Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 18 April 2013 [1]

Case C-26/12

Fiscale eenheid PPG Holdings BV cs te Hoogezand
v
Inspecteur van de Belastingdienst/Noord/kantoor Groningen

(Request for a preliminary ruling from the Gerechtshof te Leeuwarden (Netherlands))

(VAT — Pension fund set up by an employer as a separate legal entity — VAT on management services relating to the pension fund, invoiced to the employer — Whether deductible — Whether such services exempt from VAT as 'management of special investment funds')

1. A taxable person for VAT purposes has set up a pension fund for its employees. As required by law, the fund is a separate legal entity. In connection with its operation, the employer has contracted and paid for certain management services on which VAT has been invoiced.

2. Two questions arise: is the VAT invoiced to the employer deductible as being directly linked to its taxable activity; in the alternative, is the pension fund a special investment fund, management of which is exempt from VAT?

Relevant EU law

3. In 2001 and 2002, the tax years in issue in the main proceedings, Article 2 of the First VAT Directive [2] defined the VAT system as follows:

'The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged.

On each transaction, value added tax, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components.

…'

1 — Original language: English.

2 — First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14). See now Article 1(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('Directive 2006/112').

4. The Sixth Directive [3] was also applicable at the material time. Article 4 [4] provided, in particular:

‘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 17 of the Sixth Directive [5] read, in so far as is relevant:

‘Origin and scope of the right to deduct

1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;

…

5. As regards goods and services to be used by a taxable person both for transactions … in respect of which value added tax is deductible, and for transactions in respect of which value added tax is not deductible, only such proportion of the value added tax shall be deductible as is attributable to the former transactions.

…’

6. Article 13B of the Sixth Directive [6] provided, in so far as is relevant:

‘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:

…

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

3 — 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).

4 — See now Article 9(1) of Directive 2006/112.

5 — As amended by Article 28f, introduced by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1) and by Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax – scope of certain exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18). See now Articles 167, 168 and 168a of Directive 2006/112.

6 — See now Article 135(1)(g) of Directive 2006/112.

…’

Facts, procedure and questions referred

7. PPG Industries Fiber Glass BV (‘PPG Fiber Glass’) was, at the material time in the main proceedings (tax years 2001 and 2002), part of the Netherlands tax grouping PPG Holdings BV (‘PPG Holdings’).

8. Netherlands law required employers to make provision for retirement pensions for their employees. Any fund set up for that purpose was required by law to be separate from PPG for all legal purposes [7] and thus, necessarily, for VAT purposes. It could not form part of the PPG Holdings tax group. It transpired at the hearing that, under Netherlands law as it applied at the material time, employers were able to choose between setting up such a fund themselves or outsourcing their obligations to an insurance company, into which they would pay their contributions and which would assume responsibility for paying pensions to retired staff. There was, however, no option whereby they could have retained pension provision in-house.

9. For that purpose, the companies in PPG Holdings set up a fund [8] (‘the fund’) into which they paid contributions. Pensions and financing costs were covered by those contributions and by investment income. The employees made no contributions. It appears from the observations that the fund was a defined-benefit scheme, that is to say, one in which the amount of benefits is determined by a pre-established formula and does not vary according to investment returns.

10. PPG Fiber Glass contracted with various service providers for administration, asset management, auditing and consultancy services to be provided to the fund. It assumed responsibility for paying for those services, including the VAT charged.

11. The amounts of VAT invoiced in 2001 and 2002 were: for administration of the pension fund, EUR 18 102.19; for asset management, EUR 61 843.61; for auditing, EUR 5 572.58; for administration advice, EUR 19 950; for consultancy, EUR 33 835.85 – a total of EUR 139 304.23.

12. In its VAT returns, PPG Holdings deducted all those amounts from its output tax. The tax authority considered they were not deductible and issued a reassessment. A challenge to the reassessment was dismissed and the dispute is now before the Gerechtshof te Leeuwarden (Leeuwarden Regional Court). PPG Holdings contends (i) that the expenditure, being for the benefit of its employees, formed part of the overheads of its taxable economic activity and should thus be deductible pursuant to Article 17(2) of the Sixth Directive and (ii), in the alternative, that the fund is a special investment fund within the meaning of Article 13B(d)(6), so that its management must be exempted from VAT.

13. The Gerechtshof seeks a preliminary ruling on two questions:

‘(1) Can a taxable person who, pursuant to national pensions legislation, has established a separate pension fund for the purpose of safeguarding the pension rights of his employees and former employees, as participants in the fund, deduct the tax which he [has paid] on the basis of services supplied to him in respect of the implementation of the pension provision and the operation of the pension fund, pursuant to Article 17 of [the Sixth Directive]?

7 — That requirement is now part of EU law. Article 8 of Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ 2003 L 235, p. 10) requires Member States to ensure legal separation between ‘sponsoring undertakings’ and ‘institutions for occupational retirement provision’.

8 — Stichting Pensioenfonds PPG Industries Nederland.

(2) Can a pension fund, established with the objective of providing a pension for the participants in the pension fund at the lowest possible cost, where assets are brought to and invested in the pension fund by or on behalf of the participants, and where the resulting proceeds are shared, be classified as a "special investment fund" within the terms of Article 13B[(d)]6 of [the Sixth Directive]?'

14. Written observations have been submitted by PPG, the Netherlands, the United Kingdom and the European Commission, all of whom presented oral argument at the hearing on 6 February 2013.

Assessment

Question 2

15. It is clear from the order for reference that, in the national proceedings, question 2 arises only if question 1 is answered in the negative. Moreover, question 2 has now essentially been answered by the Court's recent judgment in *Wheels Common Investment Fund*.[9]

16. In that judgment, the Court held that an investment fund pooling the assets of a retirement pension scheme is not 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, 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.

17. Consequently, since the fund in the present case appears to meet all three criteria in that ruling – it pools the assets of a retirement pension scheme (or schemes), the members do not bear the risk arising from management and the employer makes contributions in order to comply with his legal obligations towards his employees – the services in issue in the main proceedings are not to be exempted from VAT under Article 13B(d)(6) of the Sixth Directive.

Question 1

18. From what was said at the hearing, it appears that the fund was set up jointly by all the companies in PPG Holdings to provide pensions for their employees, but that, within that grouping, PPG Fiber Glass was the company which contracted and paid for the services in issue. Moreover, the wording of the question makes it clear that, from the referring court's point of view, no distinction is to be drawn between the grouping and its members. I shall therefore address the issue on the basis that a single employer set up a single pension fund for its own employees, with contributions paid in, and costs assumed, only by the employer, which I shall refer to henceforth simply as 'PPG'.

19. I further note that setting up a pension fund and arranging for its management necessarily involve various costs. In the present case those costs were borne directly by PPG but, if they had been borne directly by the fund, they would still have been borne indirectly by PPG as the sole contributor to the fund.

9 — Case C-424/11 [2013] ECR.

20. The question is whether the services in issue in the main proceedings – namely, administrative, management, consultancy and auditing services relating to the fund but obtained and paid for by PPG – were used for the purposes of PPG's taxable transactions within the meaning of Article 17(2) of the Sixth Directive.

21. It is settled case-law that the right of deduction provided for in Article 17 of the Sixth Directive is an integral part of the VAT scheme and in principle may not be limited. It must be exercised immediately in respect of all the taxes charged on transactions relating to inputs. The deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT. [10]

22. That case-law is none the less subject to certain provisos. For VAT to be deductible, the input transactions must have a direct and immediate link with the output transactions giving rise to a right of deduction. Thus, the right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct. A taxable person also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole. There must always be such a link between the goods and services acquired and the output transactions in respect of which VAT is deductible. The ultimate aim pursued by the taxable person is irrelevant in that respect. [11] However, to the extent that input VAT relating to expenditure incurred by a taxpayer is connected with activities which, in view of their non-economic nature, do not fall within the scope of the Sixth Directive, it cannot give rise to a right to deduct. [12]

23. In the present case, it may be argued that the costs involved in setting up a pension fund for employees and arranging for its management and administration have no direct and immediate link with the economic activity or taxable output transactions of an employer such as PPG, whose business is to sell a variety of products. That is, essentially, the position of the Netherlands Government. On another view, however, PPG is legally required to make pension provision for its employees, without whom it could not carry on business or make taxable output transactions, so that the costs of doing so are necessarily components of the price of the goods which it supplies. That view is put forward by PPG and the Commission. The United Kingdom submits that some of the costs involved (those of setting up the fund and ongoing administrative costs relating to employees' membership of the fund) are attributable to PPG's business and thus give rise to a right of deduction. However, the remainder relate solely to the fund, a separate entity for tax purposes, and are therefore not relevant to PPG's right of deduction.

24. I have considerable sympathy with the view put forward by PPG and the Commission. If an employer's outputs are all subject to VAT, his payroll costs are by that token components of the costs of those outputs, without its being necessary to establish a direct and immediate link between specific costs and specific outputs. The same is true of any sums paid to provide retirement pensions, which are a form of deferred salary. However, such costs do not themselves bear VAT, so that there is no input tax which could be deducted from output tax. In that regard, it was accepted by all those present at the hearing that, if PPG had contracted out its pension arrangements to an insurance

10 — Case C-465/03 *Kretztechnik* [2005] ECR I-4357, paragraphs 33 and 34 and case-law cited.

11 — See Case C-496/11 *Portugal Telecom* [2012] ECR, paragraphs 36 to 38 and case-law cited. See also Case C-104/12 *Becker* [2013] ECR, paragraph 19 et seq. and case-law cited.

12 — Case C-437/06 *Securenta* [2008] ECR I-1597, paragraph 30.

company and if that company had invoiced PPG for any connected services which bore VAT,[13] that tax would have been deductible from PPG's output tax. That being so, the fact that 'the principle of fiscal neutrality, which is a fundamental principle of the common system of VAT, precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes'[14] would seem to require that VAT on the services in issue in the present case should be similarly deductible.

25. However, the submissions of the two Member States, in particular those of the United Kingdom, appear to me to be correct in their emphasis on the legal and fiscal separation between the fund and PPG, leading to the conclusion that the VAT in issue cannot be deducted in circumstances such as those of the main proceedings.

26. The reasons for requiring such legal and fiscal separation are obvious – to protect beneficiaries not only against the employer's insolvency but also against any possibility that the fund's assets might be 'raided' to deal with even a temporary cashflow problem or might be otherwise diverted from their intended purpose. Separation is now required by EU legislation, but it was already imposed by Netherlands law at the material time. The need for impregnable firewalls between the respective assets of PPG and the fund pleads strongly in favour of avoiding also any kind of fiscal osmosis between the two.

27. It can, of course, be argued that it was PPG which contracted and paid for the services in issue, so that they should be linked to PPG's economic activity (which appears to be principally, if not exclusively, taxable) rather than to the activity of the fund (which, consisting as it does essentially of receiving pension contributions from PPG and income from investments, and of making pension payments to beneficiaries, appears not to comprise any taxable element).

28. However, I find it impossible to ignore or dismiss the fact that the services were acquired for the fund's purposes of obtaining income from its investments, and were thus directly and immediately linked to the fund's activity, and only indirectly and ultimately to that of PPG. Even if PPG's economic activity is the taxable activity with which the services are most closely (albeit only indirectly) connected, the fact remains that there is a direct and immediate link with the fund's (non-taxable) activity, which stands between the services acquired and PPG's economic activity. And whether input tax can be deducted or not depends on the nature of the activity with which the goods or services on which it is due have a direct and immediate link. What counts must be the closest link, not the closest taxable link. If that were not so, the principle that input tax cannot be deducted when the inputs are used for exempt transactions or transactions falling outside the scope of VAT might easily be circumvented.

29. The situation may be more clearly illustrated by the example given by the United Kingdom at the hearing. If, instead of investing solely in securities or other financial products, the fund were to invest in immovable property in order to obtain rental income (and that is not an implausible hypothesis) then its leasing activity would be subject to VAT if (as is also plausible) it were to opt for taxation under Article 13C(a) of the Sixth Directive.[15] In that event, any auditing, consultancy, management or administration services which the fund used for the purposes of its leasing activity would be directly attributable to that taxable activity, and VAT charged on those services would be deductible from the

13 — It should, however, be remembered that Article 13B(a) of the Sixth Directive exempted 'insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents' (see now Article 135(1)(a) of Directive 2006/112).

14 — See, for example, Case C-29/08 *SKF* [2009] ECR I-10413, paragraph 67 and case-law cited. On the meaning of 'fiscal neutrality' in the context of VAT, see my Opinion in Case C-44/11 *Deutsche Bank* [2012] ECR, footnote 18.

15 — See now Article 137(1)(d) of Directive 2006/112.

VAT for which the fund had to account on its outputs. It would not be deductible from PPG's output tax, because the services would have been used for the purposes of the fund's – and not PPG's – taxable transactions, even if PPG had paid for them. As regards the chain of attribution, I cannot see that the situation can be any different simply because the fund's activity is not subject to VAT.

30. Thus, it seems to me that the fact that the services were used by the fund for the purposes of its own activity, which is not only radically different but also legally and fiscally separate from that of PPG, must be decisive. The fact that PPG paid for the services cannot be relevant. That circumstance may be regarded in three possible ways: as a double transaction of receipt and supply of services, as contemplated in Article 6(4) of the Sixth Directive,[16] in which case PPG would have to pass on the tax to the fund; as consideration obtained from a third party, constituting the taxable amount for the purposes of the fund's acquisition of the services, as contemplated in Article 11A(1)(a) of the Sixth Directive;[17] or as a gift from PPG to the fund, which would fall outside the scope of VAT. It cannot, however, mean that PPG acquired the services for the purposes of its own taxable transactions.

31. I have mentioned the principle of fiscal neutrality, which (in one sense) precludes treating similar supplies, in competition with each other, differently for VAT purposes. I have indicated also that, by contracting its pension scheme out to an insurance company rather than setting up its own fund, PPG might have been able to deduct any input VAT charged to it on services received in that regard (although there is no indication as to how much VAT might have been involved). However, that circumstance, viewed in the light of the principle of fiscal neutrality, does not alter the conclusion I have reached. As was pointed out in *Deutsche Bank*,[18] that principle is not a rule of primary law, and partly competing activities may sometimes receive different VAT treatment. The limits of the principle are apparent, moreover, from the Court's consistent case-law to the effect that taxable persons may choose to structure their business so as to limit their VAT liability[19] – such structuring would be impossible if all competing activities received the same VAT treatment.

32. However, I would stress again that my view is based on the fact that the services in issue were consumed by the fund for the purposes of its own activity, which is distinct from PPG's economic activity, and that it is legally and fiscally separate from PPG. I accept that costs incurred by an employer in making pension provision for his staff are directly and immediately linked to his economic activity as a whole (so that VAT on those costs may be deductible in appropriate circumstances) *when the costs relate to goods or services consumed by the employer*. I therefore agree with the United Kingdom's further submission that PPG may be in a position to deduct VAT on any inputs acquired for the purposes of setting up the fund, enrolling employees in the fund, ensuring that its own contributions are made timeously, and so on. Such activities fall within the sphere of PPG's activity and not within that of the separate fund.

Conclusion

33. In the light of all the foregoing considerations, I am of the opinion that the Court should rule as follows in reply to the questions raised by the Gerechtshof te Leeuwarden:

(1) On a proper construction of Article 17 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, a taxable person who has established a pension fund as a separate entity for legal and fiscal purposes, in order to safeguard the pension rights of his employees and former employees, may not deduct the tax which he has paid on

16 — See now Article 28 of Directive 2006/112.

17 — See now Article 73 of Directive 2006/112.

18 — Cited in footnote 14, paragraph 45 of the judgment; point 60 of my Opinion and case-law cited.

19 — See, most recently, Case C-103/09 *Weald Leasing* [2010] ECR I-13589, paragraph 27 and case-law cited.

services supplied to that fund in connection with its management and operation. Such tax may be deducted only by the fund itself, from any tax which it is liable to pay on its own taxable transactions.

(2) An investment fund pooling the assets of a retirement pension scheme is not a special investment fund within the meaning of Article 13B(d)(6) of Directive 77/388, management of which may be exempted from value added tax in the light of the objective of that directive 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.