Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

7 March 2013*

(Value added tax — Directive 77/388/EEC — Exemption of the management of special investment funds — Scope — Occupational retirement pension schemes)

In Case C-424/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the First-tier Tribunal (Tax Chamber) (United Kingdom), made by decision of 8 July 2011, received at the Court on 11 August 2011, in the proceedings

Wheels Common Investment Fund Trustees Ltd,

National Association of Pension Funds Ltd,

Ford Pension Fund Trustees Ltd,

Ford Salaried Pension Fund Trustees Ltd,

Ford Pension Scheme for Senior Staff Trustee Ltd

v

Commissioners for Her Majesty's Revenue and Customs,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A Borg Barthet, E. Levits, J.-J. Kasel and M. Safjan (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 12 September 2012,

after considering the observations submitted on behalf of:

— Wheels Common Investment Fund Trustees Ltd and others, by P. Lasok QC, instructed by A. Brown, Solicitor,

— the United Kingdom Government, by C. Murrell, acting as Agent, and R. Hill, Barrister,

* Language of the case: English.

— the European Commission, by R. Lyal and C. Soulay, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 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') and Article 135(1)(g) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in proceedings between Wheels Common Investment Fund Trustees Ltd and others and the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners') concerning the latter's refusal to exempt fund management services supplied to Wheels Common Investment Fund Trustees Ltd and others from value added tax ('VAT').

Legal context

European Union law

3 The Sixth Directive was repealed by Directive 2006/112, which entered into force on 1 January 2007. Since the period at issue in the main proceedings is between 1 July 2004 and 30 June 2007, both directives are applicable to those proceedings.

4 Article 13B(d)(6) of the Sixth Directive and Article 135(1)(g) of Directive 2006/112 are couched in essentially identical terms. Under those provisions, the Member States are to exempt from VAT the 'management of special investment funds as defined by Member States'.

United Kingdom law

5 At the time material to the main proceedings, Article 135(1)(g) of Directive 2006/112 was implemented by items 9 and 10 of Group 5 of Schedule 9 to the Value Added Tax Act 1994, which exempted:

'9 The management of an authorised unit trust ["AUT"] scheme or of a trust based scheme.

10 The management of the scheme property of an open-ended investment company ["OEIC"].'

6 In order to take account of the decision, made by judgment of 28 June 2007, in Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* [2007] ECR I-5517 ('*Claverhouse*'), the scope of items 9 and 10 was extended, with effect from 1 October 2008, by the Value Added Tax (Finance) (No 2) Order 2008. Those items now exempt the management of collective investment undertakings in the form of an OEIC or AUT and the management of closed-ended collective investment undertakings such as investment trust companies.

7 Note 6 to Group 5 of Schedule 9 to the Value Added Tax Act 1994 provides that 'OEIC' and 'AUT' are defined in the Financial Services and Markets Act 2000.

8 Part XVII of the Financial Services and Markets Act 2000 provides inter alia as follows in sections 235 to 237:

‘235.

Collective investment schemes

(1) In this Part “collective investment scheme” means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.

(2) The arrangements must be such that the persons who are to participate (“participants”) do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions.

(3) The arrangements must also have either or both of the following characteristics –

(a) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled;

(b) the property is managed as a whole by or on behalf of the operator of the scheme.

…

236.

Open-ended investment companies

(1) In this Part “an open-ended investment company” means a collective investment scheme which satisfies both the property condition and the investment condition.

(2) The property condition is that the property belongs beneficially to, and is managed by or on behalf of, a body corporate (“BC”) having as its purpose the investment of its funds with the aim of –

(a) spreading investment risk; and

(b) giving its members the benefit of the results of the management of those funds by or on behalf of that body.

…

237.

Other definitions

…(3) In this Part –

“an authorised unit trust scheme” means a unit trust scheme which is authorised for the purposes of this Act by an authorisation order in force under section 243;

"an authorised open-ended investment company" means a body incorporated by virtue of regulations under section 262 in respect of which an authorisation order is in force under any provision made in such regulations by virtue of subsection (2)(l) of that section;

...'

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

9 Wheels Common Investment Fund Trustees Ltd ('Wheels') is the trustee of a fund pooling for investment purposes the assets of occupational pension schemes established by the Ford Motor Company in order to meet its obligations under national legislation and collective agreements.

10 Each of those schemes provides pensions to a category of former employees, calculated by reference to the final salary of the members of the scheme and their length of service with the company. During their employment, the members of the scheme, which is open to all employees but is not compulsory, pay contributions of a fixed amount deducted from their salary. The employer also makes contributions, in an amount sufficient to ensure funding for the remaining cost of providing pension benefits.

11 At the material time, Capital International Limited provided fund management services to Wheels. In accordance with the provisions of United Kingdom VAT legislation, it charged Wheels VAT on those services and accounted for that VAT to the Commissioners.

12 In September 2007, after delivery of the judgment in *Claverhouse*, Capital International Limited claimed repayment from the Commissioners of the VAT in respect of the fund management services which it had supplied, on the ground that those services came within the exemption laid down in Article 135(1)(g) of Directive 2006/112 or Article 13B(d)(6) of the Sixth Directive, depending on the period concerned.

13 By decision of 2 January 2008, the Commissioners rejected that claim. Wheels thereupon appealed to the First-tier Tribunal (Tax Chamber) against that decision. Whilst, according to the referring tribunal, the services supplied to Wheels are services relating to 'management' within the meaning of the exemption laid down in Article 13B(d)(6) of the Sixth Directive and Article 135(1)(g) of Directive 2006/112, there is doubt as to whether the fund held by Wheels is to be classified as a 'special investment fund' within the meaning of that exemption.

14 In those circumstances, the First-tier Tribunal (Tax Chamber) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Are the words "special investment funds" in Article 13B(d)(6) of the Sixth … Directive and Article 135(1)(g) of Directive 2006/112 capable of including (i) an occupational pension scheme established by an employer that is intended to provide pension benefits to employees and/or (ii) a common investment fund in which the assets of several such pension schemes are pooled for investment purposes in circumstances where, in relation to the pension schemes in question:

(a) the pension benefits receivable by a member are defined in advance in the legal documents creating the scheme (by reference to a formula based on the length of the member's service with the employer and the member's salary) and not by reference to the value of the scheme assets;

(b) the employer is obliged to make contributions to the scheme;

(c) only employees of the employer can participate in the scheme and obtain pension benefits under it (a participant in the scheme is here referred to as a "member");

(d) an employee is free to decide whether or not to be a member;

(e) an employee who is a member is normally obliged to make contributions to the scheme based on a percentage of his salary;

(f) the contributions of the employer and the members are pooled by the scheme trustee and are invested (generally in securities) in order to provide a fund out of which the benefits provided for in the scheme are paid to the members;

(g) if the scheme assets are greater than what is required to fund the benefits provided for under the scheme, the trustee of the scheme and/or the employer may, in accordance with the terms of the scheme and relevant provisions of national law, do any one or combination of the following: (i) reduce the employer's contributions to the scheme; (ii) transfer all or a part of the benefit of the surplus to the employer; (iii) improve the benefits to members under the scheme;

(h) if the scheme assets are less than what is required to fund the benefits provided for under the scheme, the employer is normally obliged to make up the deficit and, if the employer does not, or is unable to do so, the benefits received by members are reduced;

(i) the scheme permits members to make additional voluntary contributions ("AVCs") which are not held by the scheme but are transferred to a third party for investment and the provision of additional benefits based on the performance of the investment made (such arrangements are not subject to VAT);

(j) members have the right to transfer their accrued benefits under the scheme (valued by reference to the actuarial value of those benefits at the time of transfer) to other pension schemes;

(k) the employer's and members' contributions to the scheme are not treated for the purposes of income tax levied by the Member State as income of the members;

(l) pension benefits received by members under the scheme are treated for the purposes of income tax levied by the Member State as income of the members; and

(m) the employer, and not the members of the scheme, bears the cost of charges made for the management of the scheme?

2. In the light of (i) the objective of the exemption in Article 13B(d)(6) of the Sixth … Directive and Article 135(1)(g) of Directive 2006/112, (ii) the principle of fiscal neutrality and (iii) the circumstances set out in Question 1 above:

(a) is a Member State entitled to define, in national law, the funds that fall within the concept of "special investment funds" in such a way as to exclude funds of the type referred to in Question 1 above while including collective investment undertakings as defined in [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), as amended by Directive 2001/108/EC of the European Parliament and of the Council of 21 January 2002 (OJ 2002 L 41, p. 35) ("the UCITS Directive")],

(b) to what extent (if at all) are the following relevant to the question whether or not a fund of the type referred to in Question 1 above is to be identified by a Member State in its national law as a "special investment fund":

(i) the features of the fund (set out in Question 1 above);

(ii) the degree to which the fund is "similar to and thus in competition with" investment vehicles that have already been identified by the Member State as "special investment funds"?

3. If in answer to Question 2(b)(ii) above it is relevant to determine the degree to which the fund is "similar to and thus in competition with" investment vehicles that have already been identified by the Member State as "special investment funds", is it necessary to consider the existence or extent of "competition" between the fund in question and those other investment vehicles as a separate question from the question of "similarity"?'

Consideration of the questions referred

15 By its questions, the national tribunal asks, in essence, whether and under what conditions assets of a retirement pension scheme, and the investment fund in which they are pooled, are a 'special investment fund' within the meaning of Article 13B(d)(6) of the Sixth Directive and Article 135(1)(g) of Directive 2006/112.

16 It is to be noted at the outset that, according to settled case-law, whilst the exemptions provided for, inter alia, in Article 13B(d)(6) of the Sixth Directive and Article 135(1)(g) of Directive 2006/112 are independent concepts of European Union law which must, in principle, be given a common definition whose purpose is to avoid divergences in the application of the VAT system from one Member State to another, so that the Member States cannot alter their content, that is not however the case where the legislature has conferred on the Member States the task of defining certain terms of an exemption (see, to this effect, Case C-169/04 *Abbey National* [2006] ECR I-4027, paragraphs 38 and 39, and *Claverhouse*, paragraphs 19 and 20). The aforesaid provisions confer upon the Member States the task of defining the meaning of 'special investment funds' (see, to this effect, *Abbey National*, paragraphs 40 and 41, and *Claverhouse*, paragraph 43).

17 The power to define thereby accorded to the Member States is, however, limited by the prohibition on undermining the very terms of the exemption that are employed by the European Union legislature (see *Claverhouse*, paragraph 21). A Member State cannot in particular, without negating the very terms 'special investment funds', select from among special investment funds those which are eligible for the exemption and those which are not. Those provisions thus grant it only the power to define, in its domestic law, the funds which meet the definition of 'special investment funds' (see *Claverhouse*, paragraphs 41 to 43).

18 The power accorded to the Member States to define the meaning of 'special investment funds' must also be exercised in compliance with the objectives pursued by the Sixth Directive and Directive 2006/112 and with the principle of fiscal neutrality inherent in the common system of VAT (see *Claverhouse*, paragraphs 22 and 43).

19 In that regard it must be observed, first, that the purpose of the exemption of transactions connected with the management of special investment funds is, particularly, to facilitate investment in securities by means of investment undertakings by excluding the cost of VAT and, in that way, ensuring that the common system of VAT is neutral as regards the choice between direct investment in securities and investment through collective investment undertakings (see *Abbey National*, paragraph 62, and *Claverhouse*, paragraph 45).

20 Second, the principle of fiscal neutrality precludes economic operators carrying out the same transactions from being treated differently in relation to the levying of VAT (see, to this effect, Case C-382/02 *Cimber Air* [2004] ECR I-8379, paragraphs 23 and 24; Case C-280/04 *Jyske Finans* [2005] ECR I-10683, paragraph 39; *Abbey National*, paragraph 56; and *Claverhouse*, paragraph 29).

21 It should also be noted that this principle does not require the transactions to be identical. According to settled case-law the principle also precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (see, inter alia, Case C-109/02 *Commission* v *Germany* [2003] ECR I-12691, paragraph 20; Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] ECR I-1131, paragraph 24; Case C-498/03 *Kingscrest, Associates and Montecello* [2005] ECR I-4427, paragraph 54; Case C-106/05 *L.u.p.* [2006] ECR I-5123, paragraph 32; Case C-246/04 *Turn- und Sportunion Waldburg* [2006] ECR I-589, paragraph 33; Joined Cases C-443/04 and C-444/04 *Solleveld and van den Hout-van Eijnsbergen* [2006] ECR I-3617, paragraph 39; and *Claverhouse*, paragraph 46).

22 It must therefore be determined whether an investment fund in which the assets of a retirement pension scheme are pooled, and which has characteristics such as those displayed by the fund at issue in the main proceedings, is identical to funds that constitute 'special investment funds' within the meaning of Article 13B(d)(6) of the Sixth Directive and Article 135(1)(g) of Directive 2006/112 or is sufficiently comparable with the latter to be in competition with them.

23 Funds which constitute undertakings for collective investment in transferable securities within the meaning of the UCITS Directive are special investment funds (see, to this effect, inter alia Case C-44/11 *Deutsche Bank* [2012] ECR I-0000, paragraph 32). As is clear from Article 1(2) of that directive, undertakings for collective investment in transferable securities are undertakings which, such as AUTs and OEICs (see, to this effect, *Claverhouse*, paragraph 50), have as their sole object, in accordance with the objective pursued by the exemption provided for in Article 13B(d)(6) of the Sixth Directive and Article 135(1)(g) of Directive 2006/112, the collective investment in transferable securities of capital raised from the public.

24 Furthermore, funds which, without being collective investment undertakings within the meaning of the UCITS Directive, display characteristics identical to theirs and thus carry out the same transactions or, at least, display features that are sufficiently comparable for them to be in competition with such undertakings must also be regarded as special investment funds (see, to this effect, *Abbey National*, paragraphs 53 to 56, and *Claverhouse*, paragraphs 48 to 51).

25 However, an investment fund in which the assets of a retirement pension scheme are pooled, such as that at issue in the main proceedings, cannot be regarded as a collective investment undertaking within the meaning of the UCITS Directive. Such a fund is in fact not open to the public but constitutes, as is clear from the order for reference, an employment-related benefit which employers grant only to their employees. Such a fund is thus not identical to funds that constitute 'special investment funds' within the meaning of Article 13B(d)(6) of the Sixth Directive and Article 135(1)(g) of Directive 2006/112.

26 Nor is such an investment fund sufficiently comparable with collective investment undertakings as defined by the UCITS Directive to be in competition with them. A number of characteristics differentiate them, so that they cannot be regarded as meeting the same needs.

27 In particular, the members of a retirement pension scheme such as that at issue in the main proceedings do not bear the risk arising from the management of the investment fund in which the scheme's assets are pooled, unlike private investors with assets in a collective investment undertaking (see, to this effect, *Claverhouse*, paragraph 50). Whilst the pension that may be received by an employee who is a member of a retirement pension scheme such as that at issue in the main proceedings does not depend at all on the value of the scheme's assets and the performance of the

investments made by the scheme's managers, but is defined in advance on the basis of length of service with the employer and of the amount of the salary, the return that can be hoped for by persons who purchase units in a collective investment undertaking depends on the performance of the investments made by the fund's managers over the period for which those persons hold the units.

28 Furthermore, a retirement pension scheme such as that at issue in the main proceedings also differs from a collective investment undertaking from the employer's point of view. The employer is not in a situation comparable to that of an investor in a collective investment undertaking since, even though he too must bear the financial consequences of the investments made by the scheme's managers, the contributions which he pays into the retirement pension scheme are a means by which he complies with his legal obligations towards his employees.

29 Having regard to the foregoing considerations, the answer to the questions referred is that Article 13B(d)(6) of the Sixth Directive and Article 135(1)(g) of Directive 2006/112 must be interpreted as meaning that an investment fund pooling the assets of a retirement pension scheme is not a 'special investment fund' within the meaning of those provisions, management of which may be exempted from VAT in the light of the objective of those directives and the principle of fiscal neutrality, where the members of the scheme do not bear the risk arising from the management of the fund and the contributions which the employer pays into the scheme are a means by which he complies with his legal obligations towards his employees.

Costs

30 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national tribunal, the decision on costs is a matter for that tribunal. 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:

Article 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 and Article 135(1)(g) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that an investment fund pooling the assets of a retirement pension scheme is not a 'special investment fund' within the meaning of those provisions, management of which may be exempted from value added tax in the light of the objective of those directives and the principle of fiscal neutrality, where the members of the scheme do not bear the risk arising from the management of the fund and the contributions which the employer pays into the scheme are a means by which he complies with his legal obligations towards his employees.

[Signatures]