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DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Indirect Taxation and Tax administration
Value added tax

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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 842

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN: Spain
REFERENCES: Article 132(1)(b) and (c)
SUBJECT: Scope of the exemption for medical services

1. INTRODUCTION

The question submitted by Spain (see attached) concerns the VAT treatment of situations where private medical practitioners rent operating theatres belonging to hospitals/clinics that the practitioners are not attached to, in order to carry out operations. Spain is considering two scenarios: i) only the operating theatre is rented and ii) the operating theatre is rented together with medical staff such as anaesthetists and surgical nurses.

Spain is asking whether the exemption for medical services provided for in Article 132(1)(b) or (c) of the VAT Directive¹ applies to the supply of operating theatres in the two situations described above. Spain currently does not consider the supply in either of the scenarios as being VAT exempt and has in its national legislation expressly excluded the hiring of property by entities providing hospital and medical care from the exemption for medical services. However, according to Spain doubts have been raised concerning this exclusion.

2. SUBJECT MATTER

Spain seeks to establish the scope of the exemptions for medical services, which read as follows:

"Article 132

1. Member States shall exempt the following transactions:

[...]

(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;

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

[...]"

Other provisions that should be considered are the following:

"Article 134

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;

¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

- (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 VAT."*

"Article 135

1. Member States shall exempt the following transactions:

[...]

- (l) *the leasing or letting of immovable property.*

2. The following shall be excluded from the exemption provided for in point (l) of paragraph 1:

[...]

Member States may apply further exclusions to the scope of the exemption referred to in point (l) of paragraph 1."

It should in this context be noted that the leasing or letting of immovable property as such is not VAT exempt in Spain (cf. Article 135(1)(l)), because Spain has, in accordance with Article 135(2), limited that exemption to apply only to leases for agricultural land or buildings or parts of buildings to be used exclusively as dwellings.

3. THE COMMISSION SERVICES' OPINION

3.1. The interpretation of exemptions in the VAT Directive in general

According to case-law from the Court of Justice of the European Union (CJEU) the exemptions in Article 132 of the VAT Directive are independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another². The CJEU has consistently held that the exemptions are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person³. Nevertheless, the interpretation must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the exemptions should be construed in such a way as to deprive the exemptions of their intended effect⁴.

² See, *inter alia*, case C-349/96, *CPP*, paragraph 15.

³ See, *inter alia*, case C-2/95, *SDC*, paragraph 20, and case C-141/00 *Kügler*, paragraph 28.

⁴ See, *inter alia*, case C-86/09, *Future Health Technologies*, paragraph 30.

3.2. The exemption for medical services in Article 132(1)(b) and (c)

3.2.1. The objective of the exemption and the meaning of "medical care"

The objective of the exemption in Article 132(1)(b) and (c) is to reduce the cost of medical care and to make that care more accessible to individuals⁵. The concepts of "medical care" in point (b) and "provision of medical care" in point (c) are both intended to cover services that are intended to diagnose, treat or cure diseases or health disorders or to protect, maintain or restore human health⁶. The therapeutic purpose of the medical care should not necessarily be interpreted narrowly. The CJEU has held that it is consistent with the aim of reducing healthcare costs to include examinations or preventive medical treatment even when it is clear that the person concerned is not suffering from any disease or health disorder⁷.

3.2.2. The dividing line between point (b) and point (c)

It might be of relevance for the issue raised by Spain whether the medical care as such is covered by Article 132(1)(b) or (c) of the VAT Directive.

Points (b) and (c) are intended to regulate all exemptions of medical services in the strict sense, but have separate fields of application. It can however be debated what those separate fields are. The CJEU has several times held that point (b) exempts services supplied in a hospital environment while point (c) is designed to exempt medical services provided outside such a framework, both at the private address of the person providing the care and at the patient's home or at any other place⁸. However, for the care to be exempt under point (b), the care must, in accordance with the wording, be "undertaken by" one of the bodies listed in that point. Thus, care provided by doctors acting independently of a hospital but within it, has been held to be exempt from VAT under point (c)⁹. One could then argue that the application of either point in fact does not depend on where the medical care is provided, but rather on who the provider of the medical care is.

3.2.3. The scope of the exemption provided for under point (b) and point (c)

Point (b) provides for exemption of "activities closely related to" medical care in hospitals and other similar establishments, whereas point (c) does not contain a similar concept. Already by the wording it is thus clear that point (b) has a wider scope of application than point (c).

According to the case-law regarding point (b), "closely related activities" include, for example, the transfer of a blood sample, by the laboratory which took it, to another laboratory for the purpose of analysis¹⁰. Also, the supply of telephone services and the hiring-out of televisions to in-patients by hospitals and the supply of beds and meals to people accompanying in-patients *may* amount to closely related activities, provided that the supply is essential to achieve the therapeutic objects sought by the hospital and the

⁵ Case C-45/01, *Dornier*, paragraph 43, and *Kügler*, paragraph 29.

⁶ Case C-91/12, *PFC*, paragraph 28, and Case C-106/05 *L.u.P.*, paragraph 27.

⁷ Case C-212/01 *Unterpertinger*, paragraph 40.

⁸ See for example Case C-86/09, *Future Health Technologies*, paragraph 36.

⁹ Case C-366/12, *Klinikum Dortmund*, paragraph 25.

¹⁰ Case C-76/99, *Commission v France*, paragraph 30.

medical care, and the basic purpose of the supply is not to obtain additional income through transactions which are in direct competition with those of commercial enterprises subject to VAT¹¹.

As regards point (c), the CJEU has held that minor provisions of goods which are strictly necessary at the time when the care is provided, such as ointments and bandages, are VAT exempt¹². The minor provisions of goods could then be considered ancillary to the principal (medical) service, in the sense that they do "not constitute for customers an aim in themselves, but a means of better enjoying the principal service supplied"¹³.

In more recent case-law, the CJEU has stressed that the supply of drugs and other goods must not only be strictly necessary at the time when the care is provided, but also physically and economically indissociable from the principal supply of medical care. The CJEU held that the conclusion is supported by the fact that pharmaceutical products are themselves included in the list of supplies of goods and services which may be subject to reduced rates of VAT and are accordingly, in principle, subject to a separate VAT scheme¹⁴. Thus, in the case at issue the CJEU reached the conclusion that a supply of cytostatic drugs prescribed in the course of out-patient cancer treatment by doctors working in an independent capacity in a hospital – although essential at the time of the provision of care – may not be exempt from VAT under point (c) unless the supply is physically and economically indissociable from the principal supply of medical care (which it was for the referring court to determine)¹⁵.

3.3. The services at issue

3.3.1. The supply of an operating theatre for consideration

From the information provided by Spain it can be understood that the medical practitioners at issue exercise their profession privately and that they are not attached to the hospitals providing the operating theatres. It is the view of the Commission services that the medical care that they provide to patients would be VAT exempt under point (c) as it is undertaken by the private medical practitioners and not by the hospital providing the operating theatre¹⁶. What is crucial is who, from the perspective of an average consumer, is the supplier of the services. This is determined by the underlying contractual relationships.

Considering that the exemptions in the VAT Directive are to be interpreted strictly, the Commission services are of the opinion that, as such, the supply of an operating theatre for consideration in itself cannot be considered to be "provision of medical care" as provided for under Article 132(1)(c). The question is therefore whether such a supply could be VAT exempt on other grounds.

¹¹ Joined cases C-394/04 and C-395/04, *Ygeia*, paragraph 35, cf Article 134.

¹² Case C-353/85, *Commission v UK*, paragraph 33.

¹³ *CPP*, paragraph 30.

¹⁴ *Klinikum Dortmund*, paragraphs 35-39.

¹⁵ *Klinikum Dortmund*, paragraphs 35 and 41.

¹⁶ It should in this context be noted that it does not necessarily matter whether the medical practitioner is "attached" to the hospital or not, as it is possible to consider scenarios where a medical practitioner is in fact employed by a hospital but also exercises his profession in an independent capacity and in that capacity rents an operating theatre from his employer. This would probably still fall within the scope of point (c), given that the care is still not undertaken by the hospital.

Since the medical care at issue is VAT exempt under point (c), the concept of "activities closely related" to medical care is not relevant as it is not provided for under that point. As described above, the CJEU has nevertheless in certain situations allowed for exemption of ancillary supplies of minor provisions of goods pursuant to point (c). There is thus some scope for applying the exemption in point (c) also to ancillary supplies. However, the scope so far allowed for in the case-law appears to be quite narrow given the requirements that the minor provisions of goods should be strictly necessary at the time when the care is provided, and that the supply should be physically and economically indissociable from the principal supply of medical care. Those requirements would probably not be met by the supply at issue. It is for example quite clear that the supply of an operating theatre is economically dissociable from the medical care itself. Given the case-law of the CJEU regarding point (c) which has only provided for a very narrow application of the exemption to ancillary supplies of goods, the conclusion of the Commission services is that the supply of an operating theatre to a private medical practitioner cannot be exempted from VAT as an ancillary supply.

3.3.2. The supply of an operating theatre with staff for consideration

Spain asks whether it makes a difference if the operating theatre is supplied together with medical staff, such as anaesthetists and surgical nurses.

As it is the private medical practitioner who rents the services of the medical staff – and not the hospital that undertakes the care – the point that applies to the given situation is again point (c) in the Commission services' view.

One could argue that this situation is different from the supply of an operating theatre by itself, since the medical staff, in fact, does provide medical care to the patient. However, the making available of medical staff is not the same as providing medical care. Considering the case-law of the CJEU regarding comparable exemptions¹⁷, and the fact that the exemptions in the VAT Directive are to be interpreted strictly, the Commission services is of the opinion that the term "provision of medical care" does not cover the making available, for consideration, of an operating theatre together with medical staff. The question in the second scenario will consequently again be whether such a supply could be VAT exempt on other grounds, namely as an ancillary supply to the principal supply of medical care.

As described above, there has so far in case-law only been a very narrow application of the exemption in point (c) to ancillary supplies of goods (for example ointments, bandages and cytostatic drugs) and only under strict conditions. It is difficult to reach the conclusion that a supply of medical staff could qualify as an ancillary supply to the principal supply covered by point (c) given this background.

Considering the case-law of the CJEU regarding point (c), the conclusion of the Commission services is again that the supply of an operating theatre including medical staff to a private medical practitioner is not exempt from VAT as an ancillary supply.

¹⁷ See for example case C-434/05 *Horizon College*, paragraphs 20-24, regarding the exemption for education.

3.3.3. *Would the VAT treatment be different if Article 132(1)(b) was applicable?*

As explained above, the scenarios envisaged by Spain would in the Commission services' opinion both fall within the scope of Article 132(1)(c) because the care is provided by private medical practitioners acting in an independent capacity, albeit within a hospital. It should be noted that the situation might perhaps be different if point (b) were applicable. That could only be the case if both the medical care as such and the 'ancillary' supplies (renting of operating theatre and medical staff) were undertaken by bodies meeting the conditions in point (b). A corresponding scenario would be that the operating theatre and the medical staff are rented out from hospital A to hospital B (both meeting the requirements in point (b)), and hospital B is the supplier of the medical care towards the patient based on the contractual relationship. This is not the scenario described by Spain; however for the sake of completeness it is appropriate to mention it here.

For one, point (b) contains the concept of "closely related activities". Already by this difference in the wording it can be gathered that point (b) is intended to have a wider scope of application than point (c). This is also in line with the structure of Chapter 2 of Title IX of the VAT Directive. Article 134 – which has as its objective to set limits for ancillary supplies so that the exemptions are not applied in a manner that is too generous or that will distort competition – only applies to exemptions that contain the concept of "closely related activities". Among other exemptions it thus refers to point (b) but not to point (c). The logic behind this would then be that the exemptions that do not allow for "closely related activities" to be included already have a very narrow scope of application.

The case-law setting out which activities may be considered to be "closely related activities" as provided for in Article 132(1)(b), as seen above, has in the Commission services' opinion been quite generous, although the CJEU does stress that the requirements in Article 134 must be met.

Moreover, some of the case-law regarding other exemptions in the VAT Directive containing a similar concept has been very generous. In this context it is of special interest to note *Horizon College*, concerning the exemption for education (now Article 132(1)(i)). The CJEU in that case found that the making available, for consideration, of a teacher to an educational establishment in which that teacher temporarily carries out teaching duties under the responsibility of that establishment, may constitute a transaction that is exempt from VAT on the basis of it being a supply of services "closely related" to education, if such a teacher placement is a means of better enjoying the education deemed to be the principal service (i.e. it is an ancillary service), and the supply fulfils the requirements in Article 134¹⁸. The CJEU specifically pointed out that it did not matter that there was no direct relationship between the establishment making teachers available and the students of the host establishment. The fact that the supply of teachers was an activity separate from the principal activity of the establishment making teachers available was also found irrelevant¹⁹.

There might be some similarities with *Horizon College*. If, according to the scenario described above, the medical care would be carried out by an establishment covered by letter (b) (and not by a private medical practitioner) also "closely related activities" would

¹⁸ *Horizon College*, paragraph 46.

¹⁹ *Horizon College*, paragraphs 31-32.

qualify for a tax exemption, as in Article 132 (1)(i), the relevant tax exemption in *Horizon College*. In both cases there is no direct relationship between the recipient of the services and the provider. Instead, there is a third party acting as a link between the two, although that fact does not make a difference from the point of view of the recipient of the services. Since a teacher placement in *Horizon College* can be considered a means for the student of better enjoying the education, it could be argued that an operating theatre and the medical staff is a means for the patient of better enjoying the medical care. Given this rationale, the supply of both the operating theatre and the medical staff could be seen as ancillary supplies to the principal supply, i.e. the medical care, and thus VAT exempt.

However, it can also be argued that for a supply to be considered ancillary to the main supply, both supplies should have the same recipient²⁰. In other words, since there would be no supply of medical care in the relationship between hospital A and hospital B, there would be no main supply that the ancillary supply can be ancillary to. The principal supply of medical care is only provided in the relationship between hospital B and the patient. The letting of the operating theatre would thus be an input supply for the doctor and not a supply ancillary to the medical care provided by him. In line with this reasoning, Spain has argued that the decisive factor is that the patient is not billed directly for the hiring of the operating theatre or the medical staff. However, it is not certain to what extent this argument applies anymore. With *Horizon College* the CJEU seems to have taken a different approach.

Nevertheless, it should be recalled that exemptions are generally to be interpreted strictly and that it is not clear to which extent the rationale in *Horizon College* regarding the exemption for education can be applied to the exemption for medical services. It is therefore not possible to draw a certain conclusion that the VAT treatment of the supplies at issue would be different if point (b) was applicable, but nor can it be ruled out that that would be the case.

3.4. Conclusions

- Article 132(1)(c) applies to the medical care at issue in the Spanish scenarios, since it is provided by private medical practitioners and not by any of the bodies listed in point (b).
- The supply of an operating theatre with or without staff is not VAT exempt under Article 132(1)(c) because the scope for applying the exemption to ancillary supplies is very limited due to both the wording and the case-law.
- If Article 132(1)(b) were instead applicable – i.e. if hospital A (meeting the requirements in point (b)) rented out an operating theatre with or without staff to hospital B (also meeting the requirements in point (b)) – one might consider on the basis of *Horizon College* that this supply could be VAT exempt as an ancillary supply

²⁰ In CJEU case-law regarding ancillary supplies the premise has often been that the consumer is the direct recipient of both the main supply and the ancillary supply. For example, in *CPP*, paragraph 29, the question was whether the taxable person was supplying the customer with several services or with a single service. In *Dornier*, paragraphs 33-35, regarding the medical exemption and "closely related activities", the premise was that the patients were the direct recipients of both the main and the ancillary supply.

to the medical care. However, the opposite can also be argued given that exemptions should be interpreted strictly and that, arguably, a supply between hospital A and hospital B cannot be considered ancillary to a principal supply of medical care between hospital B and the patient, as these are two different relationships.

4. DELEGATIONS' OPINION

The delegations are requested to give their opinion on this matter.

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Question from Spain

The Ministry of Finance and Public Administrations would like to have the VAT Committee's opinion on the scope of the exemptions provided for in Article 132(1)(b) and (c) of Directive 2006/112/EC of 28 November 2006 on hospital and medical care and closely related activities, and the provision of medical care in the exercise of the medical and paramedical professions.

The Spanish legislation transposing the Directive provides for exemption for provision of hospital and medical care and closely related activities undertaken by bodies governed by public law or by private establishments or bodies under the system of authorised or notified prices.

In addition, the following services are also deemed to be directly related to hospital and medical care: bed and board, operating room services, the supply of medicines and medical equipment, and other similar services provided by clinics, laboratories, nursing homes and other hospitals and medical care establishments.

The exemption does not include the hire of property by bodies governed by public law or by private establishments or bodies under the system of authorised or notified prices.

Several doubts have been raised concerning this exemption and the exclusion from the exemption of hiring of property.

1. Firstly, the question is raised whether the exemption under Article 132(1)(b) and (c) of Directive 2006/112/EC includes the assignment by clinics and hospitals, for a consideration, of the use of their operating rooms to medical practitioners not attached to the clinic/hospital where the operation is taking place.

In Spain it is common practice for certain medical practitioners who exercise their profession privately to hire from third parties certain property for the provision of medical services. For example, an orthopaedic surgeon receives his patient in his private consulting room, but in order to carry out an operation (e.g. a knee replacement) he hires an operating room from a hospital for the hours required. The hospital bills the surgeon for the hire of the operating room and the surgeon bills the patient for his services.

Under Spanish legislation, the surgeon's invoice to the patient is VAT exempt but the invoice issued by the hospital to the surgeon for hire of the operating room includes VAT which, under VAT rules, the surgeon cannot deduct.

2. In certain other cases the transfer is more complex, since medical staff (anaesthetist, nurses and nursing auxiliaries, etc.) are hired together with the operating room. The question raised in this case is whether these services are covered in full by the exemption laid down in Article 132 of the Directive or only for the part relating to the assignment of specialised medical staff.

In the example given, in addition to the operating room fully equipped with state-of-the-art equipment, the surgeon hires from the hospital, for the hours required to perform the operation, an anaesthetist who is present during the operation, an operating-room nurse

(who hands the instruments to the surgeon), a circulating nurse (who cares for the patient before and after surgery) and nursing auxiliaries. The hospital bills the surgeon for the hire of the operating room and staff, and the surgeon bills the patient for his services.

In these cases, the question is whether these are complex medical services that should be exempt; whether different services - hire of property and provision of medical services - are provided for a single price; or whether the principal service (as perceived by the surgeon receiving it) is the hire of an operating room, the other services being a means of better enjoying the principal service supplied.

3. According to our interpretation of the rules contained in the Directive, the hire of an operating room would be taxable and not exempt, even when complementary services, such as anaesthetist, operating-room nurses and nursing auxiliaries, are provided together with it.

The hire of an operating room cannot be considered to constitute ‘hospital and medical care’ within the meaning of Article 132(1)(b) of the Directive, or to constitute ‘provision of medical care in the exercise of the medical and paramedical professions’, according to Article 132(1)(c), because the recipient of the services is not the patient but the medical practitioner who hires the room and is billed for it; the room constitutes an input of his activity so it would fall outside the VAT exemption, as happens with the other purchases made by the medical practitioner to carry out his professional activity. Similarly, in our opinion, the assignment of specialised medical staff constitute a means of better enjoying the hiring of the operating room, and therefore it could not benefit from exemption either. It would be a different matter if the patients that ultimately benefited from these services of medical and health professionals were billed directly for them; in that case, it could be considered that they correspond to the description contained in Article 132(1)(b) and (c) of the Directive.

In this respect, it should be recalled that, according to the case-law of the Court of Justice of the European Union, the exemptions provided for in the Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person.

Finally, the possibility that the hiring of the operating room could be exempt under Article 135(1)(l) of the Directive does not form part of the question that we are raising with the VAT Committee since the Spanish legislation has made use of the possibility granted by Article 135(2) of limiting the exemption. Thus, our tax legislation limits the exemption to leases for agricultural land or buildings or parts of buildings to be used exclusively as dwellings. Similarly, the provision transposing the exemption contained in Article 132(1)(b) of the Directive expressly excludes the hiring of property by entities providing hospital and medical care.