Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

30 May 2013 *

(VAT — Sixth Directive 77/388/EEC — Article 5(8) — Concept of 'transfer of a totality of assets or part thereof' — Disposal of 30% of the shares in a company to which the transferor supplies services that are subject to VAT)

In Case C-651/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 2 December 2011, received at the Court on 19 December 2011, in the proceedings

Staatssecretaris van Financiën

v

X BV,

THE COURT (Ninth Chamber),

composed of J. Malenovský, President of the Chamber, U. Lõhmus (Rapporteur) and M. Safjan, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 November 2012,

after considering the observations submitted on behalf of:

— X BV, by T.K.M. Rookmaker-Penners and C.A. Peeters, belastingadviseurs,

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

— the German Government, by T. Henze and K. Petersen, acting as Agents,

— the United Kingdom Government, by S. Ossowski and A. Robinson, acting as Agents, and by R. Hill and G. Peretz, Barristers,

— the European Commission, by L. Lozano Palacios and by W. Roels and A. Cordewener, acting as Agents,

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

* Language of the case: Dutch.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 5(8) and 6(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 request has been made in proceedings between the Staatssecretaris van Financiën (State Secretary for Finance) and X BV ('X') concerning a notice of additional assessment to value added tax ('VAT') that was sent to X in respect of the period from 1 January 1996 to 31 December 1998.

Legal context

The Sixth Directive

3 Under Article 5 of the Sixth Directive:

'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.

...

8. In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and in that event the recipient shall be treated as the successor to the transferor. Where appropriate, Member States may take the necessary measures to prevent distortion of competition in cases where the recipient is not wholly liable to tax.'

4 Article 6(1) of the Sixth Directive provides:

'"Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

Such transactions may include inter alia:

— assignments of intangible property whether or not it is the subject of a document establishing title,

...'

5 Under Article 6(5) of the Sixth Directive, Article 5(8) is to apply 'in like manner to the supply of services'.

6 Article 13 of the Sixth Directive, headed 'Exemptions within the territory of the country', provides in part B, headed '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:

...

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

Netherlands law

7 The Kingdom of the Netherlands exercised the option provided by Articles 5(8) and 6(5) of the Sixth Directive and incorporated it in Article 31 of the 1968 Law on Turnover Tax (Wet op de omzetbelasting 1968) of 28 June 1968 (*Staatsblad* 1968, No 329), in the version applicable in the main proceedings. That article is worded as follows:

'On the disposal of an undertaking or part thereof to a transferee who continues to operate that undertaking or part thereof, such disposal shall not, subject to compliance with any conditions laid down by ministerial order, be subject to tax in respect of the supplies of goods and services constituting that disposal.'

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

8 In 1996, X held 30% of the shares in A BV ('A'), a company carrying on business in the field of automation. The remaining shares in A were held by B Holding BV (20.01%), X1 Beheer BV (30%) and C BV (19.99%).

9 As a member of the 'Management Board', X, like B Holding BV and XI Beheer BV, carried out management work for A in return for a contractually agreed remuneration.

10 At the end of 1996, X and the other holders of shares in A sold their shares to D plc. In connection with that sale, the management work for A came to an end and X resigned from A's Management Board.

11 A number of services were supplied to X in conjunction with that sale of shares, and the invoices provided for VAT to be charged. X deducted that VAT in its VAT returns, on the basis that the disposal of its shareholding constituted the transfer of a totality of assets and of services and that the costs incurred by X in connection with that transaction had to be considered part of the general costs associated with its entire economic activity and were, therefore, fully deductible.

12 The Inspector, as the Netherlands competent authority for the collection of VAT, rejected that deduction and issued a notice of additional assessment. He subsequently dismissed X's objection to that notice, although he reduced the amount.

13 The Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague; 'the Gerechtshof') declared X's appeal against the Inspector's decision to be well-founded and annulled the notice of additional assessment. According to the Gerechtshof, the transfer of X's shareholding was not within the scope of VAT because it was not an economic activity. It considered, however, that the input VAT could be deducted, since the shares were sold and transferred in conjunction with acts carried out by X as a trader.

14 The Staatssecretaris van Financiën appealed in cassation against the judgment of the Gerechtshof to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

15 The referring court refers to Case C-29/08 *SKF* [2009] ECR I-10413 (paragraphs 32 to 34 and point 2 of the operative part) in support of the view that the relevant disposal of 30% of the shares in A, which occurred in conjunction with the cessation of management activities in respect of that company, is an economic activity and should be exempt pursuant to Article 13B(d)(5) of the Sixth Directive.

16 None the less, the Court had stated in paragraph 41 of *SKF* that a disposal of shares which is to be considered an economic activity is not subject to VAT where that disposal may be regarded as equivalent to the transfer of a totality of assets or part thereof and the Member State concerned has exercised the option provided for in the first sentence of Article 5(8) of the Sixth Directive.

17 The referring court considers that the right to deduct depends on the applicability of that provision to a disposal of shares such as that at issue in the main proceedings.

18 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the disposal of 30% of the shares in a company – to which the transferor of those shares supplies services that are subject to VAT – equivalent to the transfer of (part of) a totality of assets within the meaning of Article 5(8) and/or of services within the meaning of Article 6(5) of the Sixth Directive?

(2) If the answer to Question 1 is in the negative, is the disposal referred to in that question equivalent to the transfer of (part of) a totality of assets within the meaning of Article 5(8) and/or of services within the meaning of Article 6(5) of the Sixth Directive, where the other shareholders, who also supply services that are subject to VAT to the company whose shares have been disposed of, transfer all the other shares in that company to the same person (almost) at the same time?

(3) If the answer to the second question is also in the negative, can the disposal referred to in Question 1 be regarded as the transfer of (part of) the undertaking for the purposes of Article 5(8) and/or Article 6(5) of the Sixth Directive, taking into account the fact that that disposal is closely linked to management activities carried out for that participation?'

Consideration of the questions referred

Admissibility of the request for a preliminary ruling

19 The European Commission does not explicitly raise a plea of inadmissibility in regard to the request for a preliminary ruling but none the less expresses doubts in its observations to the Court as to the relevance of the questions referred for the outcome of the dispute in the main proceedings. The Commission takes the view that the referring court is in a position to rule on the deductibility of VAT on the basis of the facts that are known to it. According to the Commission, it is irrelevant to

determine whether the transaction at issue in the main proceedings falls outside the scope of VAT or whether it is exempt pursuant to Article 13B(d)(5) of the Sixth Directive, the true point being whether or not the VAT borne by X on the services supplied to it is deductible; in order to answer that, it is sufficient to consider whether the costs incurred by X can be linked to the disposal of shares or whether they can be linked to X's other activities, namely the management services provided by X.

20 It must be borne in mind in that regard that, according to settled case-law, questions on the interpretation of European Union law referred by a national court in the factual and legislative context which that court is responsible for defining enjoy a presumption of relevance (see Case C-515/08 *dos Santos Palhota and Others* [2010] ECR I-9133, paragraph 20, and Case C-119/09 *Société fiduciaire nationale d'expertise comptable* [2011] ECR I-2551, paragraph 21).

21 The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25; Case C-285/09 *R* [2010] ECR I-12605, paragraph 32; and Case C-307/10 *Chartered Institute of Patent Attorneys* [2012] ECR, paragraph 32 and the case-law cited).

22 That is not the case here. While it is indeed apparent from the order for reference that the main action concerns the refusal to grant the right to deduct VAT on services obtained in connection with the disposal of shares and not the tax treatment of that disposal, the fact remains that whether there is a right to deduct is determined in particular by the tax treatment of the output transactions to which the input transactions are assigned (*SKF*, paragraph 60).

23 Therefore, the interpretation of European Union law sought, to establish the tax treatment to be accorded to a transaction such as the transaction at issue in the main proceedings, does actually respond to an objective need inherent in the outcome of a case pending before the referring court.

24 Accordingly the request for a preliminary ruling is admissible.

Substance

25 By its three questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 5(8) and/or 6(5) of the Sixth Directive must be interpreted as meaning that the disposal of 30% of the shares in a company – to which the transferor supplies services that are subject to VAT – constitutes the transfer of a totality of assets or services or part thereof within the meaning of those provisions. If not, the referring court wishes to know whether the conditions for the application of those provisions are none the less satisfied if, on the one hand, the other shareholders transfer all the other shares in that company to the same person at practically the same time, and, on the other, that disposal is closely linked to management activities carried out for that company.

26 As a preliminary point, given that the referring court refers to two provisions of the Sixth Directive, relating to the supply of goods and to the supply of services, respectively, it must be noted that, under Article 6(1) of that directive, assignments of intangible property, whether or not they are the subject of a document establishing title, are to be regarded as a supply of services. It follows that it is Article 6(5) of the Sixth Directive which ought, in principle, to be regarded as relevant in the light of the circumstances of the main proceedings.

27 However, Article 5(3)(c) of the Sixth Directive gives the Member States the option of considering 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 (Case C-259/11 *DTZ Zadelhoff* [2012] ECR, paragraph 31). Consequently, Article 5(8) of the Sixth Directive may conceivably still be relevant to the main proceedings.

28 Since the Court does not have sufficient information to determine which of the two provisions mentioned in the questions referred for a preliminary ruling is applicable to the circumstances of the main proceedings, it is appropriate to interpret Article 5(8) of the Sixth Directive, since it sets out the content of the no-supply rule, and, if appropriate, to apply, *mutatis mutandis*, the approach which a consideration of Article 5(8) suggests when interpreting Article 6(5) of the Sixth Directive.

29 In the first place, as regards the question whether the transfer of 30% of the shares in a company may constitute a transfer of a totality of assets or part thereof, it must be observed that the first sentence of Article 5(8) of the Sixth Directive provides that Member States may, in the event of a transfer of a totality of assets or part thereof, consider that no supply of goods has taken place and that the recipient is the successor to the transferor. It follows that, where a Member State has exercised that option, the transfer of a totality of assets or part thereof is not regarded as a supply of goods for the purposes of the Sixth Directive and is not subject to VAT under Article 2 of that directive (see Case C-408/98 *Abbey National* [2001] ECR I-1361, paragraph 30; Case C-497/01 *Zita Modes* [2003] ECR I-14393, paragraph 29; *SKF*, paragraph 36; and Case C-444/10 *Schriever* [2011] ECR I-11071, paragraph 20).

30 It is common ground that the Kingdom of the Netherlands has exercised the option provided for in that provision.

31 In the absence of an express reference in the Sixth Directive to the law of the Member States for the purpose of determining the meaning and scope of the concept of a transfer of a totality of assets or part thereof, this constitutes an independent concept of European Union law and must, therefore, be given a uniform interpretation in order to prevent divergences in the application of the VAT system in the Member States (*Zita Modes*, paragraphs 32 and 35, and *Schriever*, paragraph 22).

32 The Court has interpreted that concept as meaning that it covers the transfer of a business or an independent part of an undertaking including tangible elements and, as the case may be, intangible elements which, together, constitute an undertaking or a part of an undertaking capable of carrying on an independent economic activity, but that it does not cover the simple transfer of assets, such as the sale of a stock of products (see *Zita Modes*, paragraph 40; *SKF*, paragraph 37; and *Schriever*, paragraph 24). It is also important, in order for Article 5(8) of the Sixth Directive to apply, that the transferee intends to operate the business, or the part of the undertaking, transferred and not simply to liquidate the activity concerned immediately (*Zita Modes*, paragraph 44, and *Schriever*, paragraph 37).

33 As the referring court states, it is indeed apparent from paragraphs 38 and 40 of the judgment in *SKF* that the Court did not rule out that the disposal of a 100% shareholding may, in certain circumstances, be regarded as equivalent to a transfer of a totality of assets or part thereof in so far as the effect of such a disposal is the total or partial disposal of the assets of the undertakings concerned. However, in the case giving rise to that judgment, the Court did not have the information necessary to express a view on the applicability of Article 5(8) of the Sixth Directive to a transaction such as the transaction at issue in that case, and left it to the referring court to consider that point.

34 In paragraph 25 of the judgment in *Schriever*, the Court emphasised that, in order to find that there has been a transfer of a business, or of an independent part of an undertaking, for the purposes of Article 5(8) of the Sixth Directive, all of the elements transferred must, together, be sufficient to allow an independent economic activity to be carried on.

35 In that regard it must be stated that, unlike the holding of the assets of an undertaking, the holding of shares in an undertaking is not sufficient to allow an independent economic activity to be carried on.

36 According to the case-law of the Court, the mere acquisition, holding and sale of shares in a company do not, in themselves, amount to an economic activity within the meaning of the Sixth Directive, since 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. Any dividend yielded by that holding is merely the result of ownership of the property (see, to that effect, Case C-60/90 *Polysar Investments Netherlands* [1991] ECR I-3111, paragraph 13; Case C-142/99 *Floridienne and Berginvest* [2000] ECR I-9567, paragraphs 17 and 22; Case C-16/00 *Cibo Participations* [2001] ECR I-6663, paragraph 19; and Case C-496/11 *Portugal Telecom* [2012] ECR, paragraph 32 and the case-law cited).

37 It is otherwise where the holding is accompanied by direct or indirect involvement in the management of the companies in which the holding has been acquired, if that entails carrying out transactions which are subject to VAT, such as the supply of administrative, financial, commercial and technical services (see, to that effect, *Polysar Investments Netherlands*, paragraph 14; *Floridienne and Berginvest*, paragraphs 18 and 19; *Cibo Participations*, paragraphs 20 and 21; and *Portugal Telecom*, paragraphs 33 and 34).

38 Therefore, as the German Government submits, the transfer of shares in a company cannot, irrespective of the size of the shareholding, be regarded as equivalent to the transfer of a totality of assets or part thereof within the meaning of Article 5(8) of the Sixth Directive, unless the holding is part of an independent unit which allows an independent economic activity to be carried out, and that activity is carried on by the transferee. The mere disposal of shares, unaccompanied by the transfer of assets, does not allow the transferee to carry on an independent economic activity as the transferor's successor.

39 Shareholders are not owners of the assets of the undertaking in which they hold their shares; they are owners of the shares and, as such, are entitled to a dividend and to the communication of information, and are involved in the adoption of important decisions for the management of the undertaking. As regards a 30% shareholding in a company, it must be observed that that represents only a limited entitlement in respect of that company.

40 It follows from the foregoing that the transfer of 30% of the shares in a company cannot be regarded as equivalent to the transfer of a totality of assets or part thereof within the meaning of Article 5(8) of the Sixth Directive.

41 That finding is in no way affected by the aim of that provision. In accordance with the case-law of the Court, the specific purpose of Article 5(8) of the Sixth Directive is to facilitate transfers of undertakings or of parts of undertakings by making such transfers simpler and by preventing the resources of the recipient from being overburdened by a disproportionate charge to tax which, in any event, would ultimately be recovered through deduction of the input VAT paid (see *Zita Modes*, paragraph 39, and *Schriever*, paragraph 23).

42 In that regard the Court has held that special treatment is justified in particular by the fact that the amount of VAT to be advanced on the transfer is likely to be particularly large in relation to the resources of the business concerned (*Zita Modes*, paragraph 41).

43 That difficulty does not arise, however, in the context of a transfer of a shareholding, regardless of its size. As is apparent from paragraphs 36 and 37 of the present judgment, the sale of shares either does not amount to an economic activity that is subject to VAT, or is exempt under Article 13B(d)(5) of the Sixth Directive if it is effected in order to secure a direct or indirect involvement in the management of

the company in which the holding has been acquired (Case C-155/94 *Wellcome Trust* [1996] ECR I-3013, paragraph 35). In either case, the person acquiring the shares does not bear the burden of VAT.

44 In the second place, the Court must consider whether the answer given would be different if account is taken of the fact that all the shareholders are selling their shares to the same purchaser at practically the same time, as a result of which the purchaser becomes the owner of 100% of the shares in the undertaking concerned.

45 It must be borne in mind in that regard that, according to the fundamental principle which underlies the VAT system, VAT applies to each transaction by way of production or distribution after deduction of the VAT directly borne by the various cost components (see, in particular, Case C-98/98 *Midland Bank* [2000] ECR I-4177, paragraph 29, and *Abbey National*, paragraph 27).

46 It must also be pointed out that Article 5(8) of the Sixth Directive uses the term 'transferor' in the singular, which implies that it is not envisaged that that provision will apply where a number of transferors are selling their shares to the same transferee.

47 It follows that each transaction must be assessed individually and independently.

48 It is true that the Court held, in paragraph 79 of the judgment in *SKF*, that the fact that the disposal of shares was carried out by way of several successive transactions did not affect its analysis regarding the fiscal treatment to be applied to that disposal.

49 However, as has been stated in paragraph 33 of the present judgment, in *SKF* the Court did not have sufficient information to decide whether Article 5(8) of the Sixth Directive was applicable to the transaction at issue in the main proceedings in that case, and answered by interpreting Article 13B(d)(5) of that directive.

50 In any event, the facts in *SKF* differ from those at issue in the main proceedings in so far as there was no question of a number of vendors having effected successive transactions in favour of the same purchaser.

51 Accordingly, the disposal to a single person of all the shares in a company by all the shareholders of that company cannot be regarded as equivalent to the transfer of a totality of assets within the meaning of Article 5(8) of the Sixth Directive.

52 With regard, in the third place, to the relevance to the answer given of the fact that the transfer of 30% of the shares is closely linked to the management activities carried out by the vendor for the company in which it held its shares, it should be noted, as the Netherlands and United Kingdom Governments point out, that the cessation of the management activities appears to be the direct and logical result of the sale of X's shareholding.

53 It would be otherwise only if the vendor's management activities had been an autonomous part of its own undertaking that could be operated independently by the transferee and for which the transferee had paid a consideration separate from that of the price of the shares. However, in such a case, the transfer of a totality of assets would cover only the management activities, and not the disposal of shares, because the two transactions relate to different undertakings.

54 It must be held, therefore, that the fact that the shares are transferred at the same time as the management activities cease has no bearing on the answer given to the questions referred for a preliminary ruling.

55 Lastly, with a view to giving the referring court a helpful answer, given that the answer to the questions referred for a preliminary ruling is needed in order that the referring court may determine whether there is a right to deduct in the circumstances of the main action, it must be recalled that there is a right to deduct where the input transactions effected have a direct and immediate link with output transactions giving rise to the right to deduct. If that is not the case, it is necessary to examine whether the costs incurred to acquire the input goods or services are part of the general costs linked to the taxable person's overall economic activity. 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 goods or services supplied by the taxable person as part of his economic activities (*Cibo Participations*, paragraphs 31 and 33; *SKF*, paragraph 60; Case C-118/11 *Eon Aset Menidjmunt* [2012] ECR, paragraph 48; and Case C-104/12 *Becker* [2013] ECR, paragraphs 19 and 20).

56 Since the disposal of shares at issue in the main proceedings must be categorised as an exempt transaction under Article 13B(d)(5) of the Sixth Directive, a right to deduct will exist only if the cost of the services supplied to X in relation to that disposal is part of the general costs relating to its overall economic activity, without being incorporated in the sale price of those shares.

57 It is thus for the referring court to determine whether that condition is satisfied, taking into account all the circumstances in which the transactions at issue in the main proceedings were carried out.

58 It is apparent from all those considerations that the answer to the questions put is that Articles 5(8) and/or 6(5) of the Sixth Directive must be interpreted as meaning that the disposal of 30% of the shares in a company to which the transferor supplies services that are subject to VAT does not amount to the transfer of a totality of assets or services or part thereof within the meaning of those provisions, irrespective of the fact that the other shareholders transfer all the other shares in that company to the same person at practically the same time and that that disposal is closely linked to management activities carried out for that company.

Costs

59 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 (Ninth Chamber) hereby rules:

Articles 5(8) and/or 6(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 disposal of 30% of the shares in a company to which the transferor supplies services that are subject to VAT does not amount to the transfer of a totality of assets or services or part thereof within the meaning of those provisions, irrespective of the fact that the other shareholders transfer all the other shares in that company to the same person at practically the same time and that that disposal is closely linked to management activities carried out for that company.

[Signatures]