

JUDGMENT OF THE COURT (Sixth Chamber)

5 July 2012 (*)

(Sixth VAT Directive — Articles 5(3)(c) and 13B(d)(5) — Negotiation of a transaction involving the transfer of company shares — Transaction which also entails the transfer of the ownership of immovable property held by such companies — Exemption)

In Case C-259/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 22 April 2011, received at the Court on 26 May 2011, in the proceedings

DTZ Zadelhoff vof

v

Staatssecretaris van Financiën,

THE COURT (Sixth Chamber),

composed of U. Löhmus, President of the Chamber, A. Rosas (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- DTZ Zadelhoff vof, by B. van Zadelhoff, belastingadviseur,
- the Netherlands Government, by C. Wissels and C. Schillemans, acting as Agents,
- the European Commission, by C. Soulay and W. Roels, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 5(3)(c) and 13B(d)(5) 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) ('the Sixth Directive').

2 The reference was made in proceedings between DTZ Zadelhoff vof ('DTZ Zadelhoff') and the Staatssecretaris van Financiën (State Secretary for Finance) concerning the classification, for

the purposes of exemption from value added tax ('VAT'), of a transfer of company shares which also entailed the transfer of the legal ownership of immovable property held by those companies.

Legal context

European Union law

3 Article 2(1) of the Sixth Directive provides as follows:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such'.

4 Article 5(1) and (3) of the Sixth Directive is worded as follows:

'1. "Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.

...

3. Member States may consider the following to be tangible property:

...

(c) shares or interests equivalent to shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof.'

5 Article 13B of the Sixth Directive, headed 'Other exemptions', provides as follows:

'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 the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(d) the following transactions:

...

5. transactions, including negotiation, excluding management and safekeeping, in shares, interests in companies or associations, debentures and other securities, excluding:

...

– the rights or securities referred to in Article 5(3);

...'

6 According to the referring court, the Kingdom of the Netherlands has not made use of the option granted to Member States by Article 5(3)(c) of the Sixth Directive.

Netherlands law

7 Article 11 of the Wet op de omzetbelasting (the Law on Turnover Tax) of 28 June 1968 (*Staatsblad* 1968, No 329) provides as follows:

'1. Under conditions laid down pursuant to a general administrative regulation, the following shall be exempt from tax:

...

(i) the following supplies and services:

...

2° transactions, including negotiation, but excluding management and safekeeping, in shares and other securities, excluding documents establishing title to goods;

...'

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

8 At the material time in the main proceedings, Fabege AB ('Fabege'), a company established in Sweden, held, indirectly, all the shares in World Fashion Centre Amsterdam BV, the company which owned and operated Towers I and II of the World Fashion Centre Complex ('the WFC') in Amsterdam (the Netherlands). Fabege also held, indirectly, all the shares in Fabege WF BV, the company which owned and operated Tower IV, forming part of the WFC.

9 Stienstra BV Bedrijfshuisvesting ('Stienstra'), a company established in 's-Hertogenbosch (the Netherlands), held, indirectly, all the shares in De Herven III BV ('De Herven'), which owned and operated the Soetelieve office complex, situated in that town.

10 DTZ Zadelhoff is a real estate brokerage and consultancy business.

11 In 1999, DTZ Zadelhoff was instructed by Fabege, for a fee, to find prospective purchasers for the WFC. Fabege intended to transfer that complex by transferring the shares in the companies which indirectly owned it. The asking price of the shares was based almost entirely on the market value of the WFC as real estate. In accordance with its instructions, DTZ Zadelhoff found a purchaser to whom the shares were sold and transferred between 5 October 1999 and 24 January 2000.

12 In 2000, DTZ Zadelhoff was instructed by Stienstra, for a fee, to find prospective purchasers for the Soetelieve office complex. The question remained open as to whether the legal ownership of the complex or the ownership of the shares in De Herven was to be transferred. Ultimately, DTZ Zadelhoff's efforts resulted in a buyer being found, to whom the shares in De Herven were sold and transferred.

13 DTZ Zadelhoff neither charged nor paid VAT in respect of the services provided to Fabege and Stienstra consisting in finding buyers for the properties in question. It considered that the provision of those services was either exempt from tax, under Article 11(1)(i)2° of the Law on Turnover Tax of 28 June 1968, or was not taxable in the Netherlands, since the services in question are deemed not to have been performed in the territory of the Kingdom of the Netherlands if the instructing party is not established in that Member State.

14 The Inspector van de Belastingdienst ('the Inspector') considered that the exemption was not applicable and that the provision of services was to be deemed to have taken place in the

Netherlands and, consequently, a notice of additional assessment for VAT was issued to DTZ Zadelhoff for the period from 1 January to 31 December 2000. After that company lodged an objection, the amount of the assessment was reduced by decision of the Inspector.

15 DTZ Zadelhoff lodged an appeal against the Inspector's decision with the Rechtbank te Haarlem (District Court, Haarlem), which dismissed the appeal as unfounded. The company lodged an appeal against that decision with the Gerechtshof te Amsterdam (Court of Appeal, Amsterdam), which upheld the decision at first instance. DTZ Zadelhoff then lodged an appeal in cassation with the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

16 The Hoge Raad der Nederlanden considers that the Gerechtshof te Amsterdam correctly determined the place in which the services must be deemed to have been performed. On the other hand, the referring court entertains doubts as to the correct classification, for the purposes of exemption from VAT, of a transfer of company shares which also entails the transfer of the ownership of immovable property held by such companies.

17 Against that background, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 13B(d)(5) of the Sixth Directive be interpreted as also covering transactions, such as those carried out by the interested party, which in essence relate to the immovable property held by the companies concerned and its (indirect) transfer, solely on the ground that those transactions were aimed at, and resulted in, the transfer of the shares in the companies?

(2) Is the exception to the exemption contained in the second indent of Article 13B(d)(5) of the Sixth Directive also applicable if the Member State has not availed itself of the possibility provided by Article 5(3)(c) of the Sixth Directive of considering shares or interests equivalent to shares giving the holder thereof rights of ownership or possession over immovable property to be tangible property?

(3) If the previous question must be answered in the affirmative, must the aforementioned shares or interests equivalent to shares be understood to include shares in companies which, directly or indirectly (by means of (sub-) subsidiaries), own immovable property, regardless of whether they exploit it as such or whether they utilise it in the context of a different type of undertaking?'

Consideration of the questions referred

Questions 1 and 2

18 By its first two questions, which it is appropriate to consider together, the referring court asks in essence, first, whether Article 13B(d)(5) of the Sixth Directive must be interpreted as meaning that the exemption from VAT in that provision covers transactions, such as those carried out by DTZ Zadelhoff in the main proceedings, which are designed to transfer shares in the companies concerned and had that effect but which, in the final analysis, concern immovable property held by those companies and the (indirect) transfer of that property, on the sole ground that the purpose of the transactions was to transfer the shares in the companies and they had that effect and, second, whether the exception to the exemption provided for in the second indent of that provision is applicable even if the Member State has not availed itself of the possibility provided by Article 5(3)(c) of the Sixth Directive of considering shares or interests equivalent to shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property to be tangible property.

19 It must be borne in mind, first, that, in accordance with the Court's case-law, the exemptions referred to in Article 13 of the Sixth Directive 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 Case C-540/09 *Skandinaviska Enskilda Banken* [2011] ECR I-1509, paragraph 19 and the case-law cited).

20 It is also established case-law that the terms used to specify those exemptions are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (Case C-8/01 *Taksatorringen* [2003] ECR I-13711, paragraph 36; Case C-472/03 *Arthur Andersen* [2005] ECR I-1719, paragraph 24; and Case C-453/05 *Ludwig* [2007] ECR I-5083, paragraph 21).

21 Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by the exemptions provided for in Article 13 of the Sixth Directive 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 should be construed in such a way as to deprive the exemptions of their intended effect (see, to that effect, Case C-445/05 *Haderer* [2007] ECR I-4841, paragraph 18, and Case C-461/08 *Don Bosco Onroerend Goed* [2009] ECR I-11079, paragraph 25).

22 With regard in particular to the scope of Article 13B(d)(5) of the Sixth Directive, the Court has held that transactions in shares and other securities are transactions on the market in marketable securities and that trade in securities involves acts which alter the legal and financial situation as between the parties (see, to that effect, Case C-2/95 *SDC* [1997] ECR I-3017, paragraphs 72 and 73, and Case C-29/08 *SKF* [2009] ECR I-10413, paragraph 48).

23 The words 'transactions ... in securities' within the meaning of Article 13B(d)(5) of the Sixth Directive refer, therefore, to transactions which are liable to create, alter or extinguish parties' rights and obligations in respect of securities (see, in particular, Case C-235/00 *CSC Financial Services* [2001] ECR I-10237, paragraph 33, and *SKF*, paragraph 48).

24 With regard to the facts underlying the dispute in the main proceedings, it is not disputed by the applicant, the Netherlands Government or the European Commission that Fabege and Stienstra, after engaging the services of DZT Zadelhoff, sold and transferred shares which they owned indirectly.

25 The fact that, when it instructed DTZ Zadelhoff to find prospective purchasers for the Soetelieve office complex, Stienstra failed to indicate whether it was the ownership of the complex or the ownership of the shares in De Herven which was to be transferred to the purchasers is irrelevant. It is clear from the Court's case-law that it is necessary, in accordance with the VAT system's objectives of ensuring legal certainty and facilitating application of the tax, to have regard, save in exceptional cases, to the objective character of the transaction in question (see, to that effect, Case C-4/94 *BLP Group* [1995] ECR I-983, paragraph 24, and *SKF*, paragraph 47). Thus, irrespective of any original intention on the part of Stienstra, the transaction which ultimately took place was, from an objective standpoint, a transaction in shares and must therefore, subject to any exceptions, be regarded as such.

26 Second, with regard in particular to whether the services provided by DTZ Zadelhoff at issue in the main proceedings are covered by the word 'negotiation' in Article 13B(d)(5) of the Sixth Directive, it should be noted that the Court has already held that it is clear from that provision that the words 'including negotiation' are not intended to define the principal object of the exemption

laid down in the provision, but to extend the scope of the exemption to negotiation (*CSC Financial Services*, paragraph 38).

27 Accordingly, it is not necessary to consider the precise meaning of the word 'negotiation', which also appears in other provisions of the Sixth Directive, including Article 13B(d)(1) to (4), in order to hold that, in the context of Article 13B(d)(5), it refers to the activity of an intermediary who does not occupy the position of any party to a contract relating to a financial product, and whose activity amounts to something other than the provision of contractual services typically undertaken by the parties to such contracts. Negotiation is a service rendered to, and remunerated by, a contractual party as a distinct act of mediation. It may consist, amongst other things, in pointing out suitable opportunities for the conclusion of such a contract, making contact with another party or negotiating, in the name of and on behalf of a client, the detail of the payments to be made by either side. The purpose of negotiation is therefore to do all that is necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in the terms of the contract (*CSC Financial Services*, paragraph 39).

28 The purpose of the brokerage and consultancy activities undertaken by DTZ Zadelhoff in the main proceedings, which consisted in finding, for a fee, buyers for immovable property that was subsequently sold and transferred by means of a share transfer, was to ensure that Fabège and the buyer and Stienstra and the buyer, respectively, concluded a contract, without DTZ Zadelhoff having any interest of its own in the terms of the contracts. Those activities therefore correspond to the word 'negotiation' in shares within the meaning of Article 13B(d)(5) of the Sixth Directive.

29 Third, it is necessary to ascertain whether those activities fall within the exception to the exemption contained in Article 13B(d)(5) of the Sixth Directive, which is referred to in the second indent of that provision.

30 It is apparent from the second indent of Article 13B(d)(5) of the Sixth Directive that, without prejudice to other European Union provisions, Member States are to exempt inter alia transactions, including negotiation, in shares, interests in companies or associations, debentures and other securities, excluding the rights or securities referred to in Article 5(3) of the Directive.

31 Article 5(3)(c) of the Sixth Directive provides that Member States may consider to be tangible property, inter alia, shares or interests equivalent to shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof.

32 Thus, shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof, such as the shares at issue in the main proceedings, may be regarded by the Member States, for VAT purposes, as tangible property.

33 It is common ground that the Kingdom of the Netherlands has not made use of that option.

34 According to the Court's case-law, the Member States are at liberty to exercise the choice afforded them by Article 5(3) of the Sixth Directive, by, inter alia, laying down certain conditions, in so far as these do not fundamentally alter the nature of the choice afforded, since no provision of the Sixth Directive in any way restricts the Member States' discretion in this regard (Case C-326/99 *'Goed Wonen'* [2001] ECR I-6831, paragraph 34).

35 Consequently, whilst Article 5(3) of the Sixth Directive allows all the rights in question to be treated as tangible property, or only one or more of those rights to be so treated, that provision also allows such treatment to be restricted to only those rights which meet the precise criteria adopted by the Member State concerned (*'Goed Wonen'*, paragraph 34).

36 On the other hand, it would hardly be consistent with the general scheme of the Sixth Directive to accept that the reference in the second indent of Article 13B(d)(5) of the Directive to Article 5(3) applies to all the transactions set out in the latter provision irrespective of whether the Member State concerned has exercised the choice afforded it by that provision.

37 That interpretation is supported by the preparatory documents for the Sixth Directive. As the Commission stated in its written observations, Article 5(1) of its proposal for a Sixth Directive (COM(73) 950 final) provided that interests or shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof are always to be treated as the property to which they relate.

38 It is apparent from the explanatory memorandum to that proposal (p. 6) that the Commission considered that '[t]he purpose of the provisions of paragraph 1 is to charge to [VAT], for obvious reasons of impartiality, transactions which, economically speaking, are equivalent to a supply of immovable property or part thereof'.

39 However, after the Commission had submitted a number of other proposals, the Council of the European Communities ultimately chose another form of words which enables Member States, but does not oblige them, to consider to be tangible property 'shares or interests equivalent to shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof.'

40 It should be recalled that, according to the Court's case-law, while, admittedly, it is true that the terms used to specify the exemptions provided for by 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 services supplied for consideration by a taxable person (see, inter alia, Case C-305/01 *MKG-Kraftfahrzeuge-Factoring* [2003] ECR I-6729, paragraph 63, and Case C-455/05 *Velvet & Steel Immobilien* [2007] ECR I-3225, paragraph 14), a strict interpretation cannot nevertheless restrict an exemption in a manner which is not justified by the wording of the provision in question. Such an approach would be contrary to the VAT system's objectives of ensuring, inter alia, legal certainty (see, to that effect, *SKF*, paragraphs 46 and 47).

41 Similarly, the principle of fiscal neutrality could not lead to an interpretation that is at odds with the wording of Article 13B(d)(5) of the Sixth Directive, in the light of Article 5(3) of the Directive.

42 The answer to Questions 1 and 2 is, therefore, that Article 13B(d)(5) of the Sixth Directive must be interpreted as meaning that the exemption from VAT in that provision covers transactions, such as those at issue in the main proceedings, which are designed to transfer shares in the companies concerned and have that effect but which, in the final analysis, concern immovable property held by those companies and the (indirect) transfer of that property. The exception to the exemption provided for in the second indent of that provision is not applicable if the Member State has not availed itself of the possibility provided by Article 5(3)(c) of the Sixth Directive of considering shares or interests equivalent to shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property to be tangible property.

Question 3

43 In the light of the reply given to Questions 1 and 2, it is not necessary to answer the third question referred by the Hoge Raad der Nederlanden.

Costs

44 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 13B(d)(5) 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 must be interpreted as meaning that the exemption from value added tax in that provision covers transactions, such as those at issue in the main proceedings, which are designed to transfer shares in the companies concerned and have that effect but which, in the final analysis, concern immovable property held by those companies and the (indirect) transfer of that property. The exception to the exemption provided for in the second indent of that provision is not applicable if the Member State has not availed itself of the possibility provided by Article 5(3)(c) of the Sixth Directive of considering shares or interests equivalent to shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property to be tangible property.

[Signatures]

* Language of the case: Dutch.