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**Case C-156/09**

**Finanzamt Leverkusen**

**v**

**Verigen Transplantation Service International AG**

(Reference for a preliminary ruling from the Bundesfinanzhof)

(Sixth VAT Directive – Article 13(A)(1)(c) – Exemptions for activities in the public interest – Provision of medical care – Removal and multiplication of cartilage cells for the purpose of reimplantation in the patient)

Summary of the Judgment

*Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions provided for in the Sixth Directive – Exemption regarding the provision of medical care in the medical and paramedical professions – Scope*

*(Council Directive 77/388, Art. 13(A)(1)(c))*

Article 13(A)(1)(c) of Sixth [Council] Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 95/7, must be interpreted as meaning that the removal of joint cartilage cells from cartilage material taken from a human being and the subsequent multiplication of those cells for reimplantation for therapeutic purposes constitute ‘provision of medical care’ in accordance with that provision.

The concept of ‘provision of medical care’ is intended to cover services having as their purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders. Whilst the provision of medical care must have a therapeutic purpose, it does not necessarily follow that the therapeutic purpose of a service must be confined within a particularly narrow compass. In that regard, the fact that the services are carried out by laboratory staff who are not qualified medical practitioners is irrelevant, inasmuch as it is not necessary for every aspect of therapeutic care to be provided by medical staff. Moreover, whether the multiplied cells are reimplanted into the patient from whom they were originally removed or another patient has no bearing on the classification of a service as ‘the provision of medical care’.

(see paras 24, 28-29, 32, operative part)

JUDGMENT OF THE COURT (First Chamber)

18 November 2010 (*)

(Sixth VAT Directive – Article 13(A)(1)(c) – Exemptions for activities in the public interest – Provision of medical care – Removal and multiplication of cartilage cells for the purpose of reimplantation in the patient)

In Case C?156/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decision of 1 April 2009, received at the Court on 6 May 2009, in the proceedings

**Finanzamt Leverkusen**

v

**Verigen Transplantation Service International AG,**

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, A. Borg Barthet (Rapporteur), E. Levits and M. Berger, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

– the German Government, by M. Lumma and C. Blaschke, acting as Agents,

– the Spanish Government, by F. Díez Moreno, acting as Agent,

– the Commission of the European Communities, by D. Triantafyllou, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 29 July 2010,

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Articles 13(A)(1)(c) and 28b(F), first paragraph, 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), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18) (‘the Sixth Directive’).

2 The reference was made in the course of proceedings between Verigen Transplantation Service International AG (‘VTSI’) and Finanzamt Leverkusen (‘the Finanzamt’) (Tax Office), concerning the latter’s refusal to exempt from value added tax (‘VAT’) VTSI’s turnover generated by carrying out cartilage cell multiplication for customers established in other Member States.

**Legal context**

*The Sixth Directive*

3 Article 2(1) of the Sixth Directive makes ‘the supply of goods or services effected for

consideration within the territory of the country by a taxable person acting as such’ subject to VAT.

4 Article 9(1) and (2) of the Sixth Directive provide:

‘1. The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.

2. However:

…

(c) the place of the supply of services relating to:

...

– work on movable tangible property,

shall be the place where those services are physically carried out;

…’

5 Article 13(A) of the Sixth Directive, entitled ‘Exemptions for certain activities in the public interest’, provides in paragraph 1(c):

‘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;

…’

6 According to Article 28b(F) of that directive:

‘By way of derogation from Article 9(2)(c), the place of the supply of services involving valuations or work on movable tangible property, provided to customers identified for value added tax purposes in a Member State other than the one where those services are physically carried out, shall be deemed to be in the territory of the Member State which issued the customer with the value added tax identification number under which the service was carried out for him.

…’

*National legislation*

7 Article 3a(2)(3) of the Law on Turnover Tax (Umsatzsteuergesetz 1999, BGBl. 1999 I, p. 1270 (‘the UStG’)), in the version applicable to the case in the main proceedings, provides, inter alia:

‘The following services are supplied where the trader operates exclusively or for the most part:

…

(c) Work on movable tangible property and the valuation of such property. Where the customer to whom the service is supplied uses in relation to the supplying trader a value added tax identification number issued to him by another Member State, the service carried out under that number shall be regarded as having been supplied in the territory of the other Member State …'

8 Under Paragraph 4(14) of the UStG, the following transactions that fall within the scope of Paragraph 1(1)(1) of the UStG are exempt from tax:

'transactions arising from the practice of the profession of doctor, dentist, lay medical practitioner, physiotherapist or midwife or a similar professional medical activity for the purposes of Paragraph 18(1)(1) of the Law on Income Tax (Einkommensteuergesetz), or from the practice of the profession of clinical chemist …'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

9 VSTI is a biotechnology company established in Germany and operating in the field of tissue engineering. It researches, develops, produces and markets technologies to diagnose and treat human tissue diseases, and in particular cartilage diseases.

10 The dispute in the main proceedings concern VTSI's transactions involving the multiplication of chondrocytes for reimplantation into the patient, in cases where the customers to whom the service is supplied (doctors or clinics) are resident in other Member States and VTSI has stated their VAT identification number on its invoices.

11 The process is described by the Bundesfinanzhof in the following way. The doctor or clinic sends VTSI biopsy cartilage material taken from the patient. VTSI treats the tissue to make it possible to remove the chondrocytes. After preparation in their own blood serum in an incubator they are multiplied through growth, normally within three to four weeks. The resulting cells may, or may not, be introduced into a collagen membrane to produce a 'cartilage plaster'. In either event, they are sent to the patient's doctor or clinic to be reimplanted in the patient.

12 VTSI treated those services as not liable to VAT when provided to customers resident in other Member States.

13 The Finanzamt, however, considered them to be taxable and, by decision of 17 December 2003, assessed tax owed by VSTI on its turnover for 2002.

14 In the proceedings challenging that decision and those before the Finanzgericht Köln (Cologne Finance Court), VTSI argued that the multiplication of cartilage cells did not constitute medical care, but rather, 'routine laboratory services' carried out by biotechnical or medical-technical assistants. It explained that the necessary quality controls were carried out by a pharmacist and an external chemist.

15 The Finanzgericht Köln upheld VTSI's challenge. It ruled that cell multiplication was a service which had to be regarded as 'work on movable tangible property' within the meaning of Article 3a(2)(3)(c) of the UStG. That court considered that after removal from the patient's body, organs taken for transplantation became movable property. Whether the separated body part was subsequently used for transplantation in the same patient (autologous usage) or another (allogeneic usage) could have no bearing on whether or not it was subsumed under the term movable tangible property.

16 The Finanzgericht Köln found that customers resident in other Member States had used the VAT identification numbers issued to them in their respective Member States and the transactions at issue were therefore not taxable in Germany.

17 The Finanzamt appealed on a point of law against that judgment. Before the Bundesfinanzhof, it argues that the cells do not become movable property as a result of their short-term separation from the body, so that cell multiplications do not constitute 'work' within the meaning of Paragraph 3a(2)(3)(c) of the UStG. Nor, according to the Finanzamt, is there any use of a VAT identification number issued by another Member State within the meaning of Paragraph 3a(2)(3)(c) of the UStG, since that would have required a prior express agreement between the claimant and the customer.

18 The referring court considers that the handover of the multiplied cartilage cells to the patient's doctor or clinic does not constitute a supply of goods since VTSI cannot dispose freely of the cartilage material. Cell multiplication is a supply of services and is not taxable in Germany when that service is supplied in another Member State. However that could be the case only if Article 28b(F) of the Sixth Directive were interpreted as covering the service supplied by VTSI. Otherwise, the transaction should be taxable in Germany unless it could be regarded as constituting 'provision of medical care' within the meaning of Article 13(A)(1)(c) of that directive.

19 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the first paragraph of Article 28b(F) of [the Sixth Directive] to be interpreted as meaning that:

(a) cartilage material ("biopsy material") which is taken from a human being and entrusted to an undertaking for the purpose of cell multiplication and subsequent return as an implant for the patient concerned constitutes "movable tangible property" for the purposes of this provision;

(b) the removal of joint cartilage cells from the cartilage material and the subsequent cell multiplication constitute "work" on movable tangible property for the purposes of this provision;

(c) the service has been supplied to a customer "identified for (VAT) purposes" simply if the (VAT) identification number is stated in the invoice of the supplier of the service, without any express written agreement as to its use having been made?

2. If any of the above questions is answered in the negative, is Article 13(A)(1)(c) of the Sixth Directive to be interpreted as meaning that the removal of the joint cartilage cells from the cartilage material taken from a human being and the subsequent cell multiplication constitute the "provision of medical care" where the cells obtained from the cell multiplication are reimplanted in the donor?'

## Consideration of the questions referred

*The second question*

20 By its second question, which it is appropriate to examine first, the national court asks, essentially, if Article 13(A)(1)(c) of the Sixth Directive must be interpreted as meaning that the removal of joint cartilage cells from cartilage material taken from a human being and subsequent cell multiplication constitute the 'provision of medical care' in accordance with that provision where the cells obtained from that multiplication are intended to be reimplanted in the donor.

21 It should be noted at the outset that under the Sixth Directive the scope of VAT is very wide

in that Article 2 thereof, which concerns taxable transactions, refers not only to the importation of goods but also to the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such (see, in particular, Case C?255/02 *Halifax and Others* [2006] ECR I?1609, paragraph 49; Case C?401/05 *VDP Dental Laboratory* [2006] ECR I?12121, paragraph 22; and Case C?262/08 *CopyGene* [2010] ECR I?0000, paragraph 23).

22 Article 13 of the Sixth Directive nevertheless exempts certain activities from VAT. It is settled case-law that the exemptions referred to in that article constitute independent concepts of European Union law whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another (see, in particular, Case C?349/96 *CPP* [1999] ECR I?973, paragraph 15, and *CopyGene*, paragraph 24).

23 The settled case-law further shows that the terms used to specify the exemptions 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 goods and services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms 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 terms used to specify the exemptions referred to in Article 13 must be construed in such a way as to deprive the exemptions of their intended effect (see, in particular, Case C?445/05 *Haderer* [2007] ECR I?4841, paragraph 18 and the case-law cited, and *CopyGene*, paragraph 26 and the case-law cited).

24 As regards the exemption referred to in Article 13(A)(1)(c) of the Sixth Directive, it follows from the case-law that the concept of ‘provision of medical care’ is intended to cover services which have as their purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders (*CopyGene*, paragraph 28 and the case-law cited). Whilst the provision of medical care must have a therapeutic purpose, it does not necessarily follow, according to the case?law cited in the previous paragraph, that the therapeutic purpose of a service must be confined within a particularly narrow compass (see *CopyGene*, paragraph 29 and the case-law cited).

25 Here, it is not disputed that the process consisting in the removal of cartilage material to extract cells which will then be multiplied for reimplantation in a patient has, overall, a therapeutic purpose.

26 The specific services provided by VTSI form, admittedly, only part of that overall process. However, as the Advocate General observed at point 23 of her Opinion, they are an essential, inherent and inseparable part of the process, none of the stages of which can usefully be performed in isolation from the others.

27 It follows from the foregoing that the extraction of joint cartilage cells from cartilage material taken from a human and the subsequent multiplication of the cells for reimplantation for a therapeutic purpose falls within the concept of ‘provision of medical care’ referred to in Article 13(A)(1)(c) of the Sixth Directive. Such an interpretation is also consistent with the objective of reducing the cost of health care referred to in that provision (see Case C?106/05 *L.u.P.* [2006] ECR I?5123, paragraph 29).

28 The fact that the services are carried out by laboratory staff who are not qualified medical practitioners is irrelevant, inasmuch as it is not necessary for every aspect of therapeutic care to be provided by medical staff (see, to that effect, Case C?141/00 *Kügler* [2002] ECR I?6833, paragraph 41, and *L.u.P.*, paragraph 39).

29 Moreover, it should be added that whether the multiplied cells are reimplanted into the patient from whom they were originally removed or another patient has, as a rule, no bearing on classification of a service as ‘the provision of medical care’ (see, by analogy, *CopyGene*, paragraph 51).

30 The German Government argues that the classification of the services at issue as ‘the provision of medical care’ might run counter to the principle of fiscal neutrality in that the ‘cartilage plaster’ produced by VTSI is functionally comparable to a pharmaceutical product, which would not be exempt from VAT. It is clear that classification of a service as ‘the provision of medical care’ can only depend on its own character, and the question of whether or not a pharmaceutical alternative is available is irrelevant.

31 As the Advocate General stated in her Opinion at point 28, some kinds of medical care already have pharmaceutical alternatives while others do not but are likely to do so in the future, so that the two categories are in constant evolution.

32 Having regard to all the foregoing considerations, the answer to the second question is that Article 13(A)(1)(c) of the Sixth Directive must be interpreted as meaning that the removal of joint cartilage cells from cartilage material taken from a human being and the subsequent multiplication of those cells for reimplantation for therapeutic purposes constitute ‘provision of medical care’ in accordance with that provision.

*The first question*

33 In the light of the answer given to the second question, there is no need to answer the first question.

**Costs**

34 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 (First Chamber) hereby rules:

**Article 13(A)(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, as amended by Council Directive 95/7/EC of 10 April 1995, must be interpreted as meaning that the removal of joint cartilage cells from cartilage material taken from a human being and the subsequent multiplication of those cells for reimplantation for therapeutic purposes constitute ‘provision of medical care’ in accordance with that provision.**

[Signatures]

* Language of the case: German.