JUDGMENT OF THE COURT (Fourth Chamber)

10 March 2011 *

In Case C-540/09,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Regeringsrätten (Sweden), made by decision of 10 December 2009, received at the Court on 21 December 2009, in the proceedings

Skandinaviska Enskilda Banken AB Momsgrupp

v

Skatteverket,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, C. Toader (Rapporteur), A. Prechal and E. Jarašiūnas, Judges,

* Language of the case: Swedish.

Advocate General: N. Jääskinen,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 10 November 2010,

after considering the observations submitted on behalf of:

— Skandinaviska Enskilda Banken AB Momsgrupp, by J. Hefner, skattejurist,

— the Skatteverket, by M. Loeb, acting as Agent,

— the Swedish Government, by A. Falk, acting as Agent,

— Ireland, by D. O'Hagan, acting as Agent, and by A. Aston SC,

— the European Commission, by D. Triantafyllou and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 December 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 13B(a) and (d)(1), (2) and (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 the course of proceedings between Skandinaviska Enskilda Banken AB Momsgrupp ('SEB') and the Skatteverket (Swedish Tax Board) concerning the classification, for the purposes of exemption from value added tax ('VAT') of underwriting guarantee services.

Legal context

European Union law

3 Article 2 of the Sixth Directive provides:

'The following shall be subject to [VAT]:

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

…'

4 Under Article 13B of the Sixth Directive:

'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:

(1) the granting and the negotiation of credit and the management of credit by the person granting it;

(2) the negotiation of or any dealings in credit guarantees or any other security for money and the management of credit guarantees by the person who is granting the credit;

…

(5) transactions, including negotiation, excluding management and safe keeping, in shares, interests in companies or associations, debentures and other securities, excluding:

— documents establishing title to goods,

— the rights or securities referred to in Article 5(3),

…’

National law

5 Chapter 1, Paragraph 1, of the Law (1994:200) on value added tax (mervärdesskattelagen (1994:200)) of 30 March 1994 (SFS 1994 No 200; 'the ML') provides:

'[VAT] is payable to the State in accordance with this Law

1. on supplies within the territory of the State of goods or services which are subject to tax and carried out as part of a professional activity;

…'

6 Chapter 3, Paragraph 9, of the ML provides:

'Supplies of banking and financial services and transactions involving securities and comparable activities are exempt from taxation.

Banking and financial services shall not include notarial activity, collection of invoices or administrative services relating to factoring or the leasing of storage facilities.

"Transactions in securities" shall mean

1. trading and brokerage of shares, other equities and debts, whether or not represented by instruments, and

2. management of investment funds pursuant to Law (2004:46) on investment funds.'

7 Chapter 3, Paragraph 10, of the ML states as follows:

'Supplies of insurance and reinsurance services, including services supplied by brokers or other insurance intermediaries relating to insurance or reinsurance, shall be exempt from VAT.'

The facts of the main proceedings and the question referred for a preliminary ruling

8 SEB is a Swedish credit institution at the head of a 'VAT group' ('mervärdesskattegrupp'). That credit institution also supplies company financing services in conjunction with the issue of financial instruments.

9 During 2002, SEB, with another company in the same VAT group, supplied to a third company underwriting guarantees pursuant to which the members of that group

undertook to acquire any shares in that company which were not subscribed at the end of the subscription period ('the underwriting guarantee'). The members of the group were remunerated for the supply of that guarantee by payment of a commission.

10 Taking the view that the supply of underwriting guarantees benefited from exemption from VAT, that group neither invoiced nor accounted for VAT in respect of the payment of that commission.

11 Following a tax audit carried out in 2005, the Skatteverket took the view that the supply of underwriting guarantees did not constitute a transaction exempt from VAT and, by decision of 30 December 2005, issued an additional VAT assessment for the accounting period pertaining to the month of October 2002.

12 That decision was challenged by SEB before the länsrätten i Stockholms län (Regional Administrative Court, Stockholm), which dismissed the action.

13 The VAT group appealed against that judgment before the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm). Since that court dismissed the appeal, SEB lodged a further appeal before the Regeringsrätten (Supreme Administrative Court), arguing that the underwriting guarantee at issue can be compared to other services supplied in the financial sector without giving rise to payment of VAT, such as transactions in securities, insurance, granting of credit, guarantees, or put options.

14 In that regard, the referring court states first that, under Swedish case-law, the issue of underwriting guarantees does not constitute an exempted transaction for the purposes of Article 13B(d)(5) of the Sixth Directive (transactions in securities).

15 Nevertheless, the Regeringsrätten finds that there are divergences between the national laws of a number of Member States as regards the application of the exemption provided for by that provision of the Sixth Directive to underwriting guarantee services. Thus, in Ireland and in the United Kingdom, express exemption from VAT has been introduced for such services in particular.

16 In addition, the referring court points out that, in its case-law on the interpretation of the exemptions under Article 13B(a) or (d)(1), (2) and (5) of the Sixth Directive, the Court has not given any clear indication as to whether one of those exemptions is applicable to services consisting in the issue of underwriting guarantees.

17 In those circumstances, the Regeringsrätten decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 13B of the [Sixth Directive] to be interpreted as meaning that the [VAT] exemptions provided for therein also include services (underwriting) which involve a credit institution providing, for consideration, a guarantee to a company which is about to issue shares, where under that guarantee the credit institution undertakes to acquire any shares which are not subscribed within the period for share subscription?'

Consideration of the question referred

Preliminary observations

18 Before analysing the legal basis of any exemption of an underwriting guarantee such as that at issue in the main proceedings, it is appropriate to state that that guarantee falls within the scope of the Sixth Directive inasmuch as it constitutes a supply of services effected for consideration within the meaning of Article 2(1) of that directive, having regard to the fact that there is a legal relationship between the issuer and the guarantor and that the commission received by the latter from the issuer represents the value actually given in return for the guarantee supplied to the issuer by the guarantor (see, to that effect, Case C-16/93 *Tolsma* [1994] ECR I-743, paragraph 14; Case C-172/96 *First National Bank of Chicago* [1998] ECR I-4387, paragraph 26; and Case C-270/09 *MacDonald Resorts* [2010] ECR I-13179, paragraph 16).

19 It must be borne in mind that, in accordance with the case-law of the Court, 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-473/08 *Eulitz* [2010] ECR I-907, paragraph 25 and the case-law cited).

20 As regards whether such an underwriting guarantee can be exempted from VAT under Article 13B(a) or (d)(1), (2) or (5) of the Sixth Directive, it must be borne in mind that the terms used to specify the exemptions in Article 13 of the Sixth Directive are to be interpreted strictly, since those exemptions constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must in particular

be consistent with the objectives pursued by those exemptions 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 define the exemptions referred to in Article 13 should be construed in such a way as to deprive the exemptions of their intended effect (see *Eulitz*, paragraph 27 and the case-law cited).

21 Finally, with regard to the reasons underlying the adoption of VAT exemptions for the transactions set out in Article 13B, it is apparent from the case-law of the Court that the purpose of those exemptions is to alleviate the difficulties connected with determining the tax base and the amount of VAT deductible and to avoid an increase in the cost of consumer credit (Case C-455/05 *Velvet & Steel Immobilien* [2007] ECR I-3225, paragraph 24).

22 It is in the light of those considerations that the answer must be given to the question referred.

Exemption under Article 13B(d)(5) of the Sixth Directive

23 Although it is not excluded that the underwriting guarantee at issue in the main proceedings may fall within a number of categories of transactions exempt from VAT under Article 13B(a) or (d)(1), (2) and (5) of the Sixth Directive, having regard to the observations submitted to the Court in the proceedings before it, the question referred must first be considered in the light of the provisions of Article 13B(d)(5) of that directive concerning transactions in securities.

Observations submitted to the Court

24 SEB argues that the underwriting guarantee service at issue in the main proceedings is autonomous in nature in Sweden and can be dissociated from the overall service of issuing securities. Furthermore, it states that, in the present case, the underwriting guarantee was issued by entities other than those which carried out the share issue.

25 While agreeing that this underwriting guarantee service does not constitute an element in a group of financial services and that it should be assessed separately for VAT purposes, the Swedish Government takes the view that that service is not exempt from VAT pursuant to Article 13B(d)(5) of the Sixth Directive.

26 As regards the classification of that service, SEB, supported in its view by the European Commission, argues that that underwriting guarantee service represents a transaction in securities such as defined in the case-law of the Court, since it is liable to create, alter or extinguish parties' rights and obligations in respect of securities and to alter the legal and economic conditions between parties within the meaning of the judgments in Case C-2/95 *SDC* [1997] ECR I-3017, paragraphs 72 and 73, and in Case C-235/00 *CSC Financial Services* [2001] ECR I-10237, paragraph 33.

27 Ireland submits that, in that Member State, an underwriting guarantee represents only one element in a global and indivisible service connected with the issue of securities which includes, inter alia, advisory and marketing services. That global service is exempt from VAT in Ireland in so far as it constitutes a transaction in securities falling within Article 13B(d)(5) of the Sixth Directive.

28 The Skatteverket takes the view that the grant of an underwriting guarantee cannot be regarded as a transaction in securities since, of itself, an underwriting guarantee does not create, alter or extinguish rights or obligations concerning ownership of shares. Those legal effects are produced as between the guarantor and the issuer only if the issue was not entirely covered by other investors and if the guarantor was called upon to subscribe the unsubscribed remainder thereof. It would therefore be only in that hypothetical situation that exemption from VAT would be possible. However, if the issue were entirely covered by market investors, there would be no alteration to the rights and obligations pertaining to the ownership of the shares and, accordingly, no exemption would be possible.

Answer of the Court

29 It must first be borne in mind that, having regard to the observations submitted to the Court by SEB and the Swedish Government, which are in agreement on this subject, clearly, in Sweden, the underwriting guarantee in question can be regarded as a stand-alone service which can be supplied autonomously and not as a service linked to other services supplied during a share issue.

30 In order to answer the question referred, it must be borne in mind that, with regard to the scope of the exemption based on 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 (*SDC*, paragraphs 72 and 73).

31 Nevertheless, the Court has also held that transactions in securities within the meaning of Article 13B(d)(5) of the Sixth Directive refer to transactions which are liable to create, alter or extinguish parties' rights and obligations in respect of securities (*CSC Financial Services*, paragraph 33).

32 In the light of the criterion thus applied by the Court in the judgment in *CSC Financial Services*, that is to say, the amendment, even potential, of the legal and financial situation as between the parties concerned, it must be found that, in the present case, as the Advocate General noted in point 53 of his Opinion, the underwriting guarantee at issue in the main proceedings meets the requirements laid down in that case-law.

33 Even if the share issue were ultimately to be entirely covered by market investors, so that the purchase of the remaining shares by the guarantor were no longer necessary, conclusion of a contract for an underwriting guarantee, such as that at issue in the main proceedings, would be liable of itself to create, alter or extinguish rights in ownership of shares, such a possibility being alone sufficient to classify such an underwriting guarantee as a transaction in securities within the meaning of that case-law.

34 Furthermore, following the position of the Skatteverket, a credit institution which has granted a guarantee in respect of a share issue which led to the full subscription by market investors of the shares issued would not benefit, in respect of such a transaction, from exemption from VAT since there would be no transfer of shares between the parties and, accordingly, no effective alteration of their rights and obligations as regards ownership of shares.

35 However, if another credit institution granted the same type of underwriting guarantee in respect of a share issue which was not fully subscribed and was then obliged to purchase the shares not subscribed, such a transaction which, contrary to the submission of the Skatteverket, falls within the scope of the Sixth Directive and is autonomous as regards the share issue, would be exempt from VAT since, in that case, there would be effective alteration to the rights and obligations of the parties as regards ownership of shares.

36 In those circumstances, an interpretation of Article 13B(d)(5) of the Sixth Directive according to which an underwriting guarantee service would or would not be exempt from VAT depending on whether the shares issued were fully or partially subscribed would be contrary to the principle of fiscal neutrality on which, in particular, the common system of VAT established by the Sixth Directive is based, and which precludes economic operators carrying out the same transactions being treated differently in relation to the levying of VAT (Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* [2007] ECR I-5517, paragraph 29 and the case-law cited).

37 Since an underwriting guarantee such as that at issue in the main proceedings is exempt from VAT as a transaction in securities within the meaning of Article 13B(d)(5) of the Sixth Directive, it is no longer necessary, for the purposes of the resolution of the dispute in the main proceedings and thus of the answer to be given to the referring court, also to consider such a guarantee in the light of Article 13B(a) or (d)(1) and (2) of the Sixth Directive.

38 Having regard to the foregoing, the answer to the question referred is that Article 13B(d)(5) of the Sixth Directive must be interpreted as meaning that the exemption from VAT laid down therein covers services supplied by a credit institution, for consideration, in the form of an underwriting guarantee to a company wishing to

issue shares, where under that guarantee the credit institution undertakes to acquire any shares which are not subscribed within the period for share subscription.

Costs

39 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 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 laid down therein covers services supplied by a credit institution, for consideration, in the form of an underwriting guarantee to a company wishing to issue shares, where under that guarantee the credit institution undertakes to acquire any shares which are not subscribed within the period for share subscription.

[Signatures]