JUDGMENT OF THE COURT (Fifth Chamber)
20 November 2003 *

In Case C-212/01,

REFERENCE to the Court under Article 234 EC by the Landesgericht Innsbruck (Austria) for a preliminary ruling in the proceedings pending before that court between

Margarete Unterpertinger

and

Pensionsversicherungsanstalt der Arbeiter,

on the interpretation of Article 13A(1)(c) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) and the Court's case-law resulting, in particular, from Case C-384/98 *D.* v *W.* [2000] ECR I-6795,

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: A. Rosas (Rapporteur), acting for the President of the Fifth Chamber, D.A.O. Edward and A. La Pergola, Judges,

Advocate General: C. Stix-Hackl,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the United Kingdom Government, by J.E. Collins, acting as Agent, and by N. Paines QC,

— the Commission of the European Communities, by K. Gross and E. Traversa, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the United Kingdom Government and of the Commission at the hearing on 20 November 2002,

after hearing the Opinion of the Advocate General at the sitting on 30 January 2003,

gives the following

Judgment

1 By order of 9 May 2001, received at the Court on 23 May 2001, the Landesgericht Innsbruck (Regional Court, Innsbruck) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 13A(1)(c) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive'), and the Court's case-law resulting, in particular, from Case C-384/98 *D.* v *W.* [2000] ECR I-6795.

2 Those questions were raised in the course of a dispute between, initially, Ms Unterpertinger and the Pensionsversicherungsanstalt der Arbeiter (Workers' Pension Insurance Institution) concerning the refusal to pay a disability pension. Following Ms Unterpertinger's death, the only remaining issue in the main proceedings concerns the costs, in particular the question whether value added tax (hereinafter 'VAT') is payable in respect of the services of a medical expert appointed by the referring court.

Legal background

Community law

3 Under Article 2(1) of the Sixth Directive VAT is chargeable on 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such'.

4 Article 4 of the Sixth Directive provides:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

...'

5 Article 13A(1) provides:

'1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

...

(b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable to 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;

...'.

6 In *D.* v *W.*, cited above, the Court held that Article 13A(1)(c) of the Sixth Directive is to be interpreted as meaning that it does not apply to medical services consisting, not in the provision of care to persons by diagnosing and treating a disease or any other health disorder, but in establishing the genetic affinity of individuals through biological tests.

National legislation

7 Paragraphs 1(1)(1) and 6(1)(19) of the Umsatzsteuergesetz (Law on Turnover Taxes) 1994 (BGBl. No 1994/663, hereinafter 'the UStG 1994'), are worded as follows:

'Paragraph 1

Taxable transactions

1. Turnover tax is chargeable on the following transactions:

(1) Deliveries and other supplies which an operator, in the course of his business, makes for consideration within the country. The charge to tax is not excluded because the transaction is effected on the basis of a legal or administrative act or because it is to be regarded as effected under a legal provision;

...

Paragraph 6

Tax exemptions

1. The following turnover falling within Paragraph 1(1)(1) and (2), shall be exempt from tax:

...

19. Turnover from activity as a doctor, dentist, psychotherapist, midwife or self-employed supplier...; services supplied to their members by associations whose members belong to the aforesaid professions shall also be exempt from tax, to the extent that such services are used directly to generate turnover which is exempt under this provision and where the associations require their members to pay only their exact respective shares of the common expenses...'

8 A circular of the Austrian Federal Ministry of Finances of 17 January 2001 contains the following provisions concerning VAT on expert medical reports:

'Legal position as from 1 January 2001

Medical certification and the making of expert medical reports also forms part of the professional activity of doctors (Paragraph 2(3) of the ÄrzteG (Law on

doctors)). The exemption is not excluded because a third party commissions the preparation of an expert report (for example an expert opinion concerning a person's state of health for the purposes of an insurance contract).

However, the exemption does not include medical services which do not consist in providing medical care by diagnosing and treating a disease or any other health disorder [*D.* v *W.*, cited above]. The exemption under Paragraph 6(1)(19) of the UStG 1994 does not therefore apply:

— to biological tests establishing the genetic affinity of individuals [*D.* v *W.*];

— to medical investigations of the pharmacological effects of medicines on humans and dermatological investigations of cosmetic substances;

— to psychological aptitude tests relating to careers guidance'.

9 In the order for reference, the Landesgericht Innsbruck states that, under the settled case-law of the Verfassungsgerichthof (Constitutional Court, Austria), such a circular does not bind the ordinary courts in the interpretation and application of legal provisions. It is merely an aid to interpretation provided by the Federal Ministry of Finances to tax offices in the interests of uniform administrative practice.

The main proceedings and the questions referred

10 Ms Unterpertinger brought an action before the Landesgericht Innsbruck, sitting as an employment and social security court, against the decision of the Pensionsversicherungsanstalt der Arbeiter rejecting her claim for payment of a disability pension. On 3 April 2000, the referring court ordered that various expert medical reports be obtained concerning the state of health of the applicant in the main proceedings and appointed for that purpose a doctor specialising in psychiatry and neurology.

11 Ms Unterpertinger died on 10 February 2001, by which time the expert reports had already been made and sent to the Landesgericht Innsbruck. According to the order for reference, the subject-matter of the main proceedings is now limited to the question of costs, which is between only the expert and the Pensionsversicherungsanstalt der Arbeiter.

12 Under Paragraph 77 of the Arbeits- und Sozialgerichtsgesetz (Employment and Social Security Courts Law), which is a special provision of social security law, experts' fees are borne by the defendant, that is, in the main proceedings, the Pensionsversicherungsanstalt der Arbeiter, irrespective of the outcome of the proceedings. In the course of the hearing on 28 February 2001, that party to the main proceedings disputed the fee note submitted by the medical expert, to the extent that he charged VAT, calculated at the rate of 20%. The expert's fees, whose justification and amount net of tax were not disputed, have in the meantime been paid without the VAT.

13 The Gebührenanspruchsgesetz (Austrian law on professional fees) provides that an expert is entitled to payment of VAT on his fees if and to the extent that his services are subject to VAT. Jurisdiction to fix the fees lies with the Landesgericht

Innsbruck, which has stated that it will give a written decision concerning the liability to VAT of the services at issue in the main proceedings. An appeal lies against its decision in that regard.

14 It is in that context that the Landesgericht Innsbruck asks whether the services provided by medical experts are exempt from VAT. It considers that it cannot determine with certainty whether medical examinations intended to establish or to exclude disability or unfitness for work constitute 'turnover from activity as a doctor' within the meaning of Paragraph 6(1)(19) of the UStG 1994. In addition, it points out that that provision transposes into Austrian law Article 13A(1)(c) of the Sixth Directive and must, therefore, be interpreted consistently with that directive.

15 The Landesgericht Innsbruck therefore decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 13A(1)(c) of the Sixth Directive to be interpreted as meaning that the exemption from value added tax provided for therein does not apply to turnover from the activity of a doctor which consists in determining the disability, or lack of it, of a person applying for a pension?

2. Is the judgment [in *D.* v *W.*, cited above] to be interpreted as meaning that medical examinations and expert opinions based on them for the purpose of establishing or excluding disability or unfitness to work do not fall within the scope of application of the provision referred to in Question 1 above, whether or not the doctor who acts as an expert is instructed by a court or a pension insurance institution?'

The questions referred

16 By its two questions, which it is convenient to examine together, the referring court is asking, in essence, taking account particularly of *D.* v *W.*, whether Article 13A(1)(c) of the Sixth Directive is to be interpreted as meaning that the exemption from VAT under that provision applies to the services of a doctor consisting of making an expert report on a person's state of health in order to support or exclude a claim for payment of a disability pension and whether the fact that the medical expert was instructed by a court or by a pension insurance institution is relevant in that regard.

Observations submitted to the Court

17 The Austrian Government and the Commission submit that the question whether the activities as an expert of a doctor which consist in establishing the disability or lack of it of a pension claimant are subject to VAT has been answered clearly enough and in the affirmative by the judgment in *D.* v *W.* It follows from paragraph 19 of that judgment that the exemption in Article 13A(1)(c) of the Sixth Directive applies only to medical services having a therapeutic aim.

18 Starting from the interpretation given in *D.* v *W.* and basing itself in particular on the principle of strict construction of the provisions relating to VAT exemption, the Austrian Government concludes that the service at issue in the main proceedings, which is effected for the purposes of entitlement to a disability pension, is not exempt from VAT.

19 The Commission observes that, in *D.* v *W.*, the Court clearly indicated the medical activities which do not match the concept of 'provision of medical care' within the meaning of Article 13A(1)(c) by drawing a distinction according to whether or not the medical service pursues a therapeutic aim. The principles set forth in that judgment were confirmed in Case C-76/99 *Commission* v *France* [2001] ECR I-249, paragraph 24, and, more recently, in Case C-141/00 *Kügler* [2002] ECR I-6833, paragraphs 38 and 39.

20 Not all the activities performed by a doctor are exempt from VAT by virtue of that provision. The terms used to specify the exemptions envisaged by Article 13 of the Sixth Directive are to be interpreted strictly, since those exemptions constitute exceptions to the general principle that VAT is levied on all services supplied for a consideration by a taxable person. The provisions of Article 13A(1), which is intended to exempt certain activities which are in the public interest, applies only to the activities which are listed and described in great detail (Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraphs 12 and 13, and Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraphs 17 and 18).

21 According to the Commission services consisting of establishing, for the purposes of legal proceedings, whether an applicant for a pension is disabled have no therapeutic aim. Their purpose is to resolve a legal question. Accordingly, such services by a medical expert must be treated, for VAT purposes, in exactly the same way as the activity of expert witnesses in other disciplines, such as auditors or engineers.

22 The Commission submits that the fact that the doctor acting as an expert was appointed by a court is irrelevant to the liability of the service to VAT. The purpose of the service is alone material.

23 The United Kingdom Government maintains, for its part, that the facts of the main proceedings differ from those of the case which gave rise to the judgment in *D.* v *W.* In that case, the doctor's role as a court-appointed expert consisted in carrying out a genetic investigation in order to establish biological affinity between persons, an activity which is unrelated to their health. By contrast, in this case, the doctor was appointed by the referring court to carry out a medical examination and to determine Ms Unterpertinger's state of health, which amounts to a medical diagnosis. The United Kingdom Government submits that such activities are central to the medical profession and that they therefore come fully within the scope of the exemption under Article 13A(1)(c). Paragraph 18 of the judgment in *D.* v *W.* confirms that medical diagnosis falls squarely within that exemption.

24 The United Kingdom Government submits that the questions referred by the Landesgericht Innsbruck seek to determine whether the liability to VAT of a medical examination and diagnosis depends either on the purpose for which those services were sought — in this case, in order to establish eligibility for the grant of a disability pension — or on the person who required them — in the main proceedings, a court. It argues that neither of the two criteria can justify treating such services differently.

25 It is clear from the wording of Article 13A(1)(c) that, in drafting that provision, the Community legislature took account of the fact that the activities performed in the exercise of the medical professions are very varied and go beyond the simple treatment of sick patients. It did not define the exemption by reference to a narrow concept of medical treatment, but, as the Court noted in *D.* v *W.*, referred more generally to medical services relating to human health.

26 In paragraphs 21 and 23 of the judgment in *Commission* v *France*, cited above, the Court recalled its case-law according to which, while the exemptions from

VAT are to be strictly construed, they should not therefore be interpreted unduly narrowly. In addition, the objective of ensuring that the benefit of medical care does not become inaccessible because of its increased cost resulting from the imposition of VAT — an objective highlighted by the Court in that judgment in respect of the exemption under Article 13A(1)(b) — also underlies the exemption under subparagraph (c).

27 In support of its argument that the exemption under Article 13A(1)(c) does not apply only to medical treatment in the strict sense, but to all the tasks undertaken by doctors, the United Kingdom Government relies also on the description of those tasks which appears in Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (OJ 1993 L 165, p. 1). In Case C-349/96 *CPP* [1999] ECR I-973, paragraph 18, the Court stated that the terms used in the Sixth Directive can be construed by taking into account their meaning in other Community directives. The Government maintains that there is no reason to consider that the concept of 'prestations de soins à la personne' used in Article 13A(1)(c) and rendered by the expression 'medical care' in the English version of that directive has a narrower meaning than the description of the tasks of doctors which appears in Directive 93/16.

28 The United Kingdom Government submits that the wording used by the Court in *D.* v *W.* may exclude many services provided by doctors on a daily basis. Having regard to that wording, it claims that doubts can be raised as to the tax treatment of activities involved in, for example, preventive medicine, various forms of medical intervention connected to family planning and obstetrics, and cosmetic surgery. All such activities constitute supplies of medical care within the meaning of the Sixth Directive, even where they do not involve the treatment of illness. It is hardly likely that the Court wished to exclude from the VAT exemption activities such as vaccination performed by doctors or by members of the paramedical

professions or the functions consisting of giving advice on the prevention of illness and on the protection of health, to which reference is made in the preamble to Directive No 93/16.

29 The United Kingdom Government contends, therefore, that the activity consisting of examining a patient and diagnosing his state of health falls normally within the meaning of 'medical care' in Article 13A(1)(c). Referring more precisely to the question referred by the national court, it submits that the tax treatment of a medical diagnosis should not depend on the findings of the diagnosis or on the reasons for which that service was requested.

30 Likewise, the tax treatment cannot reasonably depend on whether the motives of the patient, when he asked to be examined, were to reassure himself about his state of health or to provide the information to a third party, such as a potential employer. Such a distinction could easily be circumvented. In addition, a person in poor health or suffering from a disability ought not to be deterred, because of the imposition of VAT, from claiming an entitlement connected to his state of health, for example the right to a disability pension. It matters little in that regard whether the doctor's fees are paid directly by the patient or by a social security agency.

31 The United Kingdom Government observes that in *D.* v *W.* the Court did not decide the question whether the identity of the person requesting a medical service is relevant to the tax treatment of that service. The Court held that the service in question in that case could not, because of its intrinsic nature, be exempt from VAT.

32 The United Kingdom Government maintains that when a disabled person himself consults a doctor to seek his advice on whether his state of health makes him

eligible for a social security benefit or to seek a certificate of disability in support of his claim, the service provided by the doctor is covered by the exemption under Article 13A(1)(c). There is no reason for making such services subject to VAT when they are sought by a person other than the patient, for example a social security agency calling upon its own doctor or a court deciding an action. The activity carried out by the doctor is the same in both cases and ought to be treated in the same way with regard to VAT.

33 The United Kingdom Government claims that the wording of Article 13A(1)(c) contains no condition relating to the identity of the recipient of the services and that, where the Community legislature intended to specify the identity of the supplier or of the recipient, it has done so expressly. In the past, the Court has held that conditions which are not expressly laid down in the exemption concerned are not to be applied to the exemptions under Article 13 of the Sixth Directive (Case C-281/91 *Muys' en De Winter's Bouw- en Aannemingsbedrijf* [1993] ECR I-5405, paragraph 13, and Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 38). It observes, also, that the intrinsic nature of a service does not change depending on the person who requests it.

The Court's reply

34 According to the Court's case-law, the exemptions envisaged in Article 13 of the Sixth 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 (see, in particular, *SDC*, cited above, paragraph 20, and *Kügler*, cited above, paragraph 28). Those exemptions

constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another (*CPP*, cited above, paragraph 15, and *Commission* v *France*, paragraph 21).

35 As the Commission has correctly observed, Article 13A(1)(c) does not exempt all the services which may be effected in the exercise of the medical and paramedical professions, but only 'provision of medical care', which constitutes an independent concept of Community law. It follows that services effected in the exercise of those professions remain subject to the general rule making them subject to VAT set out in Article 2(1) of the Sixth Directive, if they do not correspond to the concept of 'the provision of medical care', or to the terms of any other exemption provided for by that directive.

36 Even if other services provided by doctors may share the characteristics of activities in the public interest, it follows from the Court's case-law that Article 13A of the Sixth Directive does not exempt from VAT every activity performed in the public interest, but only those which are listed and described in great detail (*Institute of the Motor Industry*, cited above, paragraph 18, and *D.* v *W.*, paragraph 20).

37 The United Kingdom Government's argument seeking to extend the scope of the exemption under Article 13A(1)(c) to all the activities normally included in the functions of doctors and to which Directive 93/16 refers must therefore be rejected. The objectives pursued by that directive, which is intended to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications, require that the activities of doctors be therein described in such a way as to cover all of their activities in

the various Member States, whereas the definition of the activities covered by that exemption, which creates an exception to the principle of subjection to VAT, fulfils different objectives.

38 It should be noted, furthermore, that the fact that the same persons may provide both services exempted from VAT and services subject to that tax does not constitute an anomaly in the context of the system of deduction put in place by the Sixth Directive, since Articles 17(5) and 19 thereof specifically govern that situation.

39 In relation to the concept of 'provision of medical care', the Court has already held in paragraph 18 of its judgment in *D.* v *W.*, and restated in paragraph 38 of its judgment in *Kügler*, that that concept does not lend itself to an interpretation which includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders.

40 While it follows from that case-law that the 'provision of medical care' must have a therapeutic aim, it does not necessarily follow therefrom that the therapeutic purpose of a service must be confined within an especially narrow compass (see, to that effect, *Commission* v *France*, paragraph 23). Paragraph 40 of the judgment in *Kügler* shows that medical services effected for prophylactic purposes may benefit from the exemption under Article 13A(1)(c). Even in cases where it is clear that the persons who are the subject of examinations or other medical interventions of a prophylactic nature are not suffering from any disease or health disorder, the inclusion of those services within the meaning of 'provision of medical care' is consistent with the objective of reducing the cost of health care, which is common to both the exemption under Article 13A(1)(b) and that under (c) of that paragraph (see *Commission* v *France*, paragraph 23, and *Kügler*, paragraph 29).

41 On the other hand, medical services effected for a purpose other than that of protecting, including maintaining or restoring, human health may not, according to that same case-law, benefit from the exemption under Article 13A(1)(c) of the Sixth Directive. Having regard to their purpose, to make those services subject to VAT is not contrary to the objective of reducing the cost of health care and of making it more accessible to individuals.

42 As the Advocate General correctly pointed out in paragraphs 66 to 68 of her Opinion, it is the purpose of a medical service which determines whether it should be exempt from VAT. Therefore, if the context in which a medical service is effected enables it to be established that its principal purpose is not the protection, including the maintenance or restoration, of health but rather the provision of advice required prior to taking a decision with legal consequences, the exemption under Article 13A(1)(c) does not apply to the service.

43 Where a service consists of making an expert medical report, it is clear that, although the performance of that service solicits the medical skills of the provider and may involve activities which are typical of the medical profession, such as the physical examination of the patient or the analysis of his medical history, the principal purpose of such a service is not the protection, including the maintenance or restoration, of the health of the person to whom the report relates. Such a service, whose purpose is to provide a reply to questions set out in the request for the report, is effected in order to enable a third party to take a decision which has legal consequences for the person concerned or other persons. While it is true that an expert medical report may also be requested by the person concerned and may indirectly contribute to the protection of the health of such person, by detecting a new problem or by correcting a previous diagnosis, the principal purpose pursued by every service of that type remains that of fulfilling a legal or contractual condition in another's decision-making process. Such a service cannot benefit from the exemption under Article 13A(1)(c).

44 It does not matter, in that regard, that the medical report is made for the purposes of court action seeking the grant of a disability pension, that the medical expert has been instructed by a court or by a pension insurance agency or that, under national law, the costs of the expert are to be paid by that agency. Even if the circumstances demonstrate that the expert's activity in question is in the public interest, the terms of Article 13A(1)(c) do not permit application of the exemption to medical services whose purpose is not the protection of human health.

45 Accordingly, the answer to the questions referred must be that Article 13A(1)(c) of the Sixth Directive is to be interpreted as meaning that the exemption from VAT under that provision does not apply to the services of a doctor consisting of making an expert report on a person's state of health in order to support or exclude a claim for payment of a disability pension. The fact that the medical expert was instructed by a court or pension insurance institution is irrelevant in that respect.

Costs

46 The costs incurred by the Austrian Government, the United Kingdom Government and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Landesgericht Innsbruck by order of 9 May 2001, hereby rules:

Article 13A(1)(c) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, is to be interpreted as meaning that the exemption from value added tax under that provision does not apply to the services of a doctor consisting of making an expert report on a person's state of health in order to support or exclude a claim for payment of a disability pension. The fact that the medical expert was instructed by a court or pension insurance institution is irrelevant in that respect.

Rosas Edward La Pergola

Delivered in open court in Luxembourg on 20 November 2003.

R. Grass
Registrar

V. Skouris
President