

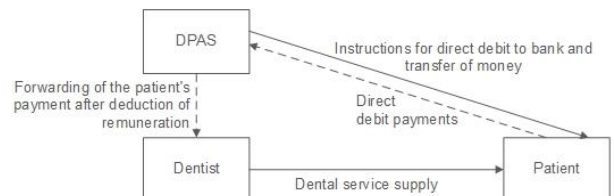


Outsourcing in the financial service sector is, in many cases, subject to VAT

1 Facts

DPAS designs, implements and manages dental plans. As part of such a plan, a dentist undertakes to provide his patients with regular dental treatments. The patients pay a specified amount per month, which *DPAS* collects by direct debit from the patient and forwards to the dentist, after deduction of its percentage. Until the ECJ judgment of 28.10.2018 (*Axa UK*) the tax authorities were also of the opinion that the supply rendered by *DPAS* to the dentist was VAT-exempt in accordance with Art.135 para 1 letter d of the VAT Directive. However, as a result of the ECJ judgement, the supply rendered by *DPAS* is now to be considered taxable.

Following the judgement, *DPAS* restructured its agreements. It continues to render a taxable supply of services to the dentists. According to the referring court, the object of (a new) further *DPAS* supply to patients is the arrangement for money to be collected into *DPAS*'s own account, in accordance with a direct debit mandate, and subsequently transferred to the relevant dentist. *DPAS* considers these supplies, concerning payment and transfer, to be VAT exempt transactions.



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2 ECJ decision

The ECJ ruled that *DPAS* did not render VAT-exempt payment and transfer transactions in accordance with Art. 135 para 1 letter d of the VAT Directive. The ECJ assumed that the object of the supply was direct debiting and the forwarding of the money. This assumption was probably made by the ECJ due to the formulation of the referred question.

VAT-exempt payment and transfer transactions only exist if the transaction, viewed broadly, forms a distinct whole. This distinct whole must fulfill the specific and essential functions of a bank transfer. Therefore, the supply must entail changes in the legal and financial situation resulting from the transfer of the money. The ECJ assumed that *DPAS* did not exert any such influence on the transmission process, but merely instructed the credit institutions to transfer the money. This is merely a step prior to the payment and transfer transactions actually being effected. Therefore, pursuant to the agreement with the patient, *DPAS* does not assume any responsibility for the failure of the direct debit mandate. The nature of the supply does not equate to a financial transaction. There are also no difficulties in determining the tax base.

3 Consequences

The ECJ persists with its rather narrow view of VAT-exempt payment and transfer transactions. Already in 2016, the ECJ clarified that the processing of debit or credit card payments, (when acquiring a cinema ticket), does not represent a VAT-exempt supply in terms of payment and bank transfer transactions. It remains to be seen whether the operation of a cash machine can be VAT-exempt. In this regard, the Federal Fiscal Court has referred a corresponding question to the ECJ (see KMLZ Newsletter 7/2018).

In factoring or debt collection activities, the supplier (=creditor) is the principal of the party who collects the debt. If the service provider renders supplies, these are generally taxable. This, at least, constitutes a "collection of claims" and is in contrast to the VAT-exemption. The special feature of the subject case is that the recipient (=debtor) instructs the service provider (= *DPAS*) to process the payment. In such a case, the supply does not constitute a "collection of claims" (the ECJ did not answer the relevant question). Such a supply of service can only be provided to the creditor. Until now, it was unclear whether, for example, medical clearing houses provided VAT-exempt supplies to patients pursuant to a corresponding contract with the patient. The same applied in all other cases in which a service provider took over payment processing by direct debit on behalf of a debtor. It is now clear, as a result of the ECJ ruling, that such supplies are generally taxable.

By refusing (according to the wording) quite possible VAT-exemptions, the outsourcing of supplies of services in sectors with VAT-exempt transactions (banks, insurance companies, doctors ...) is, in many cases, connected with a VAT burden. Cost advantages are thus nullified. A rethink should take place here. For example, it is not mandatory that VAT exemptions, provided for by the legislator, should be interpreted narrowly.