions listed in points (2), (4), (7), (9), (10) and (13) of Annex X, Part B, in accordance with the conditions applying in that Member State on 1 January 1989.'

5. Article 391 of the directive stipulates:

'Member States which exempt the transactions referred to in Articles ... 377 ... may grant taxable persons the right to opt for taxation of those transactions.'

6. Finally, point 7 of Part B of Annex X to Directive 2006/112 lists 'transactions carried out by hospitals not covered by point (b) of Article 132(1)'.

Portuguese law

7. The exemption provided for in Article 132(1)(b) of Directive 2006/112 has been transposed into Portuguese law by Article 9(2) of the Código do IVA (VAT Code).

8. In its version in force until 31 March 2016, Article 12(1)(b) of the VAT Code provided that hospitals, clinics, healthcare centres and other similar establishments which are not owned by entities governed by public law or private bodies which are part of the national health system could waive that exemption. The same provision in the version in force after 31 March 2016 limits the ability of entities governed by private law to waive the exemption to services which do not come under contracts with the State in the context of the health system.

9. According to Article 12(3) of the same code, a taxable person chooses its taxation scheme for a period of at least five years.

Facts, procedure and questions referred

10. Idealmed III — Serviços de Saúde SA, a company incorporated under Portuguese law ('Idealmed'), runs five healthcare institutions for profit.

11. In its declaration of commencement of activity on 6 January 2012, the company opted for inclusion in the normal VAT taxation scheme.

12. As of September 2012, Idealmed concluded a number of agreements with public bodies which operate in several public health subsystems to provide medical services at predefined prices.

13. As a result of an inspection, the tax authorities found that from April 2014 to June 2016, a significant part of Idealmed's activities were carried out under the above agreements. Therefore, the authorities concluded that the company's activities were subject to the exemption referred to in Article 132(1)(b) of Directive 2006/112 and it was not possible to waive that exemption. As a result, the tax authorities decided, *ex officio*, to change Idealmed's tax status as of 1 October 2012, and ordered that wrongly deducted VAT in the amount of EUR 2 009 944.90 be paid with interest.

14. On 27 June 2017, Idealmed submitted a request for an arbitration tribunal to be set up, seeking a declaration that the above decision was invalid.

15. In these circumstances, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 132(1)(b) of [Directive 2006/112] preclude a hospital owned by a company governed by private law, which has concluded agreements for the provision of medical care with the State and with legal persons governed by public law, from being deemed to have started to operate under social conditions comparable with those applicable to bodies governed by public law, as referred to in that provision, where the following conditions are met:

- more than 54.5% of revenue, including sums invoiced to the relevant user-beneficiaries, comes from State bodies and public health subsystems, at the prices stipulated in the agreements concluded with them;
- more than 69% of users are beneficiaries of public health subsystems or receive services provided within the framework of agreements concluded with State bodies;
- more than 71% of medical services are carried out under agreements concluded with public health subsystems and with State bodies; and
- the activity carried out is of significant general public interest?

(2) In view of the fact that, in accordance with Article 377 of [Directive 2006/112], Portugal chose to continue to exempt from VAT transactions carried out by hospitals not referred to in Article 132(1)(b) of that directive, that it granted such taxable persons the right to opt for taxation of those transactions under Article 391 of the directive, provided that they continue to be taxed for a minimum period of five years, and that it provides that they may become subject to the exemption scheme again only if they make an express declaration to that effect, does Article 391 and/or the principles of the protection of acquired rights and of legitimate expectations, equality and non-discrimination, neutrality and non-distortion of competition in relation to users and taxable persons which are bodies governed by public law, preclude the

taxation and customs authority from imposing the exemption scheme before that period has elapsed, since it considers that the taxable person has started to provide services under social conditions comparable with those applicable to bodies governed by public law?

- (3) Do Article 391 of [Directive 2006/112] and/or the abovementioned principles preclude a new law from requiring the application of the exemption scheme to taxable persons who previously opted for the taxation scheme, before the five-year period has elapsed?
- (4) Do Article 391 of [Directive 2006/112] and the abovementioned principles preclude legislation in accordance with which a taxable person, who opted for application of the taxation scheme because, at the time when he or she opted for that scheme, he or she was not providing healthcare services under social conditions comparable with those applicable to bodies governed by public law, can continue to be subject to that scheme if he or she starts to provide such services under social conditions comparable with those applicable to bodies governed by public law?

16. The request for a preliminary ruling was lodged at the Court on 26 March 2018. Written observations were submitted by Idealmed, the Portuguese Government and the European Commission. The same interested parties were represented at the hearing on 17 June 2019.

Analysis

17. In the present case, the referring court referred four questions to the Court concerning the exemption from VAT of medical services which are provided by private entities but on terms comparable with those on which public bodies providing similar services operate. The first question is of fundamental importance here, and this is where my analysis of the legal problems raised in the present case will begin. The other questions concern more technical issues regarding a Member State's power to change the status of a taxable person and the point in time at which such a change may take place.

First question referred for a preliminary ruling

18. The first question referred for a preliminary ruling concerns the circumstances in which it is deemed that hospital and medical care services provided by a private entity must be regarded as being provided 'under social conditions comparable to those applicable to bodies governed by public law' within the meaning of Article 132(1)(b) of Directive 2006/112 and therefore as being subject to the VAT exemption provided for in that provision.

19. This question was posed within the framework of proceedings concerning hospitals run by a commercial company which provide part of their medical services under an agreement with bodies belonging to the public health care system. In its question, the referring court draws attention to the proportion of the services provided under the public health system relative to the total value of the services provided by the entity in question. However, I do not believe that this proportion is relevant for the application of the exemption provided for in the aforementioned provision of Directive 2006/112.

20. The exemption provided for in Article 132(1)(b) of Directive 2006/112 is designed similarly to the other exemptions provided for in that article, namely, it is based on the fact that both the entity providing the services is VAT-exempt and the services provided are themselves VAT-exempt.

21. First, the exemption applies to hospital and medical care services³ provided by bodies governed by public law. In the provision in question, the conditions under which these services are to be provided are not specified; it is sufficient that they are provided by a body governed by public law.

22. Second, the exemption covers hospital and medical care services provided by entities other than bodies governed by public law ‘under social conditions comparable with those applicable to bodies governed by public law’. It should be noted that the requirement that the social conditions must be comparable with those applicable to bodies governed by public law concerns the services which may potentially be exempt rather than the general activities of the entity concerned. Therefore, this exemption is, in the case of entities other than bodies governed by public law, based on the type of services provided: only services provided under social conditions comparable with those applicable to bodies governed by public law are subject to it, whereas other services provided by the same entity are subject to taxation in accordance with the general rules.

23. This means that the proportion of the services provided under such comparable conditions relative to the entirety of the services provided by the entity concerned, however measured, is irrelevant to the application of the exemption in question, as the exemption concerns individual services rather than the activity of the entity as such.

24. Obviously, this also means that an entity other than a body governed by public law, which provides medical services both under social conditions comparable to those applicable to bodies governed by public law within the meaning of Article 132(1)(b) of Directive 2006/112 and under different conditions, becomes a mixed taxable person, that is, one who carries out both taxable and exempt transactions. This involves additional administrative burdens related to the need to properly account for both output and input VAT.⁴ However, this is an inevitable consequence of undertaking activities which are exempt from VAT.

25. The parties to the main proceedings appear to be engaged in a dispute as to whether the services provided by Idealmed are provided under social conditions comparable to those applicable to bodies governed by public law within the meaning of Article 132(1)(b) of Directive 2006/112. In particular, the company claims that the services it provides under agreements with public bodies do not fall within the scope of the general health insurance system in Portugal, but are instead targeted at a specific group of insured persons (that is, officials) and should rather be compared to a private health insurance system.

26. This question concerns the interpretation of national law and the assessment of the facts, and it falls entirely within the jurisdiction of the referring court. However, the provisions of Directive 2006/112 should be interpreted, as far as possible, uniformly throughout the European Union, even if their application requires reference to the system of national law. Therefore, I believe that where an entity provides medical services under a health insurance scheme which is compulsory or is one of the alternative insurance schemes from which the insured person is obliged to choose, and this scheme is intended to satisfy basic medical care needs, there is a significant probability that such services should be regarded as provided under social conditions comparable to those applicable to bodies governed by public law within the meaning of Article 132(1)(b) of Directive 2006/112.

27. In its observations in the present case, the Commission also raises the issue of the additional condition contained in the provision in question, namely, that the entity providing the services which are potentially subject to exemption be ‘duly recognised’. However, it appears that this requirement applies to ‘other establishments’, whereas Idealmed operates hospitals. In any event, the Court has already ruled on one occasion that this requirement does not imply the need for any formal

³ And closely related activities.

⁴ Unlike in the case of taxable transactions, a taxable person does not have the right to deduct input tax in respect of exempt transactions.

recognition of the entity in question as subject to the exemption provided for in the provision in question.⁵ It appears that the fact that an entity is authorised to provide medical services and provides them under an agreement with bodies belonging to the public health insurance system is fully sufficient to establish that that entity is 'duly recognised' within the meaning of Article 132(1)(b) of Directive 2006/112.

28. Article 133 of Directive 2006/112 allows Member States to make the exemptions provided for, inter alia, in Article 132(1)(b) of that directive subject to the fulfilment of certain conditions by the taxable person, including, among other things, that the taxable person does not systematically aim to make a profit. However, it is apparent from the file in the present case that Portuguese law does not provide for this condition. Nor does Article 132(1)(b) of Directive 2006/112 itself include this condition, unlike certain other provisions of that directive which introduce VAT exemptions, and according to the case-law of the Court, in the absence of such a condition both in Directive 2006/12 and in national law, the mere pursuit of a profit-making aim does not preclude the application of the exemption provided for in Article 132(1)(b) of that directive.⁶

29. Therefore, the fact that Idealmed provides medical services in order to make a profit does not affect the application of the exemption provided for in Article 132(1)(b) of Directive 2006/112.

30. I therefore propose that the answer to the first question referred for a preliminary ruling be that Article 132(1)(b) of Directive 2006/112 must be interpreted as meaning that hospital and medical care services provided by an entity other than a body governed by public law under social conditions comparable to those applicable to bodies governed by public law are subject to the exemption provided for in that provision irrespective of the proportion of such services relative to the entirety of the services provided by that entity. The assessment as to whether the services are provided under social conditions comparable to those applicable to bodies governed by public law falls within the jurisdiction of the national court. When making that assessment, the court should take into account, inter alia, whether those services are provided under a health insurance scheme which is either compulsory or one of the alternative insurance schemes from which an insured person is obliged to choose, and is intended to satisfy their basic medical needs.

Second, third and fourth questions referred for a preliminary ruling

31. The second, third and fourth questions referred for a preliminary ruling concern the issue of whether Article 377 of Directive 2006/112, read in conjunction with Article 391 thereof, as well as the principles of the protection of acquired rights and of legitimate expectations, equality and non-discrimination, neutrality and non-distortion of competition, preclude the application to an entity which, pursuant to national laws transposing Article 391 of that directive, opted for a scheme under which its activities were taxed in accordance with the general rules, of the exemption provided for in Article 132(1)(b) of that directive before the end of the period during which it was obliged to remain in the tax scheme of its choice. These questions should be considered together.

32. It should be recalled that under Article 377 of Directive 2006/112, the Portuguese Republic may, by way of derogation from the general principles laid down in that directive, continue to exempt, inter alia, medical services not covered by the exemption provided for in Article 132(1)(b) thereof. On the other hand, Article 391 of Directive 2006/112 provides that where this is the case, Member States may grant taxable persons the right to opt for taxation of exempt transactions. Portuguese law provides for that possibility: providers of medical services may choose between exemption or taxation in accordance with the general rules, and this choice is in principle made for a period of at least five years. Idealmed took advantage of this possibility, opting for taxation in accordance with the general

⁵ Judgment of 6 November 2003, *Dornier* (C-45/01, EU:C:2003:595, paragraphs 64 to 67).

⁶ See, by analogy, judgment of 26 May 2005, *Kingscrest Associates and Montecello* (C-498/03, EU:C:2005:322, paragraph 40).

rules. However, it emerged that, according to the tax authorities, part of the services provided by that company were provided under social conditions comparable to those applicable to bodies governed by public law within the meaning of Article 132(1)(b) of Directive 2006/112, which results in their being exempt irrespective of the company's choice of taxation scheme. Hence the second, third and fourth questions of the referring court.

33. With regard to these questions, it should first be noted that the right to opt for a taxation scheme provided for in Article 391 of Directive 2006/112 only concerns the exemptions applied by Member States pursuant to the special provisions which are laid down in Articles 370 to 390c of that directive and are derogations from its general principles. Therefore, that right concerns the exemption of transactions which are not exempt under other provisions of the directive in question, for instance, Article 132(1)(b) thereof.

34. When it comes to medical services in particular, the exemption which the Portuguese Republic maintains on the basis of the authorisation provided for in Article 377 of Directive 2006/112, together with the taxable person's right to choose a taxation scheme provided for in Article 391 of that directive, may only apply to services provided by entities other than bodies governed by public law and under social conditions which are not comparable to those applicable to bodies governed by public law. This is clear from the wording of point 7 of Part B of Annex X to Directive 2006/112. On the other hand, as regards services covered by Article 132(1)(b) of Directive 2006/112, that provision provides for a compulsory exemption in the public interest and neither the Portuguese Republic as a Member State nor taxable persons may waive that exemption.

35. I would also like to point out that the exemption provided for in Article 132(1)(b) of Directive 2006/112 applies to individual transactions rather than the activity of the entity as such. Therefore, the entity concerned may continue to tax transactions which are not subject to that exemption.

36. Therefore, Article 377 of Directive 2006/112, read in conjunction with Article 391 thereof, does not preclude the application to an entity which, pursuant to national laws transposing Article 391 of that directive, opted for a scheme under which its activities were taxed in accordance with the general rules, of the exemption provided for in Article 132(1)(b) of that directive before the end of the period during which it was obliged to remain in the tax scheme of its choice, since services provided on the terms laid down in the latter provision of Directive 2006/112 remain outside the scope of Articles 377 and 391 thereof.

37. That conclusion is not called into question by the general principles set out in the questions posed by the referring court.

38. As regards the principle of the protection of legitimate expectations, Idealmed submits that the Portuguese legislation according to which it should remain in the taxation scheme of its choice for at least five years gave rise to its legitimate expectation that that system would not be changed by a decision of the tax authorities either.

39. However, that expectation is legitimate only in so far as the transactions carried out by that company are subject to the legal regime arising from Article 377 of Directive 2006/112, read in conjunction with Article 391 thereof, since only under this regime does a taxable person have the right to choose the manner in which its transactions are taxed. However, where that taxable person engages in activities which are covered by the compulsory exemption provided for in Article 132(1)(b) of the directive in question, it cannot legitimately expect to continue to exercise its right to choose a taxation scheme under rules which do not provide for such an option. Therefore, the application of the exemption to that taxable person, even before the end of the period during which it was obliged to remain in the taxation scheme of its choice, does not infringe that principle.

40. The same applies to the principle of equality and non-discrimination, which in the common system of VAT is reflected by the principle of fiscal neutrality.⁷ In fact, that principle confirms the conclusions of this opinion, since according to that principle goods or services which are similar from the point of view of the average consumer, and which are accordingly in competition with each other, should not be treated differently for VAT purposes.⁸ Therefore, if Directive 2006/112 provides for a compulsory exemption of certain services, that exemption should cover all transactions subject thereto irrespective of the choice of taxation scheme previously made by the taxable person.

41. In the context of VAT, the principle of fiscal neutrality also means that economic operators do not bear the burden of this tax, since it is passed on in full to the consumer. That result is achieved through the deduction of input tax accrued at earlier stages of marketing.⁹ However, the system only works if the economic operator itself carries out taxable transactions. On the other hand, if the economic operator carries out exempt transactions, it, like the consumer, becomes the final link from the point of view of the VAT system and loses the right to deduct the input tax accrued at earlier stages, bearing its economic burden as a result.

42. Therefore, the principle of fiscal neutrality does not prevent Idealmed from losing its right to deduct the input tax accrued at earlier stages of marketing in respect of services which fall within the exemption under Article 132(1)(b) of Directive 2006/112. However, the company is entitled to a refund, together with interest, of the tax it paid on those services, since that tax must be regarded as having been unduly levied.¹⁰

43. In the light of the foregoing, the answer to the second, third and fourth questions should be that neither Article 377 of Directive 2006/112, read in conjunction with Article 391 thereof, nor the principles of the protection of acquired rights and of legitimate expectations, equality and non-discrimination, neutrality and non-distortion of competition preclude the application to an entity which, pursuant to national laws transposing Article 391 of that directive, opted for a scheme under which its activities were taxed in accordance with the general rules, of the exemption provided for in Article 132(1)(b) of that directive before the end of the period during which it was obliged to remain in the tax scheme of its choice.

Conclusions

44. In the light of all the foregoing, I propose that the Court's answer to the questions referred for a preliminary ruling by the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa — CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal) should be as follows:

- (1) 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 hospital and medical care services provided by an entity other than a body governed by public law under social conditions comparable to those applicable to bodies governed by public law are subject to the exemption provided for in that provision irrespective of the proportion of such services relative to the entirety of the services provided by that entity. The assessment as to whether the services are provided under social conditions comparable to those applicable to bodies governed by public law falls within the jurisdiction of the national court. When making that assessment, the court should

⁷ See, in particular, judgment of 10 November 2011, *The Rank Group* (C-259/10 and C-260/10, EU:C:2011:719, paragraph 61).

⁸ See, recently, judgment of 5 September 2019, *Regards Photographiques* (C-145/18, EU:C:2019:668, paragraph 36).

⁹ Judgment of 15 November 2012, *Zimmermann* (C-174/11, EU:C:2012:716, paragraph 46).

¹⁰ See, in particular, judgment of 19 July 2012, *Littlewoods Retail and Others* (C-591/10, EU:C:2012:478, paragraphs 24 to 26).

take into account, *inter alia*, whether those services are provided under a health insurance scheme which is either compulsory or one of the alternative insurance schemes from which an insured person is obliged to choose, and is intended to satisfy their basic medical needs.

- (2) Neither Article 377 of Directive 2006/112, read in conjunction with Article 391 thereof, nor the principles of the protection of acquired rights and of legitimate expectations, equality and non-discrimination, neutrality and non-distortion of competition preclude the application to an entity which, pursuant to national laws transposing Article 391 of that directive, opted for a scheme under which its activities were taxed in accordance with the general rules, of the exemption provided for in Article 132(1)(b) of that directive before the end of the period during which it was obliged to remain in the tax scheme of its choice.