Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 24 October 2013 [1]

Case C-461/12

Granton Advertising BV
v
Inspecteur van de Belastingdienst Haaglanden/kantoor Den Haag

(Request for a preliminary ruling from the Gerechtshof 's-Hertogenbosch (Netherlands))

(Tax legislation — Value added tax — Article 13(B)(d)(3) and (5) of Sixth Directive 77/388/EEC — Tax exemption for transactions concerning negotiable instruments and securities — Issuing of discount cards)

I – Introduction

1. This request for a preliminary ruling once again relates to the difficulties caused in the field of value added tax (VAT) law by complex distribution systems. [2] The tax treatment of special discount cards, which forms the subject-matter of the dispute in the main proceedings, touches on two problematic areas of European Union VAT law.

2. The first area relates to the purpose of exempting financial transactions from tax, which remains one of the big mysteries associated with VAT law. This is because, as the Committee on Economic and Monetary Affairs of the European Parliament recently observed, the precise reasons for that exemption were never clearly spelled out. [3]

3. The second area also touched on by the present case concerns questions relating to the treatment of vouchers for the purposes of VAT. In this regard, the Commission noted only recently more or less that the business world has moved on and that the provisions of VAT law are no longer able to keep pace with those changes. [4]

4. The Court now has the opportunity in the present case to further develop and clarify its case-law in those problematic areas of VAT law in order to dispel the confusion on the part of the EU institutions and the alleged inadequacy of the EU rules.

1 — Original language: German.

2 — See most recently in this regard my Opinion of 13 September 2012 in Case C-310/11 *Grattan*, pending before the Court.

3 — Report of the Committee on Economic and Monetary Affairs of 15 September 2008 on the proposal for a Council directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services, A6-0344/2008, p. 22.

4 — See Commission proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers, published without a date or document number on the website: http://ec.europa.eu/taxation_customs/taxation/vat/key_documents/legislation_proposed/index_en.htm (accessed on 5 October 2013), p. 2.

II – Legal framework

5. For the purposes of the period relevant to the dispute in the main proceedings, that is to say between 2001 and 2005, Sixth Council Directive 77/338/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 [5] ('the Sixth Directive') governs EU law on turnover tax.

6. Pursuant to Article 13(B)(d) of the Sixth Directive, Member States are to exempt, inter alia, the following from tax:

'…

3. transactions including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring;

…

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

— documents establishing title to goods,

— the rights or securities referred to in Article 5(3);

…'

7. The Netherlands Law on turnover tax (Wet op de omzetbelasting) is based on those provisions of the Sixth Directive.

III – The dispute in the main proceedings and procedure before the Court

8. The dispute in the main proceedings essentially concerns an additional assessment to VAT for the period 2001 to 2005 in the amount of EUR 643 567. That assessment is addressed to the Netherlands company Granton Advertising BV ('Granton Advertising'), which during the abovementioned period sold 'Granton cards' at a price of between EUR 15 and EUR 25 and — in the view of the tax authority — incorrectly treated those transactions as tax-exempt.

9. For a fixed period of time, the holder of a Granton card was entitled to discounts in connection with the use of specific supplies provided by specific undertakings, which were listed in detail on the card. Those supplies included particular offers from, for example, restaurants, cinemas and hotels. One typical discount consisted in being able to purchase two items for the price of one. However, the Granton card did not grant any entitlement to money or to the use of supplies without having to pay for them.

10. The undertakings specified on the card had entered into a contractual agreement with Granton Advertising to grant the discounts. Granton Advertising was not required to pay the undertakings in return for the grant of those discounts.

5 — OJ 1977 L 145, p. 1.

11. Before national authorities and courts Granton Advertising has claimed that the sale of Granton cards is tax-exempt. The court now seised of the proceedings, the Gerechtshof 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch), takes the view that the interpretation of the Sixth Directive is crucial in that regard. Pursuant to Article 267 TFEU, it has therefore referred the following questions to the Court:

'1. Should the expression "other securities" in Article 13(B)(d)(5) of the Sixth Directive be interpreted as covering a Granton card, being a transferable card which is used for the (partial) payment for goods and services, and if so, is the issuing and sale of such a card therefore exempt from the levying of turnover tax?

2. If not, should the expression "other negotiable instruments" in Article 13(B)(d)(3) of the Sixth Directive be interpreted as covering such a Granton card, and if so, is the issuing and sale of such a card therefore exempt from the levying of turnover tax?

3. If a Granton card is an "other security" or "other negotiable instrument" in the aforementioned sense, is it important for the question of whether the issuing and sale thereof is exempt from the levying of turnover tax that, when that card is used, a levy on a proportionate part of the fee paid for it is, for all practical purposes, illusory?'

12. In the procedure before the Court, written observations were submitted by the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the Commission.

IV – Legal assessment

13. Together with all the parties who have made submissions before the Court, I am of the opinion that a Granton card is neither an 'other security' within the meaning of Article 13(B)(d)(5) of the Sixth Directive (see in this regard A below) nor an 'other negotiable instrument' within the meaning of Article 13(B)(d)(3) of that directive (see in this regard B below). Although, in the light of those conclusions, there is no longer any need to answer the third question, I will also consider it in the alternative under C below.

A – *Tax exemption for transactions in securities pursuant to Article 13(B)(d)(5) of the Sixth Directive*

14. By its first question, the referring court is asking whether a Granton card is an 'other security' within the meaning of Article 13(B)(d)(5) of the Sixth Directive and whether the sale of such a card is therefore exempt from VAT.

15. In accordance with case-law, two general requirements must be satisfied in order for a transaction to be exempt from VAT under Article 13(B)(d)(5) of the Sixth Directive. First, the transaction must be effected 'on the market in marketable securities' and, second, it must alter the legal and financial situation as between the contracting parties.[6] It is sufficient in that regard that the transaction is simply liable to create, alter or extinguish contracting parties' rights and obligations in respect of securities.[7]

6 — Case C-29/08 *SKF* [2009] ECR I-10413, paragraph 48; Case C-540/09 *Skandinaviska Enskilda Banken* [2011] ECR I-1509, paragraph 30; Case C-259/11 *DTZ Zadelhoff* [2012] ECR, paragraph 22; and Case C-44/11 *Deutsche Bank* [2012] ECR, paragraph 36. See also Case C-350/10 *Nordea Pankki Suomi* [2011] ECR I-7359, paragraph 26.

7 — *Skandinaviska Enskilda Banken*, cited in footnote 6, paragraph 31 et seq.; *DTZ Zadelhoff*, cited in footnote 6, paragraph 23; and *Deutsche Bank*, cited in footnote 6, paragraph 37. See also Case C-235/00 *CSC Financial Services* [2001] ECR I-10237, paragraph 33.

16. The United Kingdom appears to wish to infer from that case-law that, in the present case, the tax exemption provided for under Article 13(B)(d)(5) of the Sixth Directive therefore does not apply, if only because the issuing of the Granton card does not in itself alter the legal and financial situation as between the contracting parties.

17. It must, however, be made clear that it is not the security itself which has to alter the legal and financial situation as between the contracting parties but rather the transaction, which must 'be in' a security for the purposes of Article 13(B)(d)(5) of the Sixth Directive. This normally occurs when a security is sold, which obviously alters the legal and financial situation as between the contracting parties in respect of the security, but this may also be the case in connection with a share underwriting guarantee. [8] Since in the present case the Granton cards were sold, there was in any case a change in the legal and financial situation as between the contracting parties in relation to the Granton card.

18. Consequently, the only question raised in the present case is whether the sale of the cards constitutes a transaction 'on the market in marketable securities'. In order to be such a transaction, the Granton card must be a security.

19. The Court has not yet defined what constitutes a security for the purposes of the tax exemption provided for under Article 13(B)(d)(5) of the Sixth Directive. In this connection, two questions are raised in principle: what types of rights come under the concept of a 'security' and does such a right have to be evidenced, that is to say associated with a particular document or other object?

20. The second of those questions is irrelevant to the dispute in the main proceedings, since in any event the Granton card attests to a right because it has to be presented to the undertaking in question in order to make use of the rights associated with it. It is, however, necessary to examine whether the right afforded by the Granton card, that is to say the entitlement to a discount in respect of specific supplies provided by specific undertakings, is a right which comes under the concept of a 'security' within the meaning of Article 13(B)(d)(5) of the Sixth Directive.

21. Since the wording of that provision is rather vague, that point must be clarified by reference to the scheme and to the objectives of the provision.

1. Scheme

22. The Kingdom of the Netherlands has rightly pointed out that, in order to interpret the concept of a 'security', account must be taken of the 'shares, interests in companies or associations' and 'debentures' explicitly mentioned in the provision. This is because it is clear from the wording 'and other securities' that the abovementioned rights are also securities. In view of that fact, it is clear first and foremost that two types of rights are covered by the concept of a 'security': shareholding rights in a company and rights to money as against a debtor.

23. Furthermore, the United Kingdom is right to submit that derivatives of such rights, such as for example options and futures, are likewise securities within the meaning of Article 13(B)(d)(5) of the Sixth Directive. Rights which — subject to certain conditions — afford a shareholding right in a company or a right to money as against a debtor fall within the concept of tax-exempt derivatives. The fact that rights of this kind come under the concept of a 'security' is confirmed by Article 3(1) of Regulation (EC) No 1777/2005, [9] which provides that the sale of certain options is covered by the tax exemption laid down in Article 13(B)(d)(5) of the Sixth Directive. It is true that, pursuant to

8 — *Skandinaviska Enskilda Banken*, cited in footnote 6, paragraph 33.

9 — Council Regulation (EC) No 1777/2005 of 17 October 2005 laying down implementing measures for Directive 77/388/EEC on the common system of value added tax (OJ 2005 L 288, p. 1).

Article 23 thereof, that regulation did not apply in relation to the period at issue in the dispute in the main proceedings. However, as early as 2001, the vast majority of the VAT Committee took the view that transactions involving options negotiable on regulated markets are exempt from VAT under Article 13(B)(d) of the Sixth Directive. [10]

24. In addition, it is true that it must be inferred from the exclusion applicable to documents establishing title to goods laid down in the first indent of Article 13(B)(d)(5) of the Sixth Directive that, in principle, rights to the supply of goods may also come under the concept of a 'security'. However, transactions concerning documents establishing title to goods are quite specifically not to be exempt.

25. The additional exclusion provided for in the second indent excludes the rights or securities referred to in Article 5(3) of the Sixth Directive from the tax exemption. Under point (c) of that provision, Member States may, for example, consider shares or interests equivalent to shares giving the holder thereof *de jure* or *de facto* rights of ownership or possession over immovable property to be tangible property. This therefore means, in specific circumstances, treating the transfer of rights in a company, which in principle constitutes a supply of services within the meaning of Article 6 of the Sixth Directive, [11] as the transfer of the immovable property itself and therefore as a supply of goods within the meaning of Article 5 of the Sixth Directive.

26. The Court has held in that regard that that exclusion from the tax exemption does not apply where the Member State concerned has not made use of the possibility afforded by Article 5(3)(c) of the Sixth Directive. [12] It follows from this that the rights mentioned in the exclusion laid down in the second indent may also in principle form the subject-matter of a security which is exempt under Article 13(B)(d)(5) of the Sixth Directive. However, since the exclusion laid down in the second indent refers not just to point (c) but to the whole of the third paragraph of Article 5, all of the rights referred to in that paragraph would have to be covered by the concept of a 'security'. Nevertheless, it is not only point (c) of Article 5(3) which contains descriptions of rights in a company afforded by the right of ownership over immovable property. Points (a) and (b) also refer to interests in immovable property as well as rights *in rem* giving the holder thereof a right of user over immovable property, without laying down any requirement that those rights are afforded solely by virtue of a holding in a company.

27. Conversely, there is no requirement to interpret the provisions in question to the effect that, on account of that broad reference in the second indent of the tax exemption to Article 5(3) of the Sixth Directive as a whole, not only do shareholding rights in a company, rights to money as against a debtor and the derivatives of such rights constitute rights which may form the subject-matter of a security, but any rights over immovable property may, in principle, likewise do so. The reference may in fact also be interpreted as meaning that it is intended to cover only those cases referred to in Article 5(3) which, on the basis of the general definition, come under the concept of a 'security' in the first place.

28. It must therefore be held that, having considered the scheme of the provisions, the concept of a 'security' within the meaning of Article 13(B)(d)(5) of the Sixth Directive in any event encompasses the following rights: shareholding rights in a company, rights to money as against a debtor and the derivatives of those rights. Since the first two types of rights are expressly referred to in the provision, the words 'other securities' therefore refer to the derivatives of those rights.

10 — Guideline resulting from the 63rd meeting of 17 July 2001 — TAXUD/2441/01; see, with regard to the significance of the guidelines of the VAT Committee, my Opinion in Case C-155/12 *RR Donnelley Global Turnkey Solutions Poland* [2013] ECR, point 47 et seq.

11 — See the first indent of the second subparagraph of Article 6(1) of the Sixth Directive.

12 — *DTZ Zadelhoff*, cited in footnote 6, paragraph 42.

2. Objectives

29. As I will show in what follows, that conclusion is also not called into question by the objectives of the tax exemption laid down in Article 13(B)(d)(5) of the Sixth Directive.

30. As Advocate General Jääskinen has already noted, the purpose of exempting financial transactions from tax is unclear, in particular since the travaux préparatoires do not deal with that point. [13]

31. In addition, to date the Court has approached any finding of the objectives of those exemptions only on a rudimentary basis. It is true that there are multiple instances in case-law of the finding that the purpose of the various tax exemptions for financial transactions laid down in Article 13(B)(d) of the Sixth Directive was to avoid both an increase in the cost of consumer credit and the difficulties connected with determining the taxable amount. [14] However, that attempt to provide an explanation may be unsatisfactory in relation to those exemptions which are neither concerned with the grant of a loan nor cause any discernible difficulties connected with determining the taxable amount.

32. Both points are true of the tax exemption for transactions in securities pursuant to Article 13(B)(d)(5) of the Sixth Directive which is to be examined in the present case. That exemption does not have any impact on the cost of consumer credit; nor are there any difficulties connected with determining the taxable amount in, for example, the case of the sale of a security, since — pursuant to Article 11(A)(1)(a) of the Sixth Directive — that amount can consist simply of the sale price.

33. Only recently, Advocate General Sharpston was ultimately unable to determine the objectives of the tax exemption for transactions in securities, [15] and I too can find no satisfactory explanation for it. It may be inferred from the case-law of the Court on the purpose of the tax exemption for the management of investment funds laid down in Article 13(B)(d)(6) of the Sixth Directive that the exemption for transactions in securities is intended to exempt capital investments from VAT. [16] However, to regard this as the sole purpose would be contrary to the case-law of the Court, in accordance with which a group's strategic disposal of a shareholding is also covered by the tax exemption. [17]

34. In such an unclear situation, it is appropriate to recall a principle which the Court has repeated on countless occasions in its settled case-law: the provisions in the Sixth Directive which grant exemptions from tax must be interpreted strictly since they constitute exceptions to the general principle that VAT is levied on all goods or services supplied for consideration by a taxable person. [18]

35. It is true that, in its case-law, the Court later refined that principle by adding the restriction that a tax exemption must not however be interpreted so strictly that the exemptions are deprived of their intended effect; the interpretation must therefore be consistent with the objectives pursued by those exemptions. [19] However, if — as in the present case of the tax exemption provided for in Article 13(B)(d)(5) of the Sixth Directive — such an objective cannot be identified, the principle of the strict interpretation of tax exemptions must be applied without restriction.

13 — Opinion in Case C-540/09 *Skandinaviska Enskilda Banken*, cited in footnote 6, point 22.

14 — Case C-455/05 *Velvet & Steel Immobilien* [2007] ECR I-3225, paragraph 24; Case C-242/08 *Swiss Re Germany Holding* [2009] ECR I-10999, paragraph 49; and *Skandinaviska Enskilda Banken*, cited in footnote 6, paragraph 21. See also Joined Cases C-231/07 and C-232/07 *Tiercé Ladbroke* [2008] ECR I-73, paragraph 24.

15 — Opinion in Case C-44/11 *Deutsche Bank*, cited in footnote 6, point 36 et seq., point 51 et seq. and the case-law and literature cited.

16 — Case C-424/11 *Wheels Common Investment Fund Trustees and Others* [2013] ECR, paragraph 19 and the case-law cited.

17 — *SKF*, cited in footnote 6, paragraph 42 et seq.

18 — See, for example, Case C-185/89 *Velker International Oil Company* [1990] ECR I-2561, paragraph 19, and Case C-91/12 *PFC Clinic* [2013] ECR, paragraph 23.

19 — See, for example, Case C-45/01 *Dornier* [2003] ECR I-12911, paragraph 42, and *PFC Clinic*, cited in footnote 18, paragraph 23.

36. In those circumstances, there are no grounds for regarding the grant of rights other than shareholding rights in a company, rights to money as against a debtor and the derivatives of those rights as securities within the meaning of that tax exemption. In addition, in view of the reference contained in the second indent of Article 13(B)(d)(5) of the Sixth Directive, the strict interpretation required likewise precludes any interests in immovable property from coming under the concept of a 'security'. [20]

3. Interim conclusion

37. A Granton card does not afford a shareholding right in a company or confer entitlement to a monetary payment. Nor does it grant such rights in the form of a derived right, since the card is not concerned with a conditional shareholding right in a company or a right to a monetary payment, but rather simply enables services to be acquired at a reduced price. A discount card such as the Granton card is therefore not an 'other security' within the meaning of Article 13(B)(d)(5) of the Sixth Directive, meaning that the sale of such a card is not tax-exempt under that provision.

B – *The tax exemption for transactions concerning negotiable instruments pursuant to Article 13(B)(d)(3) of the Sixth Directive*

38. The second question referred seeks to determine whether the Granton card is an 'other negotiable instrument' within the meaning of Article 13(B)(d)(3) of the Sixth Directive and whether the sale of such a card is therefore exempt from VAT.

39. In addition to transactions connected with the management of bank accounts, Article 13(B)(d)(3) of the Sixth Directive exempts transactions 'concerning … debts, cheques and other negotiable instruments'.

40. As both the Kingdom of the Netherlands and the United Kingdom have rightly pointed out, each of the examples mentioned in the provision affords a right to a particular sum of money. It is therefore clear that 'other negotiable instruments' is likewise to be understood to mean only those rights which — in the absence of a debt or a cheque — confer an entitlement to a particular sum of money.

41. Such an approach is also consistent with the objectives which I attribute to the exemption of transactions concerning negotiable instruments. In my view, such instruments are rights which are regarded in the course of trade as being similar to money and which are to be treated for VAT purposes in the same way as payments of money. Payments of money are admittedly not taxed as such, but are rather simply the consideration for a taxed supply, either because they are neither a supply of goods nor a supply of services within the meaning of Article 2(1) of the Sixth Directive, [21] or because they are non-taxable by virtue of Article 13(B)(d)(4) of the Sixth Directive.

42. However, a card such as the Granton card, which simply confers an entitlement to a discount when procuring specific supplies, is neither concerned with a right to a particular sum of money, nor is it likely to be regarded in the course of trade as similar to money.

43. The second question must therefore be answered to the effect that a discount card such as the Granton card is not an 'other negotiable instrument' within the meaning of Article 13(B)(d)(3) of the Sixth Directive. That tax exemption therefore also does not apply to the sale of Granton cards.

20 — See points 25 to 27 above.

21 — This, I would argue, is how Case C-172/96 *First National Bank of Chicago* [1998] ECR I-4387 is to be understood; for further details, see Dobratz, *Leistung und Entgelt im Europäischen Umsatzsteuerrecht*, 2005, p. 47 et seq. and p. 153 et seq.

C – Taxation of the use of a Granton card

44. By its third question, the referring court is ultimately asking what is the influence on a tax exemption for the Granton card of the fact that, when that card is used, a levy on a proportionate part of the fee paid for it is, for all practical purposes, illusory.

45. This question is admittedly put by the referring court only in the event that the Granton card is an 'other security' or an 'other negotiable instrument' within the meaning of Article 13(B)(d)(5) or (3) of the Sixth Directive. Since, as has been shown above, that is not the case, the Court is therefore not required to answer this question.

46. Nevertheless, I consider some clarification on this matter to be expedient, since the question put by the referring court might be based on incorrect assumptions about the treatment of discount cards or vouchers for VAT purposes. The Commission rightly indicated that, in this respect, observance of the case-law of the Court on the use of vouchers which confer an entitlement to a discount when they are used, and which to that extent are comparable to the Granton card at issue here, is essential.

47. The use of a Granton card with a view to procuring the supplies specified on it does not result in VAT being levied at the time of its use. Pursuant to Article 11(A)(1)(a) of the Sixth Directive, the taxable amount in relation to the supplies procured when the card is used is simply the price actually payable by the user of the Granton card; that price alone constitutes the associated consideration.

48. Indeed, in its case-law, the Court has acknowledged only two cases in which, when a voucher is used to reduce the normal price of a service, the voucher itself has a value and, consequently, the taxable amount is higher than the money paid.

49. This is the case, firstly, where the taxable person who accepts a money-off voucher is able to exchange that voucher with a third party for money.[22] In those circumstances, the voucher obtained by the taxable person has a monetary value to that person, and that monetary value must be considered to be a means of payment when determining the taxable amount.[23]

50. Secondly, a money-off voucher is relevant to the determination of the taxable amount upon the use of that voucher where the taxable person who accepts it had itself previously sold the voucher. In this situation, the voucher is again to be treated as a means of payment and, when it is used, assigned the value which was realised at the time of its earlier sale.[24]

51. However, neither of those two situations exists in the present case. The undertakings which entered into an agreement with Granton Advertising to grant discounts when a Granton card is used neither sold the Granton cards themselves nor acquire claims for payment as against a third party when a Granton card is presented.

52. The price paid to acquire the Granton card therefore has no influence on the taxable amount of the supplies procured using the Granton card. Accordingly, when that card is used, tax does not have to be levied on a proportionate part of the fee paid for it.

22 — Case C-126/88 *Boots Company* [1990] ECR I-1235, paragraph 13.

23 — Case C-427/98 *Commission* v *Germany* [2002] ECR I-8315, paragraph 58.

24 — Case C-288/94 *Argos Distributors* [1996] ECR I-5311, paragraphs 18 to 20.

53. The referring court is right to state that, if the sale of Granton cards were tax-exempt, VAT would have to be levied on its use in order to guarantee that VAT is levied on the full amount spent by the final consumer to procure the supplies specified on the Granton card. However, since, as has been shown, the tax exemptions provided for under Article 13(B)(d)(5) and (3) of the Sixth Directive do not apply to the sale of Granton cards, as part of a two-stage process — that is to say when the Granton card is sold and when it is used — everything which the holder of a Granton card has ultimately spent to acquire the supplies listed on the Granton card is covered by VAT.

54. Should the Court consider it necessary to provide an answer to the third question referred, in the light of all the foregoing that question should be answered to the effect that, in a situation such as that in the main proceedings, tax should not be levied on a proportionate part of the fee paid for a Granton card when that card is used.

V – Conclusion

55. In conclusion, I therefore propose that the first two questions referred by the Gerechtshof 's-Hertogenbosch be answered as follows:

A discount card such as the Granton card is neither an 'other security' within the meaning of Article 13(B)(d)(5) of the Sixth Directive nor an 'other negotiable instrument' within the meaning of Article 13(B)(d)(3) of that directive.