JUDGMENT OF THE COURT (First Chamber)

21 June 2007 *

In Case C-453/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Finanzgericht des Landes Brandenburg (Germany), made by decision of 23 November 2005, received at the Court on 20 December 2005, in the proceedings

Volker Ludwig

v

Finanzamt Luckenwalde,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano, A. Borg Barthet, M. Ilešič and E. Levits (Rapporteur), Judges,

* Language of the case: German.

Advocate General: P. Mengozzi,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing of 8 March 2007,

after considering the observations submitted on behalf of:

— Mr Ludwig, by K. Landry, Rechtsanwalt,

— the German Government, by C. Schulze-Bahr, acting as Agent,

— the Greek Government, by M. Apessos and Z. Chatzipavlou, acting as Agents,

— the French Government, by G. de Bergues and J.-C. Gracia, acting as Agents,

— the Commission of the European Communities, by D. Triantafyllou and W. Mölls, 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 Article 13B(d)(1) 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'), and in particular of the concept of 'negotiation of credit' to which it refers.

2 The reference was submitted in the context of proceedings brought by Mr Ludwig, financial adviser, against the Finanzamt Luckenwalde (Tax Office, Luckenwalde) in relation to the latter's refusal to exempt from turnover tax a net commission in the amount of EUR 267 received by Mr Ludwig during the first quarter of 2005.

Legal framework

Community legislation

3 Under Article 2(1) of the Sixth Directive, the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such is to be subject to value added tax ('VAT').

4 Article 13, entitled 'Exemptions within the territory of the country' provides:

'...

B. *Other exemptions*

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:

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

...'

National legislation

5 The relevant provisions of the Law on Turnover Tax (Umsatzsteuergesetz, BGBl. 1979 I, p. 1953), in the version applicable to the main proceedings, read as follows:

'Paragraph 1 — Taxable transactions

(1) The following transactions shall be subject to turnover tax:

1. Supplies of goods and services effected for consideration within the territory of the country by a trader in the course of his business.

...

Paragraph 4 — Exemptions in respect of supplies of goods and services

The following transactions covered by Paragraph 1(1)(1) shall be exempt:

...

8. (a) the granting and negotiation of credit ...'

The main proceedings and the questions referred for a preliminary ruling

6 The applicant in the main proceedings is by profession a self-employed financial adviser and acts on behalf of Deutsche Vermögensberatung AG ('DVAG') on the basis of a commercial agency agreement.

7 Through the intermediary of its subagent acting in the capacity of financial adviser, DVAG makes available to private persons a range of financial products, such as credit facilities, in respect of which the general conditions have been defined in advance with the lending financial institutions ('the lenders').

8 To that end, the financial adviser canvasses potential clients in the name of DVAG, in order to invite them to an interview, the purpose of which is to review their financial situation and to determine their possible investment needs.

9 Following an analysis of the financial situation of a person thus contacted, conducted with the assistance of a computer software programme provided by DVAG, the financial adviser proposes to that person those financial products appropriate to his needs.

10 If the person indicates that he is in favour of a credit, the adviser prepares a firm contractual offer which is sent, after signature by the client, to the DVAG, which checks that it meets the necessary legal conditions. DVAG sends the contractual offer to the lender which is free to accept or reject it, or to amend its terms.

11 If a contract is concluded, DVAG is rewarded by the lender with a commission. DVAG then pays to the financial adviser — in his capacity as subagent, and in return for his role in the conclusion of the contract — a commission, the amount of which depends on the terms of the commercial agency agreement. The client, for his part, does not pay any commission, either to DVAG or to the adviser.

12 The financial adviser is responsible for following up relations with his clients after the conclusion of each credit agreement.

13 Pursuant to those procedures, Mr Ludwig — in his capacity as subagent — received from DVAG a net commission in the amount of EUR 267, after contributing to the conclusion of a credit agreement during the first quarter of 2005. On the view that the transaction concluded by him, which also gave rise to payment of the commission, is exempt from VAT pursuant to Article 13B(d)(1) of the Sixth Directive, Mr Ludwig contests before the Finanzgericht des Landes Brandenburg (Finance Court of the *Land* of Brandenburg) the application of VAT at the rate of 16% by the German tax administration.

14 It is in the context of that action that the Finanzgericht des Landes Brandenburg decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) Is there negotiation within the meaning of Article 13B(d)(1) of the Sixth Directive when a taxable person — in some circumstances represented by a subagent — obtains credit for clients canvassed by it from various lenders, with which it has previously agreed general conditions applicable to its clients and from which it receives a commission for the negotiation of a product, even if, in

the process, it analyses the financial situation of the clients and their personal and financial needs, or is that service a dependent service ancillary to the principal service, which is a financial service not covered by Article 13B(1)(d) of the Sixth Directive?

(2) Is it a precondition of the exemption in respect of negotiation of credit under Article 13B(d)(1) of the Sixth Directive that:

(a) there is a direct contractual relationship between the negotiator, on the one hand, and the borrower and/or the lender on the other hand, and,

(b) the negotiator must establish contact not only with the borrower, but equally with the lender, and himself agree the details of the contract with the latter,

or does the tax exemption also cover commission payments received by a taxable person from a main agent, for which he works as a subagent and in whose name he acts vis-à-vis its clients, in return for those clients entering into credit agreements with providers indicated by the main agent, but without the subagent establishing contact with the lender?'

The questions referred for a preliminary ruling

Question 1

15 By its first question, the national court seeks essentially to ascertain which of Mr Ludwig's activities — the negotiation of credit or the giving of financial advice — is decisive with regard to the classification of the service supplied by him for the purposes of the exemption provided for in Article 13B(d)(1) of the Sixth Directive.

16 It is apparent from the order for reference that Mr Ludwig's activity consists, first, in advising clients with regard to their financial situation and, second, in ensuring that they enter into a credit agreement if needed. In return, Mr Ludwig receives as remuneration part of the commission paid by the lenders to DVAG, that remuneration being subject to the condition that Mr Ludwig, as subagent of DVAG, contributes to the conclusion of a credit agreement between those lenders and the clients whom he has approached.

17 It follows from Article 2(1) of the Sixth Directive, which determines the scope of the directive, that every supply of a service must normally be regarded as distinct and independent and that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, with the consequence that the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer — envisaged as being a typical consumer — with several distinct principal services or with a single service (Case C-349/96 *CPP* [1999] ECR I-973, paragraph 29).

18 In that regard, there is in particular a single supply in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (see Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I-6229, paragraph 24, and *CPP*, paragraph 30).

19 In the main proceedings, the fact, first, that the services rendered by DVAG and its subagent are remunerated by the lenders only on condition that the clients approached and advised by the financial adviser enter into a credit agreement suggests that the negotiation should be regarded as the principal service and the giving of advice as merely ancillary. Second, the negotiation of credit appears to be the decisive service both for the borrowers and for the lenders, in so far as the activity of giving financial advice occurs only in a preliminary phase and is limited to helping the client choose, from among the various financial products, which are best adapted to his situation and to his needs.

20 The answer to the first question should therefore be that the fact that a taxable person analyses the financial situation of clients canvassed by him with a view to obtaining credit for them does not preclude recognition of the service supplied as being a negotiation of credit which is exempt under Article 13B(d)(1) of the Sixth Directive if, in the light of the foregoing interpretative criteria, the negotiation of credit offered by that taxable person falls to be considered as the principal service to which the provision of financial advice is ancillary, in such a way that the latter shares the same tax treatment as the former. It is for the national court to determine whether that is the case in the proceedings before it.

Question 2

Preliminary observations

21 The terms used to specify the exemptions covered 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 (Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR I-1737, paragraph 13, and Case C-2/95 *SDC* [1997] ECR I-3017, paragraph 20).

22 It is also settled case-law that those exemptions constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another and which must be placed in the general context of the common system of VAT (Case C-240/99 *Skandia* [2001] ECR I-1951, paragraph 23, and Case C-472/03 *Arthur Andersen* [2005] ECR I-1719, paragraph 25).

23 The term 'negotiation' used in points (1) to (5) of Article 13B(d) of the Sixth Directive is not defined by that directive. The Court has nevertheless held in the context of point (5) of that provision that the concept of 'negotiation' applies to the activity of an intermediary who does not occupy the position of a 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, in effect, a service rendered to and remunerated by a contractual party as a distinct act of mediation. In that regard, the purpose of such an activity is 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 content of the

contract (see, to that effect, Case C-235/00 *CSC Financial Services* [2001] ECR I-10237, paragraph 39). On the other hand, it is not negotiation where one of the parties entrusts to a sub-contractor some of the clerical formalities related to the contract (see, to that effect, *CSC Financial Services*, paragraph 40).

24 The national court wishes to know, first, whether the concept of negotiation for the purposes of Article 13B(d)(1) of the Sixth Directive presupposes a contractual link between the provider of the service of negotiation of credit and one of the parties to the credit agreement and, secondly, if there is no such contractual link, whether a direct contact is required between that service provider and both parties to the credit agreement in order for the exemption provided for in Article 13B(d)(1) to be granted.

On the necessity of a contractual link between the negotiator and one of the parties to the contract

25 It should be noted that the transactions exempted under Article 13B(d)(1) of the Sixth Directive are defined in terms of the nature of the services provided and not in terms of the person supplying or receiving the service. That provision, in fact, makes no reference to the person supplying or receiving the service (see, by analogy, with regard to Article 13B(d)(3) and 13B(d)(5) of the Sixth Directive, *SDC*, paragraph 32, and, with regard to Article 13B(d)(6) of that directive, Case C-169/04 *Abbey National* [2006] ECR I-4027, paragraph 66).

26 The same observation may be made as regards the nature of the relationship between the negotiator and the parties to the contract, since there is no reference to that subject in the wording of Article 13B(d)(1) of the Sixth Directive.

27 The Court's case-law makes clear that, in order to be regarded as exempt transactions for the purposes of Article 13B(d) of the Sixth Directive, the services provided must, viewed broadly, form a distinct whole, fulfilling in effect the specific and essential functions of the service of negotiation (see, to that effect, with regard to Article 13B(d)(5) of the Sixth Directive, *SDC*, paragraph 66, and *CSC Financial Services*, paragraph 25, and with regard to Article 13B(d)(6) of that directive, *Abbey National*, paragraph 70).

28 In that regard, the Court has held that negotiation is an act of mediation, which may consist, amongst other things, in pointing out to one of the parties to the contract suitable opportunities for the conclusion of such a contract, in making contact with another party or negotiating, in the name and on behalf of a client, the detail of the payments to be made by either side, the purpose of such an activity being 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 that contract (see, to that effect, with regard to Article 13B(d)(5) of the Sixth Directive, *CSC Financial Services*, paragraph 39).

29 It follows from the above that the recognition of an activity of negotiation which is exempt for the purposes of Article 13B(d)(1) cannot necessarily depend on the existence of a contractual link between the provider of the negotiation service and one of the parties to the credit agreement.

30 Contrary to the argument of the German Government, that finding is not affected by the Court's statement in paragraph 39 of *CSC Financial Services* that negotiation is a service rendered to and remunerated by a contractual party as a distinct act of mediation.

31 First of all, in *CSC Financial Services*, the question of the existence of a contract between the provider and the recipient of the service — in that case, CSC Financial Services Ltd and Sun Alliance Group respectively — was not in dispute. As is clear from paragraph 7 of that judgment, such a contractual link existed in that case. Notwithstanding that fact, the Court held, subject to the assessment of the facts of the case by the national court, that CSC Financial Services Ltd appeared to exercise an activity comparable to that of a subcontractor to whom one of the parties had entrusted some basic formalities related to the contract but not falling within the scope of points (3) to (5) of Article 13B(d) of the Sixth Directive (*CSC Financial Services*, paragraph 40). The finding of the Court with regard to the existence of a contractual link between the provider and the recipient of the service could not, therefore, have the significance in the line of argument developed by the Court which is attributed to it by the German Government in its observations.

32 It must be observed, next, that in *CSC Financial Services*, the Court, with reference to paragraphs 64 and 66 of *SDC*, stressed that the nature of the activities of CSC Financial Services Ltd was the essential element in determining whether the latter provided a service which was exempt for the purposes of points (3) to (5) of Article 13B(d) of the Sixth Directive (*CSC Financial Services*, paragraphs 23 to 28). Second, the Court held at the beginning of paragraph 39 of that judgment that it was not necessary to consider the precise meaning of the term 'negotiation'.

33 Consequently, the application of the exemption provided for in Article 13B(d)(1) of the Sixth Directive cannot depend on the existence of a contractual link between the provider of the service of negotiation and one of the parties to the credit agreement, but must be assessed with regard to the very nature of the service rendered and its purpose, as referred to in paragraph 23 of the present judgment.

On the necessity of direct contact between the negotiator and both parties to the contract

34 It should be emphasised that the wording of Article 13B(d)(1) of the Sixth Directive does not, in principle, preclude the activity of negotiation from being broken down into separate services which may then fall under the concept of 'negotiation of credit' for the purposes of that provision and benefit from the exemption for which it provides (see, to that effect: with regard to Article 13B(d)(3) of the Sixth Directive, *SDC*, paragraph 64; with regard to Article 13B(d)(5) of that directive, *CSC Financial Services*, paragraph 23; and with regard to Article 13B(d)(6) of that directive, *Abbey National*, paragraph 67).

35 In those circumstances, it follows from the principle of fiscal neutrality that operators must be able to choose the form of organisation which, from the strictly commercial point of view, best suits them, without running the risk of having their operations excluded from the exemption provided for in Article 13B(d)(1) of the Sixth Directive (see, to that effect, with regard to Article 13B(d)(6) of the Sixth Directive, *Abbey National*, paragraph 68).

36 Nevertheless, as pointed out in paragraph 27 of the present judgment, in order to be classed as exempt transactions for the purposes of Article 13B(d)(1) of the Sixth Directive, the service provided must, viewed broadly, form a distinct whole, fulfilling in effect the specific and essential functions of the service of negotiation.

37 It is not, therefore, inconsistent with Article 13B(d)(1) of the Sixth Directive for the service of negotiation of credit to be divided, as in the case before the referring court, into two services, the first provided by the main agent DVAG, in the context

of the negotiation with the lenders, and the second by its subagent, Mr Ludwig, in his capacity as financial adviser, in the context of the negotiation with the borrowers.

38 As stated in paragraph 39 of *CSC Financial Services*, negotiation is an act of mediation which may consist, amongst other things, in pointing out to one party to the contract suitable opportunities for the conclusion of such a contract, the purpose of such an activity being 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 that contract. The concept of negotiation does not, therefore, necessarily presuppose that the negotiator, as subagent of the main agent, enters into direct contact with both parties to the contract, in order to negotiate its terms, provided, however, that his activity is not limited to dealing with some of the clerical formalities related to the contract.

39 In addition, the very fact that the terms of the credit agreement have been fixed in advance by one of the parties to the contract cannot, as such, preclude the supply of a negotiation service for the purposes of Article 13B(d)(1) of the Sixth Directive, given that, as stated in the previous paragraph, the activity of negotiation may be limited to pointing out to one party to the contract suitable opportunities for the conclusion of such a contract.

40 The answer to the second question must therefore be that the fact that the taxable person has no contractual link with any of the parties to a credit agreement to the conclusion of which he has contributed and that he does not establish direct contact with one of those parties does not preclude that taxable person from providing a service of negotiation of credit which is exempt under Article 13B(d)(1) of the Sixth Directive.

Costs

41 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 (First Chamber) hereby rules:

1. **The fact that a taxable person analyses the financial situation of clients canvassed by him with a view to obtaining credit for them does not preclude recognition of the service supplied as being a negotiation of credit which is exempt under Article 13B(d)(1) 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, if, in the light of the foregoing interpretative criteria, the negotiation of credit offered by that taxable person falls to be considered as the principal service to which the provision of financial advice is ancillary, in such a way that the latter shares the same tax treatment as the former. It is for the national court to determine whether that is the case in the proceedings before it.**

2. **The fact that the taxable person has no contractual link with any of the parties to a credit agreement to the conclusion of which he has contributed and that he does not establish direct contact with one of those parties does not preclude that taxable person from providing a service of negotiation of credit which is exempt under Article 13B(d)(1) of Sixth Directive 77/388.**

[Signatures]