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Judgment of the Court (Fifth Chamber) of 13 December 2001. - Commissioners of Customs & Excise v CSC Financial Services Ltd. - Reference for a preliminary ruling: High Court of Justice (England & Wales), Queen's Bench Division (Crown Office) - United Kingdom. - Sixth VAT Directive - Article 13B(d)(5) - Exempt transactions - Transactions in securities - Negotiation - Provision of a "call centre" service. - Case C-235/00.

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Keywords

Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Exemptions provided by the Sixth Directive - Banking transactions referred to in Article 13B(d)(5) - Transactions, including negotiation, in securities - Definition

(Council Directive 77/388, Art. 13B(d)(5))

Summary

\$\$On a proper construction of Article 13B(d)(5) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes transactions in securities means transactions liable to create, alter or extinguish parties' rights and obligations in respect of securities; it does not mean the supply of a mere physical, technical or administrative service which does not alter the legal or financial situation.

Negotiation in securities does not cover services, performed by a subcontractor to a party to a contract relating to a financial product, limited to providing information about the financial product and, as the case may be, receiving and processing applications for subscription to the relevant securities, without issuing them. It does, on the other hand, cover the separate service rendered to a party to such a contract by an intermediary consisting, amongst other things, in pointing out suitable opportunities for the conclusion of such a contract, making contact with another party or negotiating, in the name of and on behalf of a client, the detail of the payments to be made by either side.

(see paras 28, 33, 39-41 and operative part)

Parties

In Case C-235/00,

REFERENCE to the Court under Article 234 EC by the High Court of Justice of England and Wales (Queen's Bench Division) for a preliminary ruling in the proceedings pending before that court between

Commissioners of Customs & Excise

and

CSC Financial Services Ltd,

on the interpretation of Article 13B(d)(5) of the 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 COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, A. La Pergola, L. Sevón (Rapporteur), M. Wathelet and C.W.A. Timmermans, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

- CSC Financial Services Ltd, by D. Milne QC, and E. Wilson, Barrister, instructed by L. Allen, accountant,

- the United Kingdom Government, by G. Amodeo, acting as Agent, N. Paines QC, and R. Baldry, Barrister,

- the Commission of the European Communities, by R. Lyal, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of CSC Financial Services Ltd, of the United Kingdom Government and of the Commission at the hearing on 12 July 2001,

after hearing the Opinion of the Advocate General at the sitting on 12 July 2001,

gives the following

Judgment

Grounds

1 By order of 1 June 2000, received at the Court on 13 June 2000, the High Court of Justice of England and Wales (Queen's Bench Division) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 13B(d)(5) of the 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, hereinafter the Sixth Directive).

2 That question was raised in proceedings between the Commissioners of Customs and Excise (hereinafter the Commissioners), who are responsible for the collection of value added tax (VAT) in the United Kingdom, and CSC Financial Services Ltd (hereinafter CSC) concerning the assessment to VAT of various services provided by CSC on behalf of Sun Alliance Group (hereinafter Sun Alliance).

Relevant legislation

Community legislation

3 Article 13B(d)(5) of the Sixth Directive provides as follows:

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, excluding:

- documents establishing title to goods,

- the rights or securities referred to in Article 5(3).

National legislation

4 Items 6(e) and 7 of Group 5 of Schedule 9 to the Value Added Tax Act 1994, in the version in force at the relevant time, exempted from VAT:

6. The issue, transfer or receipt of, or any dealing with, any security or secondary security being

...

(e) units or other documents conferring rights under any trust established for the purpose, or having the effect of providing, for persons having funds available for investment, facilities for the

participation by them as beneficiaries under the trust in any profits or income arising from the acquisition, holding, management or disposal of any property whatsoever.

7. The making of arrangements for, or the underwriting of, any transaction within item 6.

5 Note 5 of Group 5 of Schedule 9 provides that [i]tem 7 includes the introduction to a person effecting transactions in securities or secondary securities within item 6 of a person seeking to acquire or dispose of such securities.

The facts and the question referred for a preliminary ruling

6 CSC provides to financial institutions what is termed a call centre service. According to the national court, that service essentially consists in the call centre handling on behalf of the financial institution concerned all its contacts with the general public in relation to the sale of certain financial products, from initial enquiry up to but excluding execution.

7 Sun Alliance, which groups together a number of companies that manage investment funds and personal equity plans, entrusted to CSC all communications and contacts with the public concerning an investment product known as the Daisy Personal Equity Plan, under which investment is made by means of units in a unit trust.

8 CSC operators provide potential investors with all the information they require regarding the Daisy Personal Equity Plan, together with the relevant investment application forms. Under applicable national legislation, they are not authorised to provide advice, merely information. CSC also processes application forms submitted by prospective investors. It checks that the form has been properly filled in, that the applicant satisfies the conditions of eligibility and that the correct payment is enclosed. It also deals with cancellation requests.

9 The formalities for issuing and transferring the securities, that is to say, the units in the unit trust, are, however, carried out by a separate company unconnected with CSC.

10 Sun Alliance pays CSC a fee for its services which is made up of a fixed sum and an amount reflecting the number of calls and sales.

11 By decision set out in a letter of 21 April 1997, the Commissioners took the view that the services provided by CSC were not exempt from VAT under Article 13B of the Sixth Directive.

12 CSC appealed against that decision to the London Value Added Tax and Duties Tribunal, which held that the exemption laid down in Article 13B(d)(5) of the Sixth Directive extended to the necessary preliminary stages of the issue and transfer of securities.

13 The Commissioners appealed against that decision, arguing before the High Court that Article 13B(d)(5) exempts only the issue of securities and does not extend to preliminary steps taken by a third party on behalf of an issuer. For its part, CSC submitted that the services it provides are specific to and an essential part of the issue of securities by Sun Alliance and thus constitute transactions in securities within the meaning of Article 13B(d)(5).

14 Those were the circumstances in which the High Court of Justice of England and Wales, taking the view that interpretation of certain provisions of the Sixth Directive was needed in order to resolve the dispute, decided to stay proceedings and refer to the Court of Justice the following question for a preliminary ruling:

How is the exemption provided by Article 13B(d)(5) of the Sixth Council Directive 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, in respect of "transactions in securities" to be interpreted? In particular,

(1) does the term "transactions in securities" apply only to transactions in which the parties' legal rights or obligations in respect of the security are altered?

(2) does the term "transactions, including negotiation, in securities" apply to a service of providing information to potential investors and receiving and processing applications from investors for the issue of a security (but not including preparing and dispatching the document of title to the security), where that service is provided to a person who has legal rights or obligations under the security by a person who does not have any legal right or obligation under the security?

The question referred for a preliminary ruling

15 The question has two parts which concern interpretation of (i) the words transactions in securities, within the meaning of Article 13B(d)(5) of the Sixth Directive, and (ii) interpretation of the words negotiation in securities, within the meaning of the same provision.

Interpretation of the words transactions in securities

Observations submitted to the Court

16 CSC argues that it is clear from paragraph 68 of the judgment in Case C-2/95 SDC [1997] ECR I-3017 that, in order to come within the scope of Article 13B(d)(5) of the Sixth Directive, the services in question must be distinct in character, specific to, and essential for exempt transactions.

17 According to CSC, the condition that the services in question should be essential for an exempt transaction ensures that services are not excluded from exemption for an arbitrary reason, such as the supplier's method of invoicing and pricing. The condition that the services at issue should be distinct in character is a comparative condition requiring the services to be readily identifiable in comparison with other services. It amounts to asking whether the services give the impression of being part of the provision of the financial service as opposed to something else. The condition which requires that the services be specific to an exempt transaction qualifies the condition of their being essential by excluding services which are essential but which merely amount to the provision of routine, technical or electronic assistance, such as the leasing of computers to a bank, the supply of cleaning services, or the supply of telephone equipment or a simple telephone answering service.

18 The United Kingdom Government submits that the exemptions laid down in Article 13B(d) of the Sixth Directive were accorded in respect of financial services and services provided by intermediaries in relation to financial services for the reason that such services were unsuited to the imposition of value added tax, principally because of the difficulty which exists in many instances of distinguishing the consideration for the service from the exchange of money or documents of value which comprises the service. However, supplies of administrative and management services - in relation to which there is generally no difficulty in applying the tax - remain taxable even when provided in connection with financial transactions. Moreover, in those instances where supplies of management or administration services are to be exempted, this is expressly provided for, as in Article 13B(d)(1), (2) and (6).

19 According to the United Kingdom Government, the Court held, at paragraphs 66 and 73 of its judgment in SDC, cited above, that the words trade in securities designate transactions which alter the legal and financial positions of the parties with regard to the securities in question. In its

submission, transactions in securities plainly do not, therefore, cover administrative services of the sort provided by CSC to Sun Alliance which are at issue in the main proceedings because nothing in CSC's service alters the legal position of any person as regards any security.

20 The Commission observes that the exemption laid down in Article 13B(d)(5) of the Sixth Directive does not depend on the identity or legal nature of the person or organisation providing the service, nor on the manner in which the service is provided (paragraphs 32 to 38 of the judgment in SDC). Nor does it matter, in its submission, that the client is unaware that the service is being provided, in part, by a party other than the one with which he enters into a legal relationship (SDC, paragraph 59).

21 According to the Commission, the purpose of Article 13B(d) of the Sixth Directive is to exclude the application of VAT to certain financial transactions, in particular those directly concerning financial instruments, because of the practical difficulties in taxing such transactions and the potential effect of VAT on the cost of credit. Those considerations do not justify extension of the exemption to inputs used by persons making an exempt supply. It does not appear to the Commission that the services provided by CSC which are at issue in the main proceedings, consisting in the provision of information to clients and the processing of application forms but excluding any act that affects rights or obligations associated with securities, can properly be regarded as transactions in securities.

Findings of the Court

22 According to the national court, the formalities for issuing and transferring the securities in question in the main proceedings, that is to say, units in a unit trust, are not carried out by CSC.

23 It is important to note that the wording of Article 13B(d)(5) of the Sixth Directive does not in principle preclude a transaction in securities from being broken down into a number of separate services which may together amount to a transaction in securities within the meaning of that provision and which may benefit from the exemption laid down therein (see, to that effect, with regard to transactions concerning transfers, within the meaning of Article 13B(d)(3) of the Sixth Directive, paragraph 64 of the judgment in SDC).

24 It is therefore necessary to determine what the conditions are for that exemption and whether those conditions are satisfied in the case of services such as those provided by CSC in the main proceedings.

25 In paragraph 66 of its judgment in SDC, the Court held that, in order to be characterised as exempt transactions for the purposes of Article 13B(d)(3) and (5), the services provided by a data-handling centre must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service described in those two provisions.

26 As regards, more specifically, transactions concerning transfers within the meaning of Article 13B(d)(3) of the Sixth Directive, it is clear from the judgment in SDC that the services provided must have the effect of transferring funds and entail changes of a legal and financial character. The Court held at paragraph 66 of its judgment in SDC that a service exempt under the Sixth Directive must be distinguished from a mere physical or technical supply, such as making a data-handling system available to a bank and that, in this regard, the national court must examine in particular the extent of the data-handling centre's responsibility vis-à-vis the banks, in particular the question whether its responsibility is restricted to technical aspects or whether it extends to the specific, essential aspects of the transactions.

27 In principle, the same analysis applies, *mutatis mutandis*, with regard to transactions in securities within the meaning of Article 13B(d)(5) of the Sixth Directive.

28 As the Court emphasised at paragraph 73 of its judgment in SDC, trade in securities involves acts which alter the legal and financial situation as between the parties and are comparable to those involved in the case of a transfer or a payment. The supply of a mere physical, technical or administrative service, which does not alter the legal or financial situation would not, therefore, appear to be covered by the exemption laid down in Article 13B(d)(5) of the Sixth Directive.

29 That view is supported, first of all, by the fact that the management and safekeeping of shares - transactions which, significantly, do not involve alteration of the legal or financial positions of the parties - are expressly excluded by Article 13B(d)(5).

30 By introducing an exception to the exemption laid down by Article 13B(d)(5) for transactions in securities, the phrase excluding management and safekeeping which appears in that provision places the management and safekeeping of shares under the general scheme of the directive, whereby VAT is to be charged on all taxable transactions, except in the case of derogations expressly provided for. It therefore follows that services of an administrative nature which do not alter the legal or financial position of the parties are not covered by the exemption laid down in Article 13B(d)(5).

31 Next, as the Court held at paragraph 70 of its judgment in SDC, it is apparent from the actual wording of Article 13B(d)(3), (4) and (5) of the Sixth Directive that none of the transactions described by those provisions concerns operations involving the supply of financial information, which cannot, therefore, be covered by the exemption provided for therein.

32 Lastly, the mere fact that a constituent element is essential for completing an exempt transaction does not warrant the conclusion that the service which that element represents is exempt (paragraph 65 of the judgment in SDC).

33 It follows from the foregoing that the words *transactions in securities* refer to transactions liable to create, alter or extinguish parties' rights and obligations in respect of securities.

Interpretation of the words negotiation in securities

Observations submitted to the Court

34 CSC maintains that the services which it provides to Sun Alliance may be described as *negotiation in securities*, within the meaning of Article 13B(d)(5) of the Sixth Directive, and that they satisfy the conditions for exemption laid down in that provision. Comparison of the various language versions reveals that most of them - although not the English version - contemplate services provided by a mere intermediary between two parties. That is the import of the French expression *négociant*, for example, or the German *Vermittlung*, or the Dutch *bemiddeling*. CSC concludes that, since it clearly acts as intermediary between investors and Sun Alliance, the services which it provides to the latter are VAT exempt.

35 The United Kingdom Government argues that the term negotiation, as it appears in Article 13B(d)(5), is a Community law concept. Comparison of the various language versions of the Sixth Directive, which reveals the use of words such as *Vermittlung* in the German version, indicates that negotiation is a service provided by an intermediary. The nature of that service is that it involves acting as intermediary between potential parties to a particular transaction. It plainly does not cover the supply to a financial institution of administrative services such as those provided by CSC to Sun Alliance, particularly where this role is unknown to the client of the financial institution.

36 According to the Commission, the word negotiation in Article 13B(d)(5) refers solely to the activities of intermediaries whose role is to procure the completion of, and negotiate the terms of a transaction on behalf of one of the parties. The Commission emphasises that their involvement in transactions may be considered to be of equal importance to that of the parties themselves and to give rise to similar difficulties of taxation. The question whether the activities of CSC at issue in the main proceedings may be regarded as those of an intermediary is essentially one of fact for the national court. Nevertheless, the Commission doubts that the provision of information and the collection and processing of application forms can be regarded as those of an intermediary in any real sense.

Findings of the Court

37 Article 13(B)(d)(5) of the Sixth Directive does not define the meaning of negotiation in securities for the purposes of that provision.

38 Clearly, the words including negotiation are not intended to define the principal object of the exemption laid down in the provision, but to extend the scope of the exemption to negotiation.

39 It is not necessary to consider the precise meaning of the word negotiation, which also appears in other provisions of the Sixth Directive, in particular, Article 13B(d)(1) to (4), in order to hold that, in the context of Article 13B(d)(5), it refers to the activity of an intermediary who does not occupy the position of any party to a contract relating to a financial product, and whose activity amounts to something other than the provision of contractual services typically undertaken by the parties to such contracts. Negotiation is a service rendered to, and remunerated by a contractual party as a distinct act of mediation. It may consist, amongst other things, in pointing out suitable opportunities for the conclusion of such a contract, making contact with another party or negotiating, in the name of and on behalf of a client, the detail of the payments to be made by either side. The purpose of negotiation is therefore to do all that is necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in the terms of the contract.

40 On the other hand, it is not negotiation where one of the parties entrusts to a sub-contractor some of the clerical formalities related to the contract, such as providing information to the other party and receiving and processing applications for subscription to the securities which form the subject-matter of the contract. In such a case, the subcontractor occupies the same position as the party selling the financial product and is not therefore an intermediary who does not occupy the position of one of the parties to the contract, within the meaning of the provision in question.

41 In view of all the foregoing considerations, the answer to the national court's question must be that, on a proper construction of Article 13B(d)(5) of the Sixth Directive,

- transactions in securities means transactions liable to create, alter or extinguish parties' rights and obligations in respect of securities;

- negotiation in securities does not cover services limited to providing information about a financial product and, as the case may be, receiving and processing applications for subscription, without issuing them.

Decision on costs

Costs

42 The costs incurred by the United Kingdom Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Fifth Chamber)

in answer to the question referred to it by the High Court of Justice of England and Wales, Queen's Bench Division, by order of 1 June 2000, hereby rules:

On a proper construction of Article 13B(d)(5) of the 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

- transactions in securities means transactions liable to create, alter or extinguish parties' rights and obligations in respect of securities;

- negotiation in securities does not cover services limited to providing information about a financial product and, as the case may be, receiving and processing applications for subscription to the relevant securities, without issuing them.