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Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

9 March 2017 (*)

(Reference for a preliminary ruling — Value added tax — Directive 2006/112/EC — Article 98(2) — Annex III, points 3 and 4 — Principle of fiscal neutrality — Medical treatment using oxygen — Reduced VAT rate — Oxygen cylinders — Standard rate of VAT — Oxygen concentrators)

In Case C-573/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the cour d'appel de Liège (Court of Appeal, Liège, Belgium), made by decision of 28 October 2015, received at the Court on 9 November 2015, in the proceedings

État belge

v

Oxycure Belgium SA,

THE COURT (Sixth Chamber),

composed of E. Regan, President of the Chamber, A. Arabadjiev and C.G. Fernlund (Rapporteur),
Judges,

Advocate General: P. Mengozzi,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 19 September 2016,

after considering the observations submitted on behalf of:

- Oxycure Belgium SA, by F. Fosseur, avocat,
- the Belgian Government, by M. Jacobs and J.-C. Halleux, acting as Agents, and D. Carmen, expert,
- the European Commission, by J.-F. Brakeland and M. Owsiany-Hornung, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 October 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 98(1) and (2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, ‘the VAT Directive’), read in conjunction with points 3 and 4 of Annex III to that directive, in the light of the principle of fiscal neutrality.

2 The request has been made in proceedings between the État belge (Belgian State) and Oxycure Belgium SA (‘Oxycure’), concerning whether Oxycure is liable to pay value added tax (VAT) on the sale and/or rental of oxygen concentrators and accessories intended for medical treatment with oxygen.

Legal context

EU law

3 Recital 4 of the VAT Directive states as follows:

‘The attainment of the objective of establishing an internal market presupposes the application in Member States of legislation on turnover taxes that does not distort conditions of competition or hinder the free movement of goods and services. It is therefore necessary to achieve such harmonisation of legislation on turnover taxes by means of a system of [VAT], such as will eliminate, as far as possible, factors which may distort conditions of competition, whether at national or Community level.’

4 Article 96 of that directive provides:

‘Member States shall apply a standard rate of VAT, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services.’

5 Article 98(1) and (2) of the directive provides:

‘1. Member States may apply either one or two reduced rates.

2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.

...’

6 Point 3 of Annex III to the VAT Directive concerns ‘pharmaceutical products of a kind normally used for health care, prevention of illnesses and as treatment for medical and veterinary purposes, including products used for contraception and sanitary protection’.

7 Point 4 of that annex covers ‘medical equipment, aids and other appliances normally intended to alleviate or treat disability, for the exclusive personal use of the disabled, including the repair of such goods, and supply of children’s car seats’.

Belgian law

8 Arrêté royal No 20, du 20 juillet 1970, fixant les taux de la taxe sur la valeur ajoutée et déterminant la répartition des biens et des services selon ces taux (Royal Decree No 20 of 20 July 1970 fixing the rates of value added tax and classifying goods and services according to those rates: 'Royal Decree No 20') provides for VAT to be charged at the rate of 6% on the goods and services specified in Table A of the annex to the decree.

9 Heading XXIII of Table A mentions, inter alia, 'orthopaedic appliances (including surgical belts); items and appliances for fracture (splints and similar); prosthetics and artificial fittings for teeth, eyes, or other body parts; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability; individual items specially designed to be worn by patients with a stoma and by individuals suffering from incontinence, except sanitary towels, panty-liners and nappies and nappy pants for children under the age of six; individual accessories forming part of an artificial kidney, including the cases used', 'aerosols and their accessories; personal material for administering mucomyst' and 'pumps for the infusion of analgesics'.

10 Heading XXXIV of Table A covers the hire of those goods.

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

11 Oxycure is a company whose main business is the hire and sale of oxygen concentrators. Appliances of this kind comprise a part whose purpose is to concentrate the oxygen in the ambient air and a nasal cannula or oxygen mask and an oxygen intake hose, which form an integral part of the appliance. Oxygen concentrators allow home-based oxygen therapy for patients suffering from a respiratory insufficiency or other serious impairment requiring oxygen treatment, whose condition can no longer be improved by the use of aerosols and bronchodilators.

12 It is clear from the file before the Court that, on 26 November 2010, when drawing up a report, the Belgian tax authority established that during the period 1 October 2007 to 31 March 2010 Oxycure had applied the reduced rate of VAT of 6% to the hire and sale of oxygen concentrators, whereas those transactions should have been taxed at the standard rate of 21% in accordance with Royal Decree No 20. On the basis of the report, a demand for payment of EUR 1 291 621.17 in VAT and a fine of EUR 129 160 was imposed.

13 On 28 December 2011, Oxycure brought an action against the demand for payment before the tribunal de première instance de Namur (Court of First Instance, Namur, Belgium), which annulled the demand by judgment of 25 April 2013.

14 On 27 June 2013, the Belgian State brought an appeal against that judgment before the cour d'appel de Liège (Court of Appeal, Liège, Belgium).

15 The referring court points out that oxygen concentrators are, along with medical oxygen cylinders and medical liquid oxygen tanks, one of three sources of oxygen available on the market, and that those sources are all interchangeable and/or complementary. First, according to a report by the Centre fédéral d'expertise des soins de santé (Belgian Health Care Knowledge Centre), each source is available in a large fixed model and a small portable model. It is also clear from the report that, from the point of view of clinical efficiency for the patient, all oxygen treatments are equivalent, regardless of whether the oxygen is supplied by one or other of the three sources, whether fixed or portable, while the differences between these methods of administration of oxygen relate to convenience issues (noise, use away from home, available volume, filling of portable model by the patient) and to the cost to society. Second, the Belgian rules on 'compulsory health insurance schemes' acknowledge the complete interchangeability of these sources of

oxygen, given that an emergency oxygen cylinder is included in the reimbursable cost of the oxygen concentrator.

16 It is apparent from the file before the Court that, in accordance with Heading XVII of Table A of Royal Decree No 20, the reduced rate of VAT of 6% is applied to oxygen cylinders.

17 Having regard to those considerations, the referring court asks whether, although none of its headings explicitly mentions oxygen concentrators, that table must be interpreted in the light of the principles of EU law and, in particular, the principle of fiscal neutrality, as it covers, at least impliedly, oxygen concentrators in the same way as as other means of oxygenation.

18 In those circumstances, the Cour d'appel de Liège (Court of Appeal, Liège) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Article 98(1) and (2) of the VAT Directive, read in conjunction with Annex III, points 3 and 4, of the VAT Directive, having regard to, in particular, the principle of neutrality, preclude a national provision which prescribes a reduced rate of VAT for oxygen treatment by means of oxygen cylinders, whereas oxygen treatment by means of an oxygen concentrator is subject to the standard rate of VAT?'

Consideration of the question referred

19 By its question, the referring court asks essentially whether Article 98(1) and (2) of the VAT Directive and Annex III, points 3 and 4 thereto, read in the light of the principle of fiscal neutrality, precludes national legislation, such as that at issue in the main proceedings, which provides that the standard rate of VAT is applicable to the supply or rental of oxygen concentrators, even though that legislation provides for a reduced VAT rate to be applied to the supply of oxygen cylinders.

20 As a preliminary point, it must be recalled that, according to Article 96 of the VAT Directive, the same rate of VAT, that is the standard rate fixed by each Member State, is applicable to supplies of goods and services (judgment of 4 June 2015, *Commission v United Kingdom*, C?161/14, not published, EU:C:2015:355, paragraph 22 and the case-law cited).

21 By derogation from that principle, the possibility to apply reduced rates of VAT is provided for by virtue of Article 98 thereof. Annex III to that directive exhaustively lists the categories of supplies of goods and services to which the reduced rates mentioned in Article 98 apply.

22 The purpose of that annex is to make less onerous, and thus more accessible for the final consumer, who ultimately pays the VAT, certain goods regarded as being particularly necessary (judgment of 17 January 2013, *Commission v Spain*, C?360/11, EU:C:2013:17, paragraph 48).

23 As regards the specific content of Annex III to the VAT Directive, the Court has held that the Union legislature must be allowed a broad discretion, since it is called upon, when it adopts a fiscal measure, to make political, economic and social choices and to prioritise the diverging interests or make complex assessments (judgment of 7 March 2015, *RPO*, C?390/15, EU:C:2017:174, paragraph 54).

24 It must be observed that that legislature, having adopted points 3 and 4 of Annex III to the VAT Directive, has chosen to allow the application of a reduced VAT rate, instead of the standard rate, to the supply of certain distinct categories of goods.

25 Thus, it follows from Article 98 of the VAT Directive that the application of either one or two reduced rates is not obligatory. It is an option accorded to the Member States as an exception to the principle that the standard rate applies. It is settled case-law that provisions which are in the

nature of exceptions to a principle must be interpreted strictly (judgment of 17 June 2010, *Commission v France*, C?492/08, EU:C:2010:348, paragraph 35 and the case-law cited).

26 Therefore, the Member States may, in principle, choose to apply a reduced VAT rate to pharmaceutical products which are mentioned in point 3 of Annex III to the VAT Directive, while applying the standard rate to medical devices mentioned in point 4 thereof. They may also choose to apply a reduced VAT rate to specific pharmaceutical products or medical devices among those mentioned in points 3 and 4, while applying the standard rate to other such products or devices. In any event, the Member States are required to apply the standard rate to products not mentioned in that annex.

27 It follows that national legislation, such as that at issue in the main proceedings, which does not provide for a reduced VAT rate for oxygen concentrators is, in principle, compatible with Article 98 of the VAT Directive.

28 However, where a Member State chooses to apply selectively the reduced rate of VAT to certain goods or specific services mentioned in Annex III to the VAT Directive, it must comply with the principle of fiscal neutrality (see, to that effect, judgments of 3 April 2008, *Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westlbien*, C?442/05, EU:C:2008:184, paragraphs 41 and 43; of 6 May 2010, *Commission v France*, C?94/09, EU:C:2010:253, paragraph 30, and of 27 February 2014, *Pro Med Logistik and Pongratz*, C?454/12 and C?455/12, EU:C:2014:111, paragraph 45).

29 Therefore, in order to answer the question referred, it must be determined whether national legislation such as that at issue in the main proceedings is inconsistent with the principle of fiscal neutrality.

30 According to settled case-law, the principle of fiscal neutrality precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (see judgment of 11 September 2014, *K*, C?502/13, EU:C:2014:2207, paragraph 24 and the case-law cited).

31 However, as the Court has repeatedly made clear, that principle cannot extend the scope of a reduced rate in the absence of clear wording to that effect (see, in particular, judgment of 5 March 2015, *Commission v Luxembourg*, C?502/13, EU:C:2015:143, paragraph 51, and of 2 July 2015, *De Fruytier*, C?334/14, EU:C:2015:437, paragraph 37).

32 That principle is not a rule of primary law which can condition the validity of a reduced rate, but a principle of interpretation, to be applied concurrently with the principle of strict interpretation of reduced rates (see, to that effect, judgment of 19 July 2012, *Deutsche Bank*, C?44/11, EU:C:2012:484, paragraph 45).

33 In the present case, the parties which submitted observations to the Court are agreed that the oxygen concentrators at issue in the main proceedings, unlike oxygen cylinders, do not fall within point 3 of Annex III to the VAT Directive, which covers certain pharmaceutical products, namely those normally used for healthcare, prevention of diseases and medical and veterinary treatments. It is clear from the case-law of the Court that the definition of 'pharmaceutical products', although it is not limited to medicinal products, does not include all medical devices, material, equipment and appliances (see, to that effect, judgment of 17 January 2013, *Commission v Spain*, C?360/11, EU:C:2013:17, paragraphs 61 to 65).

34 That interpretation is supported by point 4 of Annex III, which specifically refers to medical devices for specific uses (judgment of 17 January 2013, *Commission v Spain*, C?360/11,

EU:C:2013:17, paragraph 64). That provision covers medical equipment, aids and other appliances normally intended to alleviate or treat disability for the exclusive personal use of the disabled.

35 Since it does not appear to be proven that the oxygen concentrators at issue in the main proceedings are for the exclusive personal use of the disabled, those devices are also outside the scope of Annex III, point 4, of the VAT Directive, which is, however, for the referring court to determine.

36 In those circumstances, taking account of the case-law set out in paragraph 31 of the present judgment, the principle of fiscal neutrality cannot require a Member State, such as that at issue in the main proceedings, which uses the option available to it to apply a reduced VAT rate to specific products in Annex III, point 3, to the VAT Directive to extend that reduced rate to oxygen concentrators, even if the latter are perceived by the consumer as being similar to products to which that reduced rate applies.

37 Having regard to the foregoing considerations, the answer to the question referred is that Article 98(1) and (2) of the VAT Directive and Annex III, points 3 and 4, thereto, read in the light of the principle of fiscal neutrality, does not preclude national legislation, such as that at issue in the main proceedings, which provides that the standard rate of VAT is applicable to the supply or rental of oxygen concentrators, while that legislation provides for the application of the reduced VAT rate on the supply of oxygen cylinders.

Costs

38 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 (Sixth Chamber) hereby rules:

Article 98(1) and (2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and Annex III, points 3 and 4, thereto, read in the light of the principle of fiscal neutrality, does not preclude national legislation, such as that at issue in the main proceedings, which provides that the standard rate of value added tax is applicable to the supply or rental of oxygen concentrators, while that legislation provides for the application of the reduced value added tax rate on the supply of oxygen cylinders.

[Signatures]

* Language of the case: French.