European Union

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Hospital and Medical Care by Commercial Hospitals under EU VAT

Under EU VAT law, hospital care and medical care undertaken by public hospitals are exempt from VAT but Member States have the power to exclude commercial private hospitals from that exemption, which may, in view of other concessions laid down by the VAT Directive, give rise to a complex situation not only for medical care but also for hospital care provided by commercial hospitals whose services are not covered by the exemption. In this article, the authors discuss the complexity of that situation.

1. Introduction

One of the VAT exemptions for activities in the public interest laid down by the VAT Directive[1] of the European Union concerns the exemption for hospital and medical care. The scope of the exemption is in principle limited to services provided by bodies governed by public law ("public hospitals"). However, Member States have the power to extend the scope of the exemption for hospital and medical care to the care that is provided by private hospitals, albeit that the extension may be subject to specific conditions, which may have the effect that hospital and medical care provided by commercial private hospitals is excluded from the VAT exemption. If that is the case, the exemption for medical care provided by designated medical and paramedical professionals may become relevant; in addition, Member States may, in relation to non-exempt medical care provided by commercial private hospitals, apply a reduced rate, which gives rise to the question of how, in the light of the provisions of the VAT Directive and the case law of the Court of Justice of the European Union (ECJ), these potential concessions interact, i.e. which VAT regimes and VAT rates apply to supplies in the form of, or related to, non-exempt hospital and medical care.

2. Legal Framework

The VAT Directive contains two different exemptions for "medical care", i.e.:

– article 132(1)(b) contains an exemption for hospital and medical care, and closely related activities, undertaken by bodies governed by public law or – under comparable social conditions – by hospitals, centres for medical treatment or diagnosis and other duly recognized establishments of a similar nature; and
– article 132(1)(c) contains an exemption for the provision of medical care in the exercise of medical and paramedical professions as defined by Member States.

Since "medical care" is mentioned in both article 132(1)(b) and (c), and should be interpreted as covering services consisting of diagnosing, treating and – if possible – curing a disease or any other health disorder,[2] the first question is what exactly distinguishes the medical care in the two different provisions.

In its judgment in the infringement procedure of the European Commission against France,[3] the ECJ declared that the exemption for (activities closely related to) hospital and medical care is intended to ensure that benefits flowing from such care are not hindered in any way by increased costs of providing the care – or closely related activities – which would arise if the care were subject to VAT. That purpose of the exemption for medical care is of little practical use, because the scope of the exemption for hospital and medical care under article 132(1)(b) provided by private institutions may be limited by specific conditions that cannot be set aside on the basis of the purpose of the exemption of keeping medical care less costly for the public. In other words, the "need to reduce medical costs and to promote health care" was obviously not sufficient for the EU legislature to grant a generic and unconditional exemption for hospital and medical care, and closely related activities, undertaken by all hospitals.[4]

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1. Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L347 (2006). All references to "articles" are to the provisions of the VAT Directive and all references to the provisions of the former Sixth Directive have been converted to references to the corresponding provisions of the current VAT Directive.
2. In its judgment in E2: ECJ, 14 Sep. 2000, Case C-384/98, *D. (a minor) v. W.* on appeal by the Österreichischer Bundesschatz, [2000] ECR I-6795, ECJ Case Law IBFD, the ECJ gave a definition of medical care in the context of interpreting art. 132(1)(c). It must be assumed that, for the purposes of art. 132(1)(b), "medical care" has the same meaning because, in its judgment in SE: ECJ, 21 Mar. 2013, Case C-91/12, *Skatteverket v. PFC Clinic AB*, ECJ Case Law IBFD, the ECJ redefined "medical care" within the meaning of both art. 132(1)(b) and (c) as services that are intended to diagnose, treat or cure diseases or health disorders or to protect, maintain or restore human health.
3. E2: ECJ, 11 Jan. 2001, Case C-76/99, *Commission of the European Communities v. the French Republic*, [2001] ECR I-249, ECJ Case Law IBFD.
4. It is settled ECJ case law that the VAT exemptions laid down by the VAT Directive are aimed only at those which are listed and described in great detail in the provisions of that Directive. *See*, in the context of the exemption for postal services, the ECJ's judgment in E2: ECJ, 11 July 1985, Case 107/84, *Commission of the European Communities v. Federal Republic of Germany*, [1985] ECR 2655, ECJ Case Law IBFD and, in the context of the exemption for medical care, the ECJ's judgment in DK: ECJ, 10 June 2010, Case C-262/08, *CopyGene A/S v. Skatteministeriet*, [2010] ECR I-5053, ECJ Case Law IBFD.

Article 132(1)(b) not only mentions "medical care" but also "hospital care" and, where those services are provided by private institutions, Member States must make the exemption for hospital and medical care dependent on the condition that the private institutions operate under "comparable social conditions" to those of public institutions. In addition, they may impose the condition that the private institutions do not systematically aim to make a profit, that they are managed and administered on an essentially voluntary basis, that they charge approved prices for their services[5] and, finally, that the exemption is not likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.[6] For the sake of convenience, we have labelled the private medical institutions (hospitals) that do not comply with the optional conditions for the exemption laid down by article 132(1)(b) as "commercial hospitals". The extent to which Member States actually impose one or more of the optional conditions depends on the national health system. The conditions may have the effect that, in specific Member States, the scope of the exemption for hospital and medical care provided by commercial hospitals is limited to certain services or to services provided to specific categories of patients.

Since not all hospital and medical care, and closely related activities, are exempt from VAT, it is useful to point out that Annex III to the VAT Directive allows Member States to apply a reduced VAT rate to, inter alia, the supply of pharmaceutical products (item 3),[7] the provision of accommodation (item 12), the provision of restaurant services (item 12a) and the provision of non-exempt medical care (item 17).

3. Medical Care

Since both article 132(1)(b) and (c) refer to "medical care", it is quite obvious that the exemptions laid down by those provisions cannot be distinguished on the basis of the nature of the services. In view of the ECJ's case law, the distinction can also not be based on the place where the services are provided, i.e. within or outside hospital premises.[8]

Instead, a distinction must be drawn between "in-patient" medical care (i.e. care of patients whose medical condition requires admission to a hospital) and "out-patient" medical care (i.e. care of patients who are not hospitalized but who merely visit a hospital or clinic for diagnosis or treatment).

Also, in her Opinion in *Klinikum Dortmund*,[9] Advocate General Sharpston observed, in relation to medical care provided by doctors acting in an independent capacity on hospital premises, that the exemption laid down by article 132(1)(b) does not apply exclusively on the basis that medical care is provided on the premises of a hospital; for the purposes of that exemption, the medical care must, according to the Advocate General, also be provided by the hospital itself. In that context, the words "undertaken by" in article 132(1)(b) are clear and unequivocal.

This conclusion is also in line with the principle of tax neutrality. In this context, the principle of tax neutrality must be interpreted as preventing economic operators that carry out the same activity from being treated differently for VAT purposes, which means that medical care provided by qualified medical practitioners to out-patients, is under all circumstances, exempt from VAT under article 132(1)(c), regardless of whether the services are provided on or outside hospital premises and regardless of the legal form of the person that provides the medical care.[10]

Consequently, the exemption laid down by article 132(1)(c) applies to medical care provided to patients by doctors who have their own practice, and to out-patients by doctors who operate independently in a consulting room located in a hospital and, to a limited extent, even by doctors who provide their services as employees of a hospital. In the latter case, the hospital formally provides the medical care to the out-patients but, by its nature, medical care can only be provided by natural persons, even if, to that end, they use medical equipment.

5. Art. 133(c) provides that the non-public 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.
6. Art. 133 of the VAT Directive provides that Member States may make the granting to bodies other than those governed by public law of the exemption provided for in point (b) of art. 132(1) subject to one or more of the four conditions.
7. Pharmaceutical products may be interpreted as including prostheses and implants used in the framework of medical treatment of patients.
8. On the basis of several older judgments of the ECJ, the conclusion may seem to be justified that the distinction between art. 132(1)(b) and art. 132(1)(c) depends on the place (within or outside a hospital) where the medical care services are provided. However, the ECJ's observations merely reflected what "*normally*" happens and did not seek to provide a distinctive criterion. For example, in para. 23 of its judgment in DE: ECJ, 8 June 2006, Case C-106/05, *L. u. P. GmbH v. Finanzamt Bochum-Mitte*, [2006] ECR I-512323, ECJ Case Law IBFD, the ECJ observed, in relation to tests that L. u. P. carried out for, inter alia, companies operating laboratories with which were affiliated the general practitioners who prescribed those tests as part of the care they provided, that it should be ascertained whether those tests may be "medical care" within the meaning of art. 132(1)(c). If that is so, those tests will be exempt from VAT, irrespective of where they are carried out, even though art. 132(1)(c) does not explicitly provide for exemption of activities closely related to medical care. Consequently, for the ECJ, the place where medical care is provided has no relevance.
9. Opinion of Advocate General Sharpston in DE: ECJ, 26 Sept. 2013, Case C-366/12, *Finanzamt Dortmund-West v. Klinikum Dortmund gGmbH*, ECJ Case Law IBFD. Klinikum Dortmund was a non-profit hospital that provided chemotherapy treatment for cancer patients. The drugs administered (cytostatics) were produced in the hospital pharmacy, on the basis of a doctor's prescription issued for each individual patient. The issue was whether the cytostatics produced by Klinikum Dortmund were also exempt from VAT if they were used for out-patient medical care provided at the hospital by doctors acting in an independent capacity. A doctor diagnosed the patient's precise condition and identified a formulation for a cytostatic tailored to treat that individual condition; a therapeutic schedule was drawn up with the patient; the cytostatic was prescribed by the doctor and made up by the pharmacy; it was verified and complementary drugs might then be added to alleviate side effects; it was then administered by health care staff either under the supervision of the doctor or with the doctor being kept informed of any problem which might require his intervention; at any stage, it may have been necessary for the doctor to adjust the dosage or composition of the drugs administered, or modify the therapeutic schedule.
10. In its judgment in E2: ECJ, 10 Sept. 2002, Case C-141/00, *Ambulanter Pflegedienst Kügler GmbH v. Finanzamt für Körperschaften I in Berlin*, [2002] ECR I-6833, ECJ Case Law IBFD, the ECJ decided that the exemption envisaged in art. 132(1)(c) applies to the provision of care of a therapeutic nature by a company running an out-patient service under which qualified nursing staff provided medical care, including homecare.

On those grounds, we conclude that article 132(1)(b) applies to the provision of hospital and medical care by a hospital on hospital premises but solely to in-patients.

4. Closely Related Activities

The scope of the exemption for hospital and medical care laid down by article 132(1)(b) also includes "closely related activities", i.e. supplies of goods and services closely related to such care. The ECJ has already decided that such 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 biological analysis, since the objective of taking a sample is to have it analysed, so that the transfer of the blood sample must be regarded as constituting an activity closely related to exempt medical care.[11] In its judgment in *Ygeia*,[12] the ECJ decided that the supply of telephone services and the hiring-out of televisions to in-patients by hospitals covered by the exemption laid down by article 132(1)(b), and the supply by those hospitals of beds and meals to people accompanying in-patients may amount to activities closely related to exempt hospital and medical care, but only if such supplies are essential to achieve the therapeutic objectives sought by the hospital and medical care.[13] If they are not essential to achieve the therapeutic objectives sought by the hospital and medical care, providing beds and meals to people accompanying in-patients may, depending on the legislation of the Member State in question, be subject to a reduced VAT rate.

In this context, administering medicines to in-patients during their stay in hospital can be seen as closely related to hospital care within the meaning of article 132(1)(b).

In contrast, the exemption in article 132(1)(c) does not expressly cover "closely related activities", which means that the scope of that exemption does, in principle, not go beyond the provision of the medical care itself. However, in its judgment in the infringement procedure of the European Commission against the United Kingdom,[14] the ECJ decided that the exemption for medical care laid down by article 132(1)(c) also applies to minor provisions of goods which are strictly necessary at the time when the qualified medical practitioner provides the medical care.

When it mentioned "minor provisions of goods", the ECJ expressly referred to, for example, ointments and bandages that are essential to the medical treatment performed by a doctor in the course of a consultation, and those minor provisions share the exemption for medical care. Under those circumstances, the ointments and bandages can also be considered to be "ancillary" to the principal [medical] service, in the sense that they do "not constitute an end in themselves, but a means of better enjoying the doctor's medical care service"[15] or as elements or acts that are so closely linked that they form objectively, from an economic point of view, a single transaction, which it would be artificial to split,[16] or as "the supply of services which form logically part of the provision of [medical care] services, and which constitute an indispensable stage in the process of the supply of those services to achieve their therapeutic objectives".[17] According to the ECJ, such "minor provisions" do not include supplies of medicines and other goods, such as corrective spectacles, prescribed by a doctor in the course of a consultation, which are physically and economically dissociable from the provision of the medical care service,[18] but the "minor provisions" could include the administering of medicines to in-patients.

5. Medical Care of In-Patients

In the light of the analysis above, hospital and medical care provided to in-patients by public hospitals are exempt from VAT under all circumstances and, provided that they are essential to achieve the therapeutic objectives sought by the hospital and medical care, "closely related activities" are also covered by the exemption.

In contrast, depending on the national legislation of individual Member States, the same care provided by commercial hospitals may be subject to VAT.

5.1. Commercial hospitals

Under the assumption that, for the purpose of the exemption for hospital and medical care, a Member State has imposed one or several conditions (*see* section 2.) on commercial hospitals, and assuming that a commercial hospital does not satisfy that condition or those conditions, the exemption laid down by article 132(1)(b) does not apply, which would lead to the conclusion that the hospital and medical services are subject to VAT at the standard rate or, depending on the legislation of the Member State concerned, the medical care is subject to a reduced rate.

However, it seems unlikely that that conclusion applies to the medical care that is provided to in-patients by doctors

11. E2: ECJ, 11 Jan. 2001, Case C-76/99, *Commission of the European Communities v. the French Republic*, [2001] ECR I-249, ECJ Case Law IBFD.
12. GR: ECJ, 1 Dec. 2005, Joined Cases C-394/04 and C-395/04, *Diagnostikon kai Therapeftikon Kentron Athinon-Igia A.E. v. Ipourgos Ikonomikon*, [2005] ECR I-10373, ECJ Case Law IBFD.
13. Art. 134 provides that supplies of goods or services cannot be exempt under art. 132(1)b) if they are not essential to the exempt transactions or where their basic purpose 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. It seems quite difficult to see the provision of beds and meals to persons accompanying a patient that has been admitted to a hospital as "essential" to hospital and medical care.
14. E2: ECJ, 23 Feb. 1988, Case 353/85, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, [1988] ECR 817, ECJ Case Law IBFD.
15. E2: ECJ, 25 Feb. 1999, Case C-349/96, *Card Protection Plan Ltd v. Commissioners of Customs and Excise*, para. 30, [1999] ECR I-973, ECJ Case Law IBFD.
16. NL: ECJ, 27 Oct. 2005, Case C-41/04, *Levob Verzekeringen B.V., OB Bank N.V., v. Staatssecretaris van Financiën*, [2005] ECR I-9433, ECJ Case Law IBFD.
17. In para. 40 of its judgment in *CopyGene* (*supra* n. 4), the ECJ observed that, as regards medical services, taking account of the objective pursued by the exemption provided for in art. 132(1)(b), only services which are logically part of the provision of hospital and medical care services, and which constitute an indispensable stage in the process of the supply of those services to achieve their therapeutic objectives, are capable of amounting to "closely related activities" within the meaning of that provision.
18. *Supra* n. 14.

acting in a hospital but in an independent capacity".[19] It can be argued that, in the latter case, the exemption provided for under article 132(1)(c) applies, even though that exemption is in principle reserved for out-patient medical care provided by medical practitioners, because there may be a direct *intuitu personae* relationship[20] between the medical attendant (independent doctor) and the in-patient, particularly if the medical attendant is a surgeon. In such cases, not the hospital, but the doctor provides the medical care and the doctor will also charge the fee for the medical care services to the patient. The question is whether the situation changes where the doctor is employed by the hospital and the hospital formally provides the medical care services to the in-patients. It can be argued that, even if the doctor is employed by the hospital, there can still be a direct relationship between the hospital doctor and the in-patient under which the doctor provides the medical care *intuitu personae*, to the effect that, for VAT purposes, the hospital doctor must be regarded as providing the in-patient medical care under the exemption laid down by article 132(1)(c). Since the doctor is an employee, the commercial hospital will issue the related invoice and the total service must then be split up into exempt medical care and other taxed services.

However, in the absence of an *intuitu personae* relationship between a doctor employed by a commercial hospital and the in-patient, medical care provided by the hospital will be subject to VAT at the standard rate because it must be assumed that, if it applies, the reduced VAT under item 17 of Annex III to the VAT Directive can, in this context, only be applied to medical care within the meaning of, in particular, article 132(1)(c).[21]

5.2. Closely related activities

Since hospital care constitutes a separate[22] supply for the purposes of the exemption laid down by article 132(1)(b), it seems logical that the same principle must be adopted where that exemption does not apply. Consequently, hospital care should be treated as a single supply and be taxed in accordance with the regime that applies to that package of services; if it is excluded from the exemption, hospital care must be subject to the standard rate because there is no possibility under the VAT Directive for Member States to apply a reduced rate to non-exempt hospital care.

A reduced rate may apply to the provision of accommodation and meals to persons accompanying in-patients because those services normally do not form part of hospital and medical care. However, it would be artificial to split up hospital care into, for example, the reduced-rated provision to in-patients of accommodation, meals and pharmaceutical products; in the words of the ECJ, those elements do not constitute "an end in themselves, but a means of better enjoying the hospital care service as a whole".[23] If the administering of medicines by hospital staff to in-patients is not ancillary to medical care as "minor provisions" that are essential to the medical treatment performed by a doctor in the course of a consultation and if the non-exempt medical care is not subject to a reduced rate, the application of a reduced rate to the administering of medicines to in-patients would only be possible if that transaction could be qualified as a "supply of pharmaceutical products". However, it is fairly difficult to argue that the medicines that hospital staff administer to in-patients during their stay in hospital can be treated as "supplies of goods" (pharmaceutical products) because there is no transfer by the hospital to the patient of the right to dispose of the pharmaceutical products as owner. Patients that are admitted to a hospital have little or no say in the kind or dose of the medication they receive or the time when they take their medicines.

6. Conclusions

The exemption laid down by article 132(1)(b) has the clear advantage that almost all supplies made by hospitals to in-patients, including hospital care, are subject to the same regime, i.e. they are exempt.

The situation becomes much more complex for commercial hospitals that are excluded from that exemption. Under those circumstances, the medical care provided by commercial hospitals to in-patients may still be exempt from VAT, albeit under article 132(1)(c), or subject to a reduced VAT rate under item 17 of Annex III to the VAT Directive, provided that there is a direct *intuitu personae* relationship between the medical attendant and the in-patient. Where that exemption or the reduced rate cannot be applied, the medical care is subject to VAT at the standard rate.

Where it is not exempt, hospital care provided by commercial hospitals is subject to the standard VAT rate and that supply should not artificially be split up into separate components that, depending on the legislation of the Member State concerned, are subject to a reduced VAT rate. Hospital care provided by commercial hospitals must, just like all other transactions, be taxed in accordance with the real situation and on the basis of the provisions of the VAT Directive, as interpreted by the ECJ, even if it makes the care more expensive to the public.

19. The situation discussed by Advocate General Sharpston in her Opinion in *Klinikum Dortmund* (*supra* n. 9) referred to that category of doctors, albeit that they provided the medical care to out-patients.
20. An *intuitu personae* relationship is a personal services contractual relationship, where an individual of one of the contracting parties is an essential element of the contract.
21. Item 17 of Annex III applies to the "provision of medical (and dental) care … in so far as those services are not exempt pursuant to points (b) to (e) of Article 132(1)". It should be noted that art. 132(1)(d) applies to the supply of human organs, blood and milk, and art. 132(1)(e) applies to dental care.
22. Art. 132(1) (b) mentions hospital and medical care separately, which should be interpreted as meaning that hospital care does not form part of, and is not ancillary to, medical care.
23. *Supra* n. 15, the ECJ's judgment in *CPP*.