JUDGMENT OF THE COURT (First Chamber)
21 October 2004 *

In Case C-8/03,

REFERENCE for a preliminary ruling under Article 234 EC

from the Tribunal de première instance de Bruxelles (Belgium), made by decision of 24 December 2002, received at the Court on 10 January 2003, in the proceedings:

Banque Bruxelles Lambert SA (BBL)

v

État belge,

* Language of the case: French.

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, A. Rosas, R. Silva de Lapuerta, K. Lenaerts and S. von Bahr (Rapporteur), Judges,

Advocate General: M. Poiares Maduro,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 March 2004,

after considering the observations submitted on behalf of:

— Banque Bruxelles Lambert SA (BBL), by B. de Duve, S. Houx and F. Herbert, avocats,

— the Kingdom of Belgium, by E. Dominkovitis, acting as Agent, and by G. Vander sanden and E. De Plaen, avocats,

— the Hellenic Republic, by D. Kalogiros and S. Spyropoulos, acting as Agents, and by M. Tassopoulou,

— the Commission of the European Communities, by E. Traversa and C. Giolito, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2004,

gives the following

Judgment

1 The reference for a preliminary ruling relates to the interpretation of Articles 4, 9(2)(e) and 13B(d)(6) 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 That reference was made in proceedings between Banque Bruxelles Lambert SA (BBL) ('BBL') and the Belgian State relating to the determination, for the purposes of liability to value added tax ('VAT'), of the place where services were supplied by BBL to open-ended investment companies (*societés d'investissement à capital variable*) ('SICAVs') in Luxembourg.

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 subject to VAT.

4 According to Article 4(1) and (2) of that directive:

'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.'

5 Article 9(1) and the third and fifth indents of Article 9(2)(e) of that directive provide:

'1. The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.

2. However:

...

(e) the place where the following services are supplied when performed for customers established outside the Community or for taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides:

...

— services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and the supplying of information,

...

— banking, financial and insurance transactions including reinsurance, with the exception of the hire of safes'.

6 Article 13B(d)(5) and (6) of the Sixth Directive provides, for its part, that Member States are to exempt:

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

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

7 Article 1(2) of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 1985 L 375, p. 3) defines undertakings for collective investment in transferable securities ('UCITS') as undertakings:

'— the sole object of which is the collective investment in transferable securities of capital raised from the public and which operate on the principle of risk-spreading,

and

— the units of which are, at the request of holders, re-purchased or redeemed, directly or indirectly, out of those undertakings' assets. ...'

8 Under Article 1(3) of that directive, such undertakings may be constituted 'either under the law of contract (as common funds managed by management companies) or trust law (as unit trusts) or under statute (as investment companies)'.

National legislation

9 Article 4(1) of the Belgian VAT Code, in the version applying to the facts in the main proceedings, provides:

'"Taxable person" shall mean any person who, habitually and independently, in the course of carrying out an economic activity, whether it be on a primary or ancillary basis, and whether or not it be with a view to profit, supplies goods or services covered by this Code, irrespective of the place where that economic activity is carried on.'

10 Under Article 21(2) of the Code:

'The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which services are supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.'

11 Article 21(3)(7)(d) and (e) of the Belgian VAT Code states that, by way of exception to Article 21(2), the place where a service is supplied shall be deemed to be:

'7. the place where the recipient of the service has established his business or a fixed establishment at which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides, where the service is

performed for a customer established outside the Community or, for the purposes of his economic activity, to a taxable person established in the Community but not in the same country as the supplier, to the extent that the subject of the service is:

...

(d) work of an intellectual nature supplied in the ordinary course of business by legal and other consultants, accountants, engineers, consultancy bureaux and other suppliers carrying on similar activities as well as data processing and the supplying of information, ...;

(e) banking, financial and insurance transactions, including reinsurance, with the exception of the hire of safes'.

The main proceedings and the questions referred

12 The order for reference states that, during the period relevant to the main proceedings, BBL provided services to Luxembourg SICAVs [BBL Renta Fund, BBL Renta Cash, BBL Patrimonial, International Aviation Fund, BBL Capital Cash, BBL Portfolio and BBL (L) Invest]. Under the consultancy agreement entered into with each of its SICAVs, BBL undertook to:

— assist the SICAV in the management of its assets, by ensuring that any advice given by it was strictly in accordance with the general management guidelines and investment policy adopted by the SICAV;

— provide to those responsible for the day-to-day management of the SICAV all documentation, information and oral or written advice they might deem necessary in order to carry out their duties;

— assist the SICAV in the acquisition, subscription, transfer and disposal of shares, bonds and all other negotiable securities and in relation to currency or treasury operations.

13 In February 1998, BBL was the subject of an inspection carried out by the Liège special tax inspection department for the period from 1 May 1993 to 31 December 1997. As a result of that inspection, a report was drawn up on 28 May 1998, stating that BBL had not invoiced VAT in relation to fees invoiced to the Luxembourg SICAVs for advice given, as it considered that those services had been supplied in the Grand Duchy of Luxembourg by virtue of Article 21(3)(7)(d) or (e) of the Belgian VAT Code.

14 In that regard, the national court states that the report suggests that Article 21(3)(7) of the Belgian VAT Code does not apply, because Luxembourg SICAVs are not considered under Luxembourg legislation to be taxable persons.

15 Furthermore, according to the report, BBL acted with the intention of avoiding VAT or permitting VAT to be avoided, as it could not have been unaware that VAT arising on the cost of the services supplied to the Luxembourg SICAVs was not paid either to the Belgian State or to the Luxembourg State.

16 On 8 June 1998, a final demand was issued to BBL for, inter alia, EUR 45 491 373.03 by way of VAT due for the period from 1 May 1993 to 31 December 1997, for EUR 90 982 746.07 by way of a fine at the rate of 200% and for EUR 1 819 654.49 in respect of interest on late payment from 1 January to 20 June 1998.

17 BBL brought proceedings to contest that final demand before the Tribunal de première instance de Bruxelles (Brussels Court of First Instance).

18 The national court observes that to take the view that each Member State is free to treat, or not to treat, persons established in its territory or carrying on business there as being subject to VAT is to misconstrue the Community provisions relating to VAT, the purpose of which is precisely to harmonise the concept of a taxable person and to allocate among the Member States the power to tax transactions by providing a uniform definition of the place where goods and services are supplied.

19 In accordance with the duty to interpret national provisions in conformity with Community law, Article 21(3) of the Belgian VAT Code, which transposed Article 9(2)(e) of the Sixth Directive into Belgian law, must be interpreted in the light of the wording of that directive and the purpose which it is intended to achieve, and there is no need to refer to Luxembourg law.

20 However, the national court observes that the question whether SICAVs carry out an economic activity within the meaning of Article 4 of the Sixth Directive and accordingly whether they are subject to VAT has not yet been decided by the Court.

21 If the Luxembourg SICAVs were not to be treated as subject to VAT, with the result that the services supplied by BBL would be deemed to be supplied in Belgium, the national court observes that the question arises whether those services could benefit from the exemption provided for under Article 13B(d)(6) of the Sixth Directive.

22 In the light of those considerations, the Tribunal de première instance de Bruxelles decided to stay the proceedings and to refer the two questions set out below to the Court for a preliminary ruling:

'— Are *sociétés d'investissement à capital variable* (open-ended investment companies) (SICAVs) established in a Member State which have as their sole object the collective investment in transferable securities of capital raised from the public in accordance with Council Directive 85/611 of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) taxable persons for value-added-tax purposes within the meaning of Article 4 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, so that, where services referred to in Article 9(2)(e) of that directive are supplied to those SICAVs, the place where those services are deemed to be supplied is the place where the SICAVs have established their seat?

— If the answer to that question is in the negative, the resolution of the case entails determining what types of services provided to SICAVs may benefit from the exemption under Article 13B(d)(6) of the Sixth Directive: is it necessary in that context to distinguish between services which comprise the giving of assistance and management advice, on the one hand, and management services in the strict sense, on the other, the latter being said to differ from the former in that they imply a power on the manager's part to take decisions relating to the administration and disposal of the assets under management?'

The first question

23 By its first question, the national court is essentially asking whether SICAVs which have as their sole object the collective investment in transferable securities of capital raised from the public in accordance with Directive 85/611 are taxable persons within the meaning of Article 4 of the Sixth Directive, so that, where services referred to in Article 9(2)(e) of that directive are supplied to such SICAVs which are established in a Member State other than that of the supplier of the services, the place where those services are supplied is the place where the SICAVs have established their business.

Observations submitted to the Court

24 All parties which have submitted observations are of the opinion that SICAVs established in accordance with Directive 85/611 carry out economic activities which make them taxable persons for the purposes of Article 4 of the Sixth Directive.

25 In that regard, BBL notes the Court's case-law relating to financial instruments which establishes a distinction between transactions which constitute economic activities for the purposes of the Sixth Directive and those which do not, in particular Case C-60/90 *Polysar Investments Netherlands* [1991] ECR I-3111; Case C-333/91 *Sofitam* [1993] ECR I-3513 and Case C-155/94 *Wellcome Trust* [1996] ECR I-3013.

26 The activities of UCITS in that regard must be analysed on two levels: first, the relationship between the UCITS and its participants and, secondly, that between the UCITS and the market.

27 As regards the relationship between the UCITS and its participants, BBL argues that UCITS can be distinguished from the other economic operators in the financial markets, inasmuch as they actively promote the marketing of their own units. When the units are marketed, the UCITS charge a fee, known, as appropriate, as entry commission or exit commission. That commission is the counterpart of a right of access or withdrawal on the part of the subscriber to the UCITS and the provision of the services connected with that access or withdrawal.

28 As regards the relationship between the UCITS and the market, BBL submits that UCITS aim to offer the general public a service which is comparable to the services offered by private banks to their favoured customers in the field of asset management.

29 As it considers that those SICAVs which carry on activities regulated by Directive 85/611 are taxable persons by virtue of Article 4 of the Sixth Directive, BBL claims that Article 9(2)(e) of that directive is applicable.

30 The Belgian Government submits that, according to the Court's case-law, the mere acquisition and holding of shares in a company is not to be regarded as an economic activity, within the meaning of the Sixth Directive, conferring on the holder the status of a taxable person (see, inter alia, *Polysar Investments Netherlands*, paragraph 13, and Case C-80/95 *Harnas & Helm* [1997] ECR I-745, paragraph 15).

31 However, the activities carried out by SICAVs are referred to in Article 13B(d)(4) and (5) of the Sixth Directive, and transactions referred to in those provisions will fall within the scope of VAT, in particular where they are effected as part of a commercial share-dealing activity (see *Polysar Investments Netherlands*, paragraph 14, and *Harnas & Helm*, paragraph 16).

32 The Greek Government argues that the transactions carried out by SICAVs are not those of a mere investor who has acquired shares in order to retain them for purposes of profit, as was the position in *Polysar Investments Netherlands*, but the organised exploitation of capital to buy and sell transferable securities. That Government also states that the fact that, according to Article 13B(d)(6) of the Sixth Directive, the management of special investment funds is exempt from VAT means that those involved in that management are, in principle, subject to the tax.

33 The Commission states as a preliminary point that, leaving Belgium and Luxembourg aside, the question whether SICAVs are subject to VAT has not been completely resolved in the Member States. In the Netherlands, by reference to the *Polysar Investments Netherlands* case-law, SICAVs are, as in Luxembourg, treated as non-taxable persons. In Belgium, Germany, Denmark, Spain, France, Ireland, Italy, Portugal and the United Kingdom, SICAVs are treated as taxable persons, but are exempt.

34 Next, the Commission observes that management companies, within the meaning of Directive 85/611, are generally undertakings which supply services in consideration for which they charge management fees. The fact that Article 13B(d)(6) of the Sixth Directive expressly provides for the management of special investment funds to be exempt shows that the transactions concerned fall within the scope of VAT.

35 The management company or the SICAV which manages funds undeniably carries on an activity which amounts to the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis for the purposes of Article 4(2) of the Sixth Directive, and thus falls to be distinguished from holding companies which do no more than hold shares. To treat managers of funds differently, depending on whether that activity is carried out by a management company outside the fund or by the SICAV itself, would contravene the principle that VAT should be neutral.

Findings of the Court

36 It must be noted that under Article 4(1) of the Sixth Directive a taxable person is any person who independently carries out any economic activity specified in paragraph 2 of that article. 'Economic activities' are defined in Article 4(2) as comprising all activities of producers, traders and persons supplying services, and in particular the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis. 'Exploitation' within the meaning of Article 4(2) refers, in accordance with the requirements of the principle that the common system of VAT should be neutral, to all those transactions, whatever may be their legal form (see Case C-186/89 *Van Tiem* [1990] ECR I-4363, paragraph 18; Case C-306/94 *Régie dauphinoise* [1996] ECR I-3695, paragraph 15, and Case C-77/01 *EDM* [2004] ECR I-4295, paragraph 48).

37 The purpose of the Sixth Directive, which seeks in particular to found a common system of VAT upon a uniform definition of 'taxable persons', requires that status to be assessed solely on the basis of the criteria set forth in Article 4 of that Directive (see *Van Tiem*, paragraph 25).

38 It must also be pointed out that it is settled case-law that the mere acquisition and holding of shares in a company is not to be regarded as an economic activity within the meaning of the Sixth Directive, conferring on the holder the status of a taxable person. The mere acquisition of financial holdings in other undertakings does not amount to the exploitation of property for the purpose of obtaining income therefrom on a continuing basis because any dividend yielded by that holding is merely the result of ownership of the property and is not the product of any economic activity within the meaning of that directive (see *Harnas & Helm*, paragraph 15, and Case C-442/01 *KapHag* [2003] ECR I-6851, paragraph 38). IIIf, therefore, such activities do not in themselves constitute an economic activity within the meaning of that directive, the same must be true of activities consisting in the sale of such holdings (see *Wellcome Trust*, paragraph 33, and *KapHag*, paragraph 40).

39 Likewise, the simple acquisition and the mere sale of other negotiable securities cannot amount to exploitation of an asset for the purpose of obtaining income on a continuing basis, the only consideration for those transactions consisting of a possible profit on the sale of those securities (see *EDM*, paragraph 58).

40 As a rule, such transactions cannot, by themselves, constitute economic activities within the meaning of the Sixth Directive.

41 However, it follows from Article 13B(d)(5) of the Sixth Directive that transactions affecting securities may come within the scope of VAT. The Court has already held that the transactions covered by that provision are those which consist in drawing revenue on a continuing basis from activities which go beyond the compass of the simple acquisition and sale of securities, such as transactions carried out in the course of a business trading in securities (see *EDM*, paragraph 59).

42 It follows from Article 1(2) of Directive 85/611 that the transactions carried out by SICAVs consist in the collective investment in transferable securities of capital raised from the public. With the capital provided by subscribers when they purchase shares, SICAVs assemble and manage, on behalf of the subscribers and for a fee, portfolios consisting of transferable securities.

43 Such an activity, which goes beyond the compass of the simple acquisition and the mere sale of securities and which aims to produce income on a continuing basis, constitutes an economic activity within the meaning of Article 4(2) of the Sixth Directive.

44 It follows that SICAVs are taxable persons within the meaning of Article 4 of the Sixth Directive.

45 Accordingly, where services referred to in Article 9(2)(e) of the Sixth Directive are supplied to SICAVs established in a Member State other than that of the supplier of the services, the place where those services are provided is the place where the SICAVs have established their business.

46 Against that background, the Belgian Government, which accepts that consultancy services, data processing services and information provision services provided to the SICAVs come within the scope of the third indent of Article 9(2)(e) of the Sixth Directive, none the less argues that the management services provided to them, which can be characterised by the fact that they comprise, *de jure* or *de facto*, the power to take decisions, are, by contrast, not covered by that provision.

47 In that regard, it is sufficient to hold, as the Advocate General noted at point 20 of his Opinion, that the third and fifth indents of Article 9(2)(e) of the Sixth Directive cover both consultancy services and banking and financial transactions.

48 The answer to the first question must therefore be that SICAVs which have as their sole object the collective investment in transferable securities of capital raised from the public in accordance with Directive 85/611 are taxable persons within the meaning of Article 4 of the Sixth Directive, so that, where services referred to in Article 9(2)(e) of that directive are supplied to such SICAVs established in a Member State other than that of the supplier of the services, the place where those services are provided is the place where the SICAVs have established their business.

The second question

49 Since the second question was posed only in the event of a negative answer to the first question, it does not require an answer.

Costs

50 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. The costs incurred in submitting observations to the Court, other than by those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Open-ended investment companies (SICAVs) which have as their sole object the collective investment in transferable securities of capital raised from the public in accordance with Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) are taxable persons within the meaning of Article 4 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, so that, where services referred to in Article 9(2)(e) of that directive are supplied to such SICAVs which are established in a Member State other than that of the supplier of the services, the place where those services are provided is the place where the SICAVs have established their business.

Signatures.