

VAT, Nutrition Counselling & Fitness Studios: Frenetikexito (C-581/19)

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On 4 March 2021, the CJEU issued a ruling on *Frenetikexito* (Case C-581/19) that is bound to throw Portuguese gym-goers off-balance. For some time, the Portuguese tax authorities have been assessing VAT on nutrition counselling provided by fitness studios on the basis such services are dependent and ancillary to fitness training. In a series of recent cases, national courts have taken the view that fitness training and nutrition counselling are independent supplies and that, as such, nutrition counselling can benefit from the exemption applicable to medical care. However, the CJEU's ruling in *Frenetikexito* (Case C-581/19) may force national courts to rethink their position. The case also provides another example of how treacherous VAT exemptions can be.

Nutrition Counselling as an Independent Supply

The CJEU has held in settled case law that every supply should, in principle, be regarded as independent and assessed separately for VAT purposes. Assessing each supply as an independent transaction is connatural to an indirect tax such as VAT, where rules governing place of supply, exemptions, chargeability of tax and tax rates are made dependent upon the nature and features of supplies.

This principle, however, does not go without exception.

According to the CJEU, this principle shall not apply in the case of *single complex supplies*, i.e. whenever the elements of a transaction are so closely intertwined, from the standpoint of the "typical consumer", that it would be artificial to split them for VAT purposes. In such an event, one should consider the mutually dependent supplies that give rise to a different single complex supply which must be treated for VAT purposes according to its own nature and features.

The lack of a separate availability or the joint pricing and invoicing of the supplies are indicators that may help ascertain the existence of a single complex supply.

According to the CJEU, the principle shall not apply either in the case of *dependent ancillary supplies*, i.e. whenever one element of a transaction is dependent on another element, in the sense that for the "typical consumer" it does not constitute an end in itself but only a means of better enjoying the principal supply. In such an event, the ancillary supply loses its independent nature and must therefore be treated for VAT purposes as part of the principal supply.

The relative value of the supplies or the absence of distinct economic interest for the "typical consumer" are useful indicators of a dependent ancillary supply.

These notions on composite supplies have been tried and tested in numerous decisions from the CJEU, ranging from horse training to airport parking services.

In dealing with VAT exemptions, a further exception may be introduced to the principle that each supply must be assessed separately. In the context of Article 132 of the VAT Directive, exemptions applicable to certain supplies are extended to "closely related" services or activities. That is the case, e.g., of Article 132(1)(b), relating to hospital and medical care, or of Article 132(1)(i), relating to school and university education. In such cases, an exemption may be extended to services provided by a different person or enjoyed by another beneficiary.

As to nutrition counselling provided by fitness studios, the Portuguese tax authorities believed that the first supply was dependent on the latter, assessing VAT at the standard rate for the whole of the subscription fees. In the tax authorities' eyes, a typical customer subscribes to nutrition counselling sessions simply as a means to better enjoy a fitness training program.

In its decision delivered on 4 March 2021, the CJEU, however, took a different view. Concurring with Advocate General Kokott, the CJEU believes nutrition counselling and fitness training should be regarded as independent supplies since they are not indivisibly linked to each other and may be supplied at different times and locations by different staff. Some customers of Frenetikexito did attend nutrition counselling sessions without subscribing to a training program and vice versa, each supply being invoiced separately. The two supplies at stake, therefore, should not be taken as a single complex supply.

In the view of the CJEU, nutrition counselling should not be taken as a dependent ancillary supply to fitness training either since they have distinct economic aims. Healthy nutrition and physical activity are both elements of a healthy lifestyle, but as a rule, nutrition counselling aims are not contingent on training. Notably, in the case, 40% of the fitness studio's monthly fees were attributed to counselling, while 60% were attributed to fitness training. This value ratio seems to challenge the view that (VAT exempt) nutrition counselling is ancillary to (VAT non-exempt) training.

There is, however, another angle to the story that deserves some thoughts.

In many instances, the provision of nutrition counselling by fitness studios directly responded to the reintroduction of the standard VAT rate for training in 2011.

VAT rates applicable to fitness training in Portugal have undergone many changes in recent years. Up to 2008, fitness training was subject to the standard rate, then of 21%. Starting in 2008, a reduced rate was applied. The reduction of VAT, however, was patently not passed on by studios to their customers. As a result, the standard rate was reintroduced in 2011, now standing at 23%.

At about the same time, fitness studios started offering nutrition counselling to their customers in addition to their fitness plans. Just as fitness training, nutrition counselling is charged on a subscription basis, whether sessions are attended or not. However, as a rule, gym-goers who opted for nutrition counselling were offered a rebate of an equivalent amount in their fitness plans fees.

By shifting the taxable base from training to nutrition, many studios managed to lower VAT on their services while keeping the total fees charged to customers unchanged. Therefore, value ratios of 60/40 or 50/50 may not so much point to the independent nature of the supplies as to an abusive practice in their pricing.

Nutrition Counselling as Medical Care

In asserting the independent nature of supplies, the CJEU certainly deals a blow to the Portuguese tax authorities' strategy. As to the question of whether nutrition counselling may benefit from the exemption for medical care provided in Article 132(1)(c) of the VAT Directive, however, the opposite is true.

Since the start of the dispute with fitness studios, Portuguese tax authorities and national courts have always taken nutrition counselling as medical care for the purposes of the VAT exemption set in Article 132(1)(c), which refers to the "the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned". Nutrition practitioners (dietitians) are recognized by Portuguese internal law as paramedical professions, and the Portuguese tax authorities have issued rulings that clarify it.^[1]

The applicability of the VAT exemption for medical care to these services - were they independent supplies - had therefore never been put into question.

The CJEU does not see things quite the same way. The exemption provided for in Article 132(1)(c) demands medical care services to have a "therapeutic aim" and should only cover services that pursue "the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders". This line of interpretation has been construed and held by the CJEU on a number of occasions, namely in *Future Health Technologies* (Case C-86/09), concerning the collection and storage of stem cells, and *PFC Clinic* (Case C-91/12), regarding plastic surgery and cosmetic treatments.

Whether nutrition advice is aimed at gym-goers' health disorders or simply intended to improve their well-being and appearance is for national courts to assess. As the Advocate General Kokott suggested, however, it is "rather doubtful" the exemption for medical care should be applied in the case, as "general nutrition advice" has no obvious therapeutic aim, particularly when nutrition counselling sessions are paid for by gym-goers as an addition to their fitness plans but are not always used.

In line with this reasoning, the CJEU now states "a nutrition monitoring service provided in a sports facility may, in the medium-and long-term or viewed very broadly, be a tool to prevent certain conditions, such as obesity". Such a service may, in principle, have a "health purpose", but not necessarily the "therapeutic purpose" required for the application of Article 132(1)(c) of the VAT Directive. In the case of *Frenetikexito*, no evidence of a therapeutic purpose seems present. Therefore, the CJEU concludes, subject to the verification by the national court, the nutrition services provided by certified and authorized professionals in sports facilities, potentially in the context of programmes that also include physical well-being and fitness services, are not capable of falling under the exemption.

All things considered, fitness studios are in for a setback. To establish the therapeutic aim of nutrition counselling sessions on a case-by-case basis certainly is more challenging than establishing the independent nature of the supplies. Plus, as in *PFC Clinic* (Case C-91/12), this is an instance where the correct application and control of the VAT exemption must be balanced with consumers' medical privacy. Unless some sort of common procedure is agreed upon between the tax administration and the medical authorities, litigation is likely to linger for years.

The referral of the *Frenetikexito* case (Case C-581/19) to the CJEU was made over a EUR 13,000 VAT bill. National courts may soon have a lot more on their hands.

[1] Law Decree no. 261/93 of 24 July 1993; Ruling no. 9215 of 19 August 2015, VAT Services.