# JUDGMENT OF THE COURT (Third Chamber)

27 April 2006 *

In Joined Cases C-443/04 and C-444/04,

REFERENCES for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decisions of 15 October 2004, received at the Court on the same day, in the proceedings

**H.A. Solleveld** (C-443/04),

**J.E. van den Hout-van Eijnsbergen** (C-444/04)

v

**Staatssecretaris van Financiën,**

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský, S. von Bahr, A. Borg Barthet and A. Ó Caoimh (Rapporteur), Judges,

* Language of the case: Dutch.

Advocate General: J. Kokott,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 20 October 2005,

after considering the observations submitted on behalf of:

— Mr Solleveld, by A.B. Schoonbeek, advocaat,

— Ms van den Hout-van Eijnsbergen, by F.D. Kouwenhoven, belastingadviseur,

— the Netherlands Government, by H.G. Sevenster and D.J.M. de Grave, acting as Agents,

— the Commission of the European Communities, by P. van Nuffel and D. Triantafyllou, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2005,

gives the following

## Judgment

1 These references for a preliminary ruling concern 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; 'the Sixth Directive').

2 The references were made in the context of disputes between (1) Mr Solleveld, a physiotherapist, and (2) Ms van den Hout-van Eijnsbergen, a psychotherapist, and the Staatssecretaris van Financiën (State Secretary for Finances), concerning decisions of the Inspecteur van de Belastingdienst — Ondernemingen (Tax Inspector; 'the Inspector') refusing to exempt from value added tax ('VAT') medical care carried out by them in the exercise of their respective professional activities.

## Legal context

*Community legislation*

3 Article 13A(1) of the Sixth Directive provides:

'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:

...

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

...'

*National legislation*

Legislation in respect of VAT

4 In the version in force before 1 December 1997, Article 11(1)(g) of the Law on turnover tax (Wet op de omzetbelasting 1968) of 28 June 1968 (*Staatsblad* 1968, No 329; 'the 1968 Law on turnover tax') provides that the following are exempted from turnover tax:

'[S]ervices provided by doctors (other than veterinary surgeons), psychologists, speech therapists, health-care assistants and midwives; services provided by members of a paramedical profession in respect of which rules have been laid down under the law on paramedical professions ...'

5 Since 1 December 1997, Article 11(1)(g) of the 1968 Law on turnover tax provides that the following are exempted from turnover tax:

'[S]ervices provided by persons carrying on an occupation in respect of which rules have been laid down by or pursuant to the law on the different categories of health-care professionals ...'

Legislation in respect of healthcare

6 Until its repeal in 1997, the Law on the paramedical professions (Wet op de paramedische beroepen) of 21 March 1963 (*Staatsblad* 1963, No 113; 'the Law on the paramedical professions') laid down in Article 1(2):

'The present Law shall not apply to nursing care and, for the rest, shall apply only to paramedical professions organised by a general administrative measure on the basis of Article 2.'

7 It is apparent from the order for reference in Case C-444/04 that, when the Law on the paramedical professions was in force, the conditions for entry in the Register of Psychotherapists were laid down by the Decree on the registration of psychotherapists (Besluit inzake registratie van psychotherapeuten) (*Staatscourant* 1986, No 149; 'the 1986 Decree'). It is common ground that that Decree did not constitute a general administrative measure within the meaning of the Law on the paramedical professions.

8 The Law on the different categories of healthcare professionals (Wet op de beroepen in de individuele gezondheidszorg) of 11 November 1993 (*Staatsblad* 1993, No 655), as amended in 1997 ('the BIG Law'), provides in Article 3(1):

'Registers shall be kept in which a person who satisfies the conditions laid down by or pursuant to this law may be registered upon request respectively as a: doctor, dentist, pharmacist, healthcare psychologist, psychotherapist, physiotherapist, midwife, care assistant.'

9 The activities falling within the area of expertise of physiotherapists within the meaning of the BIG Law are defined and listed, respectively, in Article 29 of that Law and in Article 5 of the Decree on the training requirements and area of expertise of psychotherapists (Besluit opleidingseisen en deskundigheidsgebied fysiotherapeut) of 13 October 1997 (*Staatsblad* 1997, No 516; 'the 1997 Decree'). According to Article 5(1) of that Decree, those activities include, in particular, examination of the patient for a hindrance or threat to their motor function and treatment of the patient using physiotherapy techniques. Under Article 5(2), such techniques include therapy through exercise, massage and physical stimulation, with the exception of exposure to ionising rays.

## The main proceedings and the questions referred for a preliminary ruling

*Case* C-443/04

10 Mr Solleveld is a physiotherapist registered as such in the Register established by the BIG Law. In addition to his 'classical' physiotherapy activities, Mr Solleveld carries

out so-called 'disturbance field diagnostics', in respect of which he completed additional specific training in Germany. It is apparent from the order for reference that this activity gives particular attention to dysfunctions of the jaw and mouth, which are established by X-rays, mouth-flow measurements, electrodermal and intra-oral investigations. This activity is based on the theory that detailed examination of the jaw, the teeth and the oral cavity can lead to the detection of causes of ailments and illnesses and form the starting point of treatment aimed at improving or remedying a condition.

11 Mr Solleveld's activities in this area consist first of establishing a diagnosis, to determine whether the patient's ailments are associated with 'disturbance fields' in the jawbone or teeth. If that is the case, Mr Solleveld establishes a treatment plan. The latter involves, essentially, soft laser applications, homeopathic treatments and manual therapy. Before carrying out these treatments, Mr Solleveld may also refer the patient to a dentist or maxillary surgeon.

12 As Mr Solleveld did not pay any VAT on services in connection with his activities in the area of disturbance field diagnostics, notices of additional assessment were sent to him in respect of the period 1 January 1994 to 31 December 2000. The objections which he made to those notices were rejected by the Inspector. The rejection was based, in particular, on the opinion of the Inspecteur voor de Gezondheiszorg (Inspector of Public Health), according to whom disturbance field diagnostics does not fall within the area of expertise of a physiotherapist within the meaning of Article 29 of the BIG Law and Article 5 of the 1997 Decree.

13 By judgment of 18 November 2002, the Gerechtshof te Amsterdam (Amsterdam Regional Court of Appeal) dismissed the action brought by Mr Solleveld against the decisions to reject his objections, on the ground, in essence, that the medical care in question could not be regarded as having been provided by the latter in his capacity as a physiotherapist.

14 Mr Solleveld appealed on a point of law to the Hoge Raad der Nederlanden (Netherlands Supreme Court) against the said judgment. In its order for reference, that court, after having observed that the medical care in question is not provided by Mr Solleveld in his professional capacity within the meaning of the BIG Law, is uncertain as to whether it should nevertheless be exempted from VAT, since, first, its purpose is, from a subjective point of view, to contribute to the medical treatment of the patient and, second, it is apparent from the facts established by the Gerechtshof te Amsterdam that, in 40% of cases, Mr Solleveld's patients are referred to him by a doctor or dentist and most insurance companies reimburse the cost of the treatment, at least when the patients have taken out additional insurance covering medical practices other than those coming within the scope of traditional medicine.

15 Under these circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 13A(1) ... (c) of the Sixth Directive be construed as meaning that exemption from VAT is conferred in respect of interventions comprising the establishment of a diagnosis, the provision of therapeutic advice and possible provision of treatment, in the framework of [disturbance field diagnostics] even where those interventions cannot be subsumed within the exercise, by the person carrying out those interventions, of a medical or paramedical profession as defined by the Member State concerned?'

*Case* C-444/04

16 Ms van den Hout-van Eijnsbergen works as a self-employed psychotherapist, and has a teaching diploma in this field. The Geneeskundig Hoofdinspecteur voor de Geestelijke Volksgezondheid (Principal Mental Health Inspector) found that she satisfied the conditions laid down in the 1986 Decree, and she was entered in the Register established by that Decree as a psychotherapist in 1988.

17 As Ms van den Hout-van Eijnsbergen did not pay VAT on the services relating to her activities, notices of additional assessment were sent to her for the period 1 January 1992 to 31 December 1995. The objection which she made to these notices was rejected by the Inspector.

18 By judgment of 20 March 2003, the Gerechtshof te 's-Gravenhage (The Hague Regional Court of Appeal) dismissed the action brought by Ms van den Hout-van Eijnsbergen against the decision to reject her objection, on the ground, in essence, that 'services provided by doctors and psychologists' as referred to in Article 11(1)(g) of the 1968 Law on turnover tax, in the version in force during the tax years at issue in the main proceedings, must be construed solely as services provided by persons authorised to use the title of doctor or psychologist.

19 Ms van den Hout-van Eijnsbergen brought an appeal on a point of law before the Hoge Raad der Nederlanden against the said judgment. In its order for reference, that court, after having observed that it is beyond reasonable doubt that the purpose of treatments provided by self-employed psychotherapists is therapeutic, notes that psychotherapists did not appear on the list of professions referred to in Article 11(1) (g) of the 1968 Law on turnover tax in the version applicable to the dispute, even if they satisfied the statutory requirements for registration and were actually entered in the Register of Psychotherapists. Moreover, the referring court indicates that that provision, in the version in force since 1 December 1997, now states that medical care provided by psychotherapists is exempt from VAT. The said court is accordingly uncertain as to whether the exhaustive list of the medical professions in the 1968 Law on turnover tax, in the version in force prior to the said date, could be sufficient to exclude the medical care at issue from the exemption laid down by Article 13A(1)(c) of the Sixth Directive.

20 Under these circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 13A(1) ... (c) of the Sixth Directive be construed as meaning that psychotherapy treatments provided by a person carrying on a profession who satisfies the statutory requirements for registration listed [above] and is entered in the Register of Psychotherapists ... are exempt from VAT, even where those interventions cannot be subsumed within the exercise, by the person carrying out those interventions, of a medical or paramedical profession as defined by the Member State concerned?'

21 By order of the President of the Court of 21 January 2005, Cases C-443/04 and C-444/04 were joined for the purposes of the written and oral procedure and of the judgment.

## The questions referred

22 By its questions, the referring court asks in substance whether the exemption from VAT laid down by Article 13A(1)(c) of the Sixth Directive applies to treatments carried out, respectively, by a physiotherapist and by a psychotherapist outside the context of the exercise of the medical and paramedical professions as defined by the legislation of the Member State concerned.

23 According to a literal interpretation of Article 13A(1)(c) of the Sixth Directive, the practitioner must satisfy two conditions to benefit from the exemption laid down in

that provision, which are, first, that he must provide 'medical care' and, second, that this must be carried out 'in the exercise of the medical and paramedical professions as defined by the Member State concerned'.

24 In the present case, it is common ground that the treatments given by the applicants in the main proceedings constitute medical care within the meaning of that provision, since those treatments are carried out for the purpose of diagnosing, treating and, in so far as possible, curing diseases or health disorders, thus pursuing a therapeutic aim (Case C-307/01 *D'Ambrumenil and Dispute Resolution Services* [2003] ECR I-13989, paragraph 57).

25 On the other hand, the questions raised by the referring court concern whether the said treatments can be regarded as having been carried out in the exercise of the medical or paramedical professions, as defined by national legislation, in accordance with the second condition under Article 13A(1)(c) of the Sixth Directive.

26 In that respect, it is apparent from the orders for reference that, in Case C-444/04, the treatments in question were given by a provider who did not belong, at the time of the facts in the main proceedings, to one of the paramedical professions defined by the national legislation for the purposes of exemption from VAT, while, in Case C-443/04, although the treatments in question were given by a service provider belonging to such a paramedical profession, they did not come within the areas of expertise of that profession, as it is defined by the said legislation.

27 It follows that, by its question in Case C-444/04, the referring court seeks in particular to determine to what extent the Member States may, for the purposes of the exemption from VAT laid down in Article 13A(1)(c) of the Sixth Directive,

exclude certain professions from the definition of paramedical professions adopted by the national legislation, whereas, in Case C-443/04, the said court asks in substance whether the Member States may exclude certain specific medical-care activities from the said definition.

28 In that respect, it is clear from the wording of Article 13A(1)(c) of the Sixth Directive that that provision does not itself define the concept of 'paramedical professions', but refers instead to the definition adopted by the national legislation of the Member States.

29 Under these circumstances, it is for each Member State to define, in its own domestic law, the paramedical professions in the context of which medical care is exempt from VAT, pursuant to Article 13A(1)(c) of the Sixth Directive. The Court has already held that that provision confers discretion on the Member States in this respect (Case C-45/01*Dornier* [2003] ECR I-12911, paragraph 81).

30 That discretion covers not only the power to define the qualifications required to carry out the said professions, but also the power to define the specific medical-care activities which are covered by such professions. In fact, since the various qualifications acquired by the service providers do not necessarily prepare them to provide all types of care, a Member State is entitled to take the view, in the exercise of its discretion, that the definition of paramedical professions would be incomplete if it were limited to imposing general requirements as to the qualifications of providers, without specifying the care in respect of which they are qualified in the context of those professions.

31 However, the discretion enjoyed by the Member States in this respect is not unlimited.

32 Admittedly, as the Netherlands Government states, the Member States are entitled, pursuant to the first clause of Article 13A(1) of the Sixth Directive, to lay down the conditions for granting exemptions to ensure their correct and straightforward application.

33 Thus, contrary to the submission of the Commission of the European Communities, it must be accepted that the Member States' discretion in defining the paramedical professions authorises them not to consider as such and, therefore, to exclude from the exemption from VAT laid down by Article 13A(1)(c) of the Sixth Directive a particular profession such as that of psychotherapist in Case C-444/04, even if certain aspects of that profession are governed by specific rules under national law.

34 Similarly, it is correct, as the Netherlands Government submits, that the correct and straightforward application of the exemption from VAT laid down in Article 13A(1)(c) of the Sixth Directive is ensured where, as in Case C-443/04 in respect of physiotherapy services, the said exemption is granted only to providers with the professional qualifications specified in the national legislation on the paramedical professions and only in connection with the specific medical-care activities in respect of which those qualifications were acquired, as those activities are defined in the said legislation.

35 However, it follows from the Court's case-law that the requirement of a correct and straightforward application of the exemptions does not allow the Member States to prejudice the objectives of the Sixth Directive or the principles of Community law, in particular the principle of equal treatment, which is reflected, in the field of VAT, by the principle of fiscal neutrality (see *Dornier*, paragraphs 42 and 69;

Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraphs 29 and 52; and Case C-246/04 *Turn- und Sportunion Waldburg* [2006] ECR I-589, paragraphs 44 to 46).

36 Consequently, where a taxable person requests that his medical-care activities be recognised as coming within the ambit of the exercise of paramedical professions, for the purpose of benefiting from the exemption from VAT laid down in Article 13A(1)(c) of the Sixth Directive, it is for the national courts to examine whether the competent authorities have observed the limits of the discretion granted by this provision, having regard to the objective pursued by the latter and the principle of fiscal neutrality inherent in the common system of VAT (see, to that effect, Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 56; *Dornier*, paragraph 69; and *Kingscrest Associates and Montecello*, paragraph 52).

37 In this respect, concerning, first, the objective pursued by Article 13A(1)(c) of the Sixth Directive, it should be noted that the condition laid down by that provision, that medical care must be provided in the exercise of the paramedical professions as defined by the Member State concerned, is to ensure that the exemption applies only to medical care provided by practitioners with the required professional qualifications (*Kügler*, paragraph 27). Consequently, not all medical care falls within the scope of such an exemption, the latter concerning only that of sufficient quality having regard to the professional training of the providers.

38 It follows that the exclusion of a particular profession or a specific medical-care activity from the definition of the paramedical professions adopted by the national legislation for the purpose of the exemption laid down by Article 13A(1)(c) of the Sixth Directive must be capable of justification on objective grounds based on the

professional qualifications of the care providers and, therefore, by considerations relating to the quality of the services provided.

39 As regards, secondly, the principle of fiscal neutrality, which is inherent in the common system of VAT, it must be remembered that, according to case-law, that principle precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (Case C-109/02 *Commission* v *Germany* [2003] ECR I-12691, paragraph 20; and *Kingscrest Associates and Montecello*, paragraph 54).

40 In order to determine whether medical care is similar, it is appropriate to take into account, concerning the exemption laid down in Article 13A(1)(c) of the Sixth Directive and having regard to the objective pursued by that provision, the professional qualifications of the care providers. In fact, where it is not identical, medical care can be regarded as similar only to the extent that it is of equivalent quality from the point of view of recipients.

41 It follows that the exclusion of a profession or specific medical-care activity from the definition of the paramedical professions adopted by the national legislation for the purpose of the exemption from VAT laid down in Article 13A(1)(c) of the Sixth Directive is contrary to the principle of fiscal neutrality only if it can be shown that the persons exercising that profession or carrying out that activity have, for the provision of such medical care, professional qualifications which are such as to ensure a level of quality of care equivalent to that provided by persons benefiting, pursuant to that same national legislation, from an exemption.

42 It is therefore for the referring court to determine whether, having regard to all of these factors, the exclusion, in Case C-444/04, of the profession of psychotherapist and, in Case C-443/04, of activities in the area of disturbance field diagnostics carried out by a physiotherapist, from the field of the exercise of the paramedical professions for the purpose of the exemption from VAT laid down in Article 13A(1)(c) of the Sixth Directive exceeds the limits of the discretion granted to the Member States by that provision.

43 In that respect, as regards Case C-444/04, it should at the outset be pointed out that, contrary to the line of argument put forward by the Netherlands Government, the fact that all psychotherapists have been treated in the same way in respect of VAT, whatever their legal status, is not relevant. On the other hand, it should be examined whether, as Ms van den Hout-van Eijnsbergen submits, the Member State concerned, during the tax years at issue in the main proceedings, made the activities of psychotherapists with a teaching diploma subject to a VAT regime which was different from that applied to psychiatrists and psychologists carrying out the same activities.

44 If that were the case, it would be for the referring court to examine whether psychotherapists with a teaching diploma, such as the applicant in the main proceedings, actually have, like psychiatrists and psychologists, the professional qualifications required to carry out the psychotherapy treatments practised by the applicant and, if so, whether they benefit, in respect of such activities, from the exemption from VAT.

45 If so, the national legislation at issue in the main proceedings would exceed the discretion enjoyed by the Member States under Article 13A(1)(c) of the Sixth Directive only if the quality of the treatments carried out by psychotherapists could be regarded, having regard to their professional qualifications, as equivalent to that of similar treatments carried out by psychiatrists, psychologists or any other medical

or paramedical profession, a matter which it is for the referring court to determine in the light of all of the relevant circumstances of the case before it.

46 In that respect, the referring court will be able to take into account, in particular, the fact that the applicant in the main proceedings has a teaching diploma and that the psychotherapy treatments which she carried out during the relevant tax years took place within a statutory framework, under the control of the Public Health Inspectorate and in accordance with conditions set out in specific legislation, respect of which is attested to by entry in a register provided for that purpose, these circumstances being such as to ensure that she had, for the exercise of her activities, the required professional qualifications.

47 As regards Case C-443/04, in order to establish whether the Member State concerned exceeded its discretion under Article 13A(1)(c) of the Sixth Directive, it is appropriate to examine whether treatments using disturbance field diagnostics are exempted from VAT where they are carried out by doctors or dentists.

48 When it was questioned on this point at the hearing, the Netherlands Government, without wishing to adopt a firm position in this respect, nevertheless indicated, in respect of doctors, that it was not a priori excluded that, taking into account their expertise and more comprehensive medical training, they could benefit from the exemption from VAT if they carried out the said treatments.

49 Under these circumstances, it is for the referring court, following the reasoning in paragraphs 44 and 45 of this judgment, to determine whether, by not excluding from VAT the treatments using disturbance field diagnostics given by the applicant in the main proceedings, the Member State concerned has exceeded its discretion under

Article 13A(1)(c) of the Sixth Directive, having regard to the VAT regime applied to doctors and dentists in respect of the same treatments and to the quality of the care provided in this context by each of them.

50 In this respect, the referring court will be able to take into account, in particular, the fact that, in his capacity as physiotherapist, the applicant in the main proceedings exercises a paramedical profession within the meaning of the national legislation of the Member State concerned, that he undertook specific additional training to be able to carry out the said treatments and that treatment often begins following referral of his patients by doctors or dentists.

51 The answers to the questions referred must therefore be that:

— Article 13A(1)(c) of the Sixth Directive must be interpreted as meaning that it confers on the Member States the discretion to define the paramedical professions and the medical care coming within the scope of such professions for the purpose of the exemption laid down by that provision. However, the Member States must, in the exercise of that discretion, comply with the objective pursued by the said provision, which is to ensure that the exemption applies solely to services provided by persons with the required professional qualifications, and the principle of fiscal neutrality.

— National legislation which excludes the profession of psychotherapist from the definition of the paramedical professions is contrary to the said objective and principle only to the extent that psychotherapeutic treatments would, if carried out by psychiatrists, psychologists or any other medical or paramedical profession, be exempt from VAT, whereas, carried out by psychotherapists,

they can be regarded as being of equivalent quality having regard to the professional qualifications of the latter, a matter which it is for the referring court to determine.

— National legislation which excludes certain specific medical-care activities, such as treatments using disturbance field diagnostics, carried out by physiotherapists from the definition of that paramedical profession is contrary to the said objective and principle only to the extent that such treatments would, if carried out by doctors or dentists, be exempt from VAT, whereas, carried out by physiotherapists, they can be regarded as being of equivalent quality having regard to the professional qualifications of the latter, a matter which it is for the referring court to determine.

## Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) 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 must be**

**interpreted as meaning that it confers on the Member States the discretion to define the paramedical professions and the medical care coming within the scope of such professions for the purpose of the exemption laid down by that provision. However, the Member States must, in the exercise of that discretion, comply with the objective pursued by the said provision, which is to ensure that the exemption applies solely to services provided by persons with the required professional qualifications, and the principle of fiscal neutrality.**

**National legislation which excludes the profession of psychotherapist from the definition of the paramedical professions is contrary to the said objective and principle only to the extent that psychotherapeutic treatments would, if carried out by psychiatrists, psychologists or any other medical or paramedical profession, be exempt from value added tax, whereas, carried out by psychotherapists, they can be regarded as being of equivalent quality having regard to the professional qualifications of the latter, a matter which it is for the referring court to determine.**

**National legislation which excludes certain specific medical-care activities, such as treatments using disturbance field diagnostics, carried out by physiotherapists from the definition of that paramedical profession is contrary to the said objective and principle only to the extent that such treatments would, if carried out by doctors or dentists, be exempt from value added tax, whereas, carried out by physiotherapists, they can be regarded as being of equivalent quality having regard to the professional qualifications of the latter, a matter which it is for the referring court to determine.**

[Signatures]