

## **Summary of the query Q1/2015/JAS from the Austrian Ombudsman Board concerning the interpretation of Council Directive 2006/112/EC on the common system of value added tax ('VAT') in connection with the remuneration of lawyers acting as legal guardians**

Decision

**Case** Q1/2015/JAS - **Opened on** 26/08/2015 - **Decision on** 02/03/2016

### **Facts and background**

On 29 July 2015, the Austrian Ombudsman Board submitted the query, which referred to its on-going inquiry.

In the Austrian legal system, judicially appointed legal guardians are entitled to compensation for their efforts. These efforts not only include the administration of the wards' funds, but also custodial and family-like care services.

Lawyers, who are subject to VAT, effectively receive a lower compensation for their services as legal guardians than legal guardians not subject to VAT, such as "legal guardian associations" or family members acting as legal guardians.

When the Austrian Ombudsman Board proposed that Austria should exempt legal guardian services from VAT, the Austrian authorities argued that such an exemption would be incompatible with Council Directive 2006/112/EC.

However, the Austrian Ombudsman Board believed that Article 132(1)(g) of Directive 2006/112/EC could provide a legal basis for such a general exemption, since the services provided by lawyers do not differ from services provided by "legal guardian associations".

### **Legal issues at stake**

The Austrian Ombudsman Board sought clarification on Article 132(1)(g) of Council Directive 2006/112/EC on the common system of value added tax, which states that:



*" Member States shall exempt the following transactions: the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing ."*

## Query

On 27 August 2015, the European Ombudsman decided to open a query procedure in order to seek an opinion of the Commission's services as regards the following questions, posed by the Austrian Ombudsman Board:

- i. On the interpretation of Article 132(1)(g) of Directive 2006/112/EC: Can a Member State exercise the discretion it enjoys in the context of recognising a body as being devoted to social wellbeing in such a way that it recognises a lawyer acting as a legal guardian as being a body devoted to social wellbeing?
- ii. If not, can Article 132(1)(g) of Council Directive 2006/112/EC be interpreted such as to provide a legal basis for a general exemption of compensation for legal guardianship, even for undertakings which do not constitute "bodies recognised by the Member State concerned as being devoted to social wellbeing", in particular lawyers?
- iii. If not, does Directive 2006/112/EC have to be interpreted as inhibiting a Member State's general exemption from VAT for services provided by legal guardians?
- iv. Is the European Commission aware of any similar cases and their handling in other Member States?

The Ombudsman's services consulted members of the European Network of Ombudsmen in relation to the last question. This consultation received two replies from a) Belgium and b) Finland.

a) The Federal Ombudsman of Belgium explained that the remuneration of legal guardians is generally exempted from VAT. While legal guardians of minors are generally not remunerated, legal guardians of unaccompanied foreign minors receive remuneration.

Services and supply of goods closely linked to welfare, social security and the protection of children and youth performed by public bodies or other organizations homologated by the competent authority as institutions of a social nature, are exempted from VAT. This includes institutions and bodies (and natural persons), whose main aim is to look after youth and take care of their education, support and leisure. Legal guardians fall under this exemption, as well as lawyers acting as legal guardians.

b) The Parliamentary Ombudsman of Finland reported that legal aid offices have increasingly outsourced public guardianship services to various service providers, including municipalities as



well as law firms and other private enterprises. The Supreme Administrative Court has since pronounced that fees charged by enterprises for guardianship services are subject to value added tax. Therefore, these service providers have added the tax amount to the fees charged to their principals. If the legal aid office provides the guardianship service itself, no tax is added to the fee.

The Parliamentary Ombudsman examined this issue on his own initiative and identified a clear and structural problem that violates the equality of persons who need guardianship services. In practice, the persons in question cannot choose whether a legal aid office or a service provider will look after their affairs. They may thus have ended up using a service provider liable to pay value-added tax quite at random and against their will, without knowing or understanding the significance of the value added tax liability. He suggested that compensation for this violation of equality must be paid to the principals in question. In response, the Ministry of Justice reserved more than 500.000 EUR in the Budget for the purpose of paying compensation to the principals of outsourced guardianship services.

## Commission's reply

In its reply dated 2 October 2015, the Commission explained that Article 132(1)(g) of Directive 2006/112/EC is interpreted strictly in the sense that there needs to be a strong link with social security and social wellbeing services. This link can, for example, be established when looking at the statutes of an undertaking, which will include its aim. The social character of the body also has to be recognised by the respective Member State. However, the term '*body*' ('*Einrichtung*' in German) is large enough to also include private undertakings.

The Commission further showed with reference to case law that in order to assess taxing of an undertaking, the principle of fiscal neutrality would need to be taken into account.

In relation to the discretion that a Member State can exercise, the Commission stated that a Member State could decide that bodies other than public law bodies can be exempted from paying tax, applying the conditions set out in article 133 of Directive 2006/112/EC. If a Member State uses its discretion to apply the conditions set out in article 133, it may not make this tax exemption dependent on the service provider being part of a certain association ('*Verein*' in German) or being a member of a certain federation ('*Verband*' in German).

The Commission concluded that such services provided by guardians in their professional function are not exempted from VAT. The services will not be considered essential in accordance with article 134 of Directive 2006/112/EC, because legal advice is not considered essential for the exercise of guardianship.

## Feedback

The Ombudsman forwarded the Commission's reply and two responses from the European



Network of Ombudsmen to the Austrian Ombudsman Board with an invitation to submit comments.

On 27 November 2015, the Austrian Ombudsman Board thanked the Ombudsman for having provided it with the Commission's response, which was satisfactory.

## **Closing procedure**

The Commission had provided an exhaustive reply concerning the interpretation of the relevant provisions of Directive 2006/112/EC on the common system of value added tax ('VAT') in connection with the remuneration of lawyers acting as legal guardians.

Taking into account the Commission's reply and responses received in the framework of consultation with the members of the European Network of Ombudsmen, the European Ombudsman concluded that the query was successfully completed. On 2 March 2016, she thus closed the query.