JUDGMENT OF THE COURT (Fourth Chamber)

18 July 2013 (*)

(Value added tax – Sixth Directive 77/388/EEC – Articles 17 and 13B(d)(6) – Exemptions – Deduction of input tax – Pension fund – Concept of ‘management of special investment funds’

In Case C-26/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Gerechtshof te Leeuwarden (Netherlands), made by decision of 3 January 2012, received at the Court on 18 January 2012, in the proceedings

Fiscale eenheid PPG Holdings BV cs te Hoogezand

v

Inspecteur van de Belastingdienst/Noord/kantoor Groningen,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, U. Lõhmus, M. Safjan (Rapporteur) and A. Prechal, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 February 2013,

after considering the observations submitted on behalf of:

– Fiscale eenheid PPG Holdings BV cs te Hoogezand, by E.M. van Kasteren, O.L. Mobach and C. Evers, belastingadviseurs,

– the Netherlands Government, by B. Koopman and C. Wissels, acting as Agents,

– the United Kingdom Government, by H. Walker, O. Thomas and L. Christie, acting as Agents, and R. Hill, Barrister,

– the European Commission, by L. Lozano Palacios and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 April 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 13B(d)(6) and 17 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 request has been made in proceedings between Fiscale eenheid PPG Holdings BV cs te Hoogezand ('PPG') and the Inspecteur van de Belastingdienst/Noord/kantoor Groningen ('the Inspecteur') concerning an additional assessment to value added tax (VAT) for the period from 1 January 2001 to 31 December 2002.

Legal context

European Union law

3 Article 4(1) and (2) of the Sixth Directive provides:

'1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.'

4 Under Article 6(4) of the Sixth Directive:

'Where a taxable person acting in his own name but on behalf of another takes part in a supply of services, he shall be considered to have received and supplied those services himself.'

5 Article 11A(1)(a) of the Sixth Directive defines the taxable amount, in respect of supplies of goods, as everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party.

6 Article 13B of the Sixth Directive provides:

'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:

(a) insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents;

…

(d) the following transactions:

…

6. management of special investment funds as defined by Member States;

…'.

7 Article 17 of the Sixth Directive provides:

‘1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

…

5. As regards goods and services to be used by a taxable person both for transactions covered by paragraphs 2 and 3, in respect of which value added tax is deductible, and for transactions in respect of which value added tax is not deductible, only such proportion of the value added tax shall be deductible as is attributable to the former transactions.

…’

Netherlands law

8 Article 2 of the Law on turnover tax of 1968 (Wet op de omzetbelasting 1968, ‘the Law’) states:

‘From the tax due on supplies of goods and services, there shall be deducted the tax on the supplies of goods and services made to the trader, on the acquisitions of goods by him within the Community, and on the import of goods intended for him.’

9 Under Article 11 of the Law:

‘1. Subject to conditions to be determined by general administrative measures, there shall be exempt from tax:

…

(i) the following … services:

…

3. the management of assets assembled by investment funds and investment companies for the purposes of collective investment:

…’.

10 Article 15 of the Law provides:

‘1. The tax referred to in Article 2 which is deducted by the trader is:

(a) the tax which, in the declaration period, has been invoiced by other traders, in an invoice drawn up in the prescribed manner, on supplies of goods and services made by them to the trader;

…

(c) the tax which has become due in the declaration period:

…

on supplies of goods and services made to the trader;

…’.

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

11 Pursuant to a statutory obligation, PPG set up pension schemes for the employees of its undertakings with Stichting Pensioenfonds PPG Industries Nederland (‘the pension fund’). In accordance with Netherlands legislation, that pension fund is separate from PPG from a legal and fiscal point of view. The contributions relating to the pension schemes are paid in full not by the employees but by PPG.

12 As PPG and the Netherlands Government confirmed at the hearing, Netherlands law in force at the material time left it to employers to choose whether to set up such a fund themselves or to entrust the performance of their obligations to an insurance company, to which they would pay their contributions and which would be responsible for paying pensions to retired employees. There was no option, however, for them to retain an internal pension scheme.

13 A subsidiary of PPG, PPG Industries Fiber Glass BV, entered into contracts with suppliers of services established in the Netherlands relating to the administration of the pensions and the management of the assets of the pension fund. The costs associated with those contracts were paid by that subsidiary and not passed on to the pension fund. PPG deducted the amounts of VAT relating to those costs incurred in 2001 and 2002, namely EUR 139 304.23, as input tax.

14 PPG was issued with an additional assessment to VAT for the period from 1 January 2001 to 31 December 2002. The additional assessment was upheld by the Inspecteur in a decision on a complaint. The Rechtbank Leeuwarden (District Court, Leeuwarden) (Netherlands) dismissed the action brought against the decision of the Inspecteur. PPG appealed against that judgment to the Gerechtshof te Leeuwarden (Regional Court of Appeal, Leeuwarden).

15 Before that court, the parties are in dispute as to whether the Inspecteur was entitled to issue the additional assessment in respect of the VAT deducted by PPG.

16 PPG answers that question in the negative, submitting that the costs relating to the pensions of its members’ employees are general costs of the undertaking, and the VAT invoiced to it is therefore eligible for deduction under Article 15(1) of the Law. In the alternative, PPG argues that the exemption in Article 11(1)(i)(3) of the Law applies to the services supplied to it in respect of the employees’ pensions.

17 The Inspecteur submits that PPG cannot be regarded as itself being the recipient of the services which it transferred to the pension fund without invoicing any consideration, and is not therefore entitled to deduct the VAT invoiced to it in that connection. On the alternative issue of exemption from VAT, the Inspecteur argues that the pension funds cannot be classified as ‘special investment funds’.

18 In those circumstances, the Gerechtshof te Leeuwarden decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Can a taxable person who, pursuant to national pensions legislation, has established a separate pension fund for the purpose of safeguarding the pension rights of his employees and former employees, as participants in the fund, deduct the tax which he [has paid] on the basis of

services supplied to him in respect of the implementation of the pension provision and the operation of the pension fund, pursuant to Article 17 of [the Sixth Directive]?

(2) Can a pension fund, established with the objective of providing a pension for the participants in the pension fund at the lowest possible cost, where assets are brought to and invested in the pension fund by or on behalf of the participants, and where the resulting proceeds are shared, be classified as a "special investment fund" within the terms of Article 13B[(d)](6) of [the Sixth Directive]?'

Consideration of the questions referred

Question 1

19 By its first question, the referring court asks essentially whether Article 17 of the Sixth Directive must be interpreted as meaning that a taxable person who has set up a pension fund in the form of a legally and fiscally separate entity, in order to safeguard the pension rights of his employees and former employees, is entitled to deduct the VAT he has paid on services relating to the management and operation of the fund.

20 To answer that question, it should be recalled at the outset that the deduction system established by the Sixth Directive is meant to relieve the operator entirely of the burden of the VAT paid or payable in the course of all his economic activities. Thus the common system of VAT seeks to ensure complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject, in principle, to VAT (see Case C-153/11 *Klub* [2012] ECR, paragraph 35, and Case C-550/11 *PIGI* [2012] ECR, paragraph 21).

21 For a taxable person to be accorded the right to deduct input VAT, and in order to determine the extent of that right, the existence of a direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct is, in principle, necessary (see Case C-98/98 *Midland Bank* [2000] ECR I-4177, paragraph 24, and Case C-408/98 *Abbey National* [2001] ECR I-1361, paragraph 26).

22 However, a taxable person also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services he supplies. Such costs have a direct and immediate link with the taxable person's economic activity as a whole (see Case C-104/12 *Becker* [2013] ECR, paragraph 20).

23 In either case, whether there is a direct and immediate link will depend on whether the cost of the input services is incorporated either in the cost of particular output transactions or in the cost of the goods or services supplied by the taxable person as part of his economic activities (see Case C-29/08 *SKF* [2009] ECR I-10413, paragraph 60; Case C-118/11 *Eon Aset Menidjmunt* [2012] ECR, paragraph 48; and Case C-651/11 *X* [2013] ECR, paragraph 55).

24 It must therefore be ascertained whether, despite the fact that the fund set up by PPG is an entity that is legally separate from PPG, the existence of such a link is apparent, in the present case, from all the circumstances of the transactions in question.

25 It is common ground that in the case in the main proceedings PPG acquired the services in question for the purpose of the administration of its employees' pensions and the management of the assets of the pension fund set up to safeguard those pensions. By setting up the fund, PPG complied with a legal obligation imposed on it as an employer, and, in so far as the costs of the

services acquired by PPG in that connection form part of its general costs, which is for the referring court to verify, they are, as such, component parts of the price of PPG's products (see, to that effect, Case C-465/03 *Kretztechnik* [2005] ECR I-4357, paragraph 36).

26 In those circumstances, it may be considered that the exclusive reason for the acquisition of the input services lies in the taxable person's taxable activities, and that there is a direct and immediate link.

27 If there were no right to deduct the input tax paid, not only would the taxable person be deprived, by reason of the legislative choice to protect pensions by a legal separation of the employer from the pension fund, of the tax advantage resulting from the application of the deduction system, but the neutrality of VAT would also no longer be guaranteed.

28 That consideration is not called into question by the possibility, raised at the hearing, of complying with the legal obligation of providing a pension scheme for the taxable person's employees by other means than setting up a fund in the form of a legally and fiscally separate entity. The contrary view would amount to restricting the freedom of taxable persons to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens (see, on this point, Case C-277/09 *RBS Deutschland Holdings* [2010] ECR I-13805, paragraph 53).

29 In the light of the foregoing, the answer to Question 1 is that Article 17 of the Sixth Directive must be interpreted as meaning that a taxable person who has set up a pension fund in the form of a legally and fiscally separate entity, such as that at issue in the main proceedings, in order to safeguard the pension rights of his employees and former employees, is entitled to deduct the VAT he has paid on services relating to the management and operation of that fund, provided that the existence of a direct and immediate link is apparent from all the circumstances of the transactions in question.

Question 2

30 By its second question, the referring court asks essentially whether Article 13B(d)(6) of the Sixth Directive must be interpreted as meaning that a pension fund set up with the objective of providing a pension for the participants in the pension fund at the lowest possible cost, where assets are brought to and invested in the pension fund by or on behalf of the participants, and where the resulting proceeds are shared, may be classified as a 'special investment fund' within the meaning of that provision.

31 It is apparent from the order for reference that the second question arises only if the first question is answered in the negative. The second question is, moreover, identical in substance to the question answered by the Court in Case C-424/11 *Wheels Common Investment Fund Trustees and Others* [2013] ECR.

32 In those circumstances, there is no need to answer the second question.

Costs

33 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 (Fourth Chamber) hereby rules:

Article 17 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 a taxable person who

has set up a pension fund in the form of a legally and fiscally separate entity, such as that at issue in the main proceedings, in order to safeguard the pension rights of his employees and former employees, is entitled to deduct the value added tax he has paid on services relating to the management and operation of that fund, provided that the existence of a direct and immediate link is apparent from all the circumstances of the transactions in question.

[Signatures]

* Language of the case: Dutch.