JUDGMENT OF THE COURT (First Chamber)

7 March 2013 (*)

(Taxation — Value added tax — Directive 77/388/EEC — Exemption of the management of special investment funds — Scope)

In Case C-275/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decision of 5 May 2011, received at the Court on 3 June 2011, in the proceedings

**GfBk Gesellschaft für Börsenkommunikation mbH**

v

**Finanzamt Bayreuth,**

THE COURT (First Chamber),

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

Advocate General: P. Cruz Villalón,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 28 June 2012,

after considering the observations submitted on behalf of:

– GfBk Gesellschaft für Börsenkommunikation mbH, by E. Schulz,

– the German Government, by T. Henze, acting as Agent,

– the Greek Government, by I. Pouli and K. Boskovits, acting as Agents,

– the Luxembourg Government, by C. Schiltz, acting as Agent,

– the European Commission, by C. Soulay and B.-R. Killmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 November 2012,

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’).

2 The request has been made in proceedings between GfBk Gesellschaft für Börsenkommunikation mbH ('GfBk') and Finanzamt Bayreuth (Tax Office, Bayreuth) concerning the latter's refusal to exempt from value added tax ('VAT') advisory services provided by GfBK to an investment management company ('IMC').

**Legal context**

*European Union law*

3 Article 13B(d) of the Sixth Directive is worded 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:

…

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 ...;

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

4 Article 1(2) and (3) of 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) defines such undertakings in the following terms:

'2. For the purposes of this Directive, and subject to Article 2, UCITS shall be undertakings:

– the sole object of which is the collective investment in transferable securities of capital raised from the public and which operate on the principle of risk-spreading,

and

– the units of which are, at the request of holders, re-purchased or redeemed, directly or indirectly, out of those undertakings' assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to such re-purchase or redemption.

3. Such undertakings may be constituted according to law, either under the law of contract (as common funds managed by management companies) or trust law (as unit trusts) or under statute (as investment companies).

…’

5 Under Article 4(1) of Directive 85/611, ‘[n]o UCITS shall carry on activities as such unless it has been authorised by the competent authorities of the Member State in which it is situated’.

6 Article 6 of Directive 85/611 states that ‘[n]o management company may engage in activities other than the management of unit trusts and of investment companies’.

7 Directive 85/611 was amended by Directive 2001/107/EC of the European Parliament and of the Council of 21 January 2002 (OJ 2002 L 41, p. 20) with a view to regulating management companies and simplified prospectuses, and by Directive 2001/108/EC of the European Parliament and of the Council of 21 January 2002 (OJ 2002 L 41, p. 35) with regard to investments of UCITS.

8 Pursuant to the second subparagraph of Article 5(2) of Directive 85/611 as amended by Directive 2001/107, ‘[t]he activity of management of unit trusts/common funds and of investment companies includes, for the purpose of this Directive, the functions mentioned in Annex II which are not exhaustive’.

9 Annex II mentions the following as ‘[f]unctions included in the activity of collective portfolio management’:

‘– Investment management.

– Administration:

(a) legal and fund management accounting services;

(b) customer inquiries;

(c) valuation and pricing (including tax returns);

(d) regulatory compliance monitoring;

(e) maintenance of unit-holder register;

(f) distribution of income;

(g) unit issues and redemptions;

(h) contract settlements (including certificate dispatch);

(i) record keeping.

– Marketing.’

10 Article 5g(1) of Directive 85/611 as amended by Directive 2001/107 introduced the possibility for Member States to ‘permit management companies to delegate to third parties for the purpose of a more efficient conduct of the companies’ business’ provided that that mandate complies with the conditions set out in Article 5g(1)(a) to (i).

11 Those conditions include the condition laid down in Article 5g(1)(c) that ‘when the delegation concerns the investment management, the mandate may only be given to undertakings which are authorised or registered for the purpose of asset management and subject to prudential

supervision; the delegation must be in accordance with investment-allocation criteria periodically laid down by the management companies'.

*German law*

12 In accordance with Paragraph 4(8)(h) of the Law on Turnover Tax (Umsatzsteuergesetz) of 26 November 1979, in the version in force during the period from 1999 to 2002 at issue in the main proceedings ('the UStG'), 'the management of special investment funds under the Law on Investment Management Companies [Gesetz über Kapitalanlagegesellschaften; "the KAAG"]' is exempt from tax.

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

13 GfBk is an undertaking whose objects are the dissemination of information and recommendations relating to the stock market, the provision of advice relating to investment in financial instruments and the marketing of financial investments.

14 In December 1999 GfBk concluded a contract with an IMC which managed a retail investment fund in the form of a special investment fund under the KAAG. GfBk thereby undertook to advise the IMC 'in the management of the fund' and, 'constantly to monitor the fund and to make recommendations for the purchase or sale of assets'. GfBk also undertook to 'pay heed to the principle of risk diversification, to statutory investment restrictions ... and to investment conditions …'.

15 It is apparent from the documents before the Court that the parties had agreed that GfBk would be paid for its advice on the basis of a percentage calculated by reference to the average monthly value of the investment fund.

16 Pursuant to that contract, from 1999 to 2002 GfBk provided the IMC at issue in the main proceedings, by telephone, fax or email, with recommendations concerning the purchase and sale of securities. The IMC entered those recommendations into its purchase and sale order system and, after checking that they did not infringe any statutory investment restriction applicable to special investment funds, implemented them, often within a few minutes of receiving them. Although the IMC made no selection of its own in the management of the investment fund, the final decision and final responsibility continued thereby to lie with it. GfBk was informed of the action taken following its recommendations and received daily statements of the composition of the investment fund for which it provided advice.

17 In the context of the fiscal procedure relating to turnover tax, GfBk requested that its advisory services to the IMC at issue in the main proceedings be exempted from VAT as outsourced services for the management of a special investment fund. The Finanzamt refused that request, taking the view that the services supplied by GfBk were not covered by the 'management of special investment funds' within the meaning of Article 13B(d)(6) of the Sixth Directive and could not therefore warrant such exemption.

18 GfBk brought legal proceedings to challenge the decisions taken against it. In the appeal on a point of law which it brought before the Bundesgerichtshof (Federal Finance Court), the latter decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

‘For the purpose of interpreting the term “management of special investment funds” within the meaning of Article 13B(d)(6) of [the Sixth Directive], is the service provided by the third-party manager of a special investment fund sufficiently specific and hence exempt from [VAT] only if:

(a) the manager performs a management function and not only an advisory function, or if

(b) the service differs in nature from other services by reason of a characteristic feature for the purpose of exemption from [VAT] under this provision, or if

(c) the manager operates on the basis of a delegation of functions under Article 5g of Directive 85/611/EEC as amended?’

**Consideration of the question referred**

19 By its question, the national court asks, in essence, whether and under what conditions advisory services provided by a third party to an IMC concerning investment in transferable securities fall within the concept of ‘management of special investment funds’ for the purposes of the exemption laid down in Article 13B(d)(6) of the Sixth Directive.

20 It is to be noted at the outset that management services provided by a third-party manager fall, in principle, within the scope of Article 13B(d)(6) of the Sixth Directive, since the management of special investment funds that is referred to in Article 13B(d)(6) is defined according to the nature of the services provided and not according to the person supplying or receiving the service (see, to this effect, Case C-169/04 *Abbey National* [2006] ECR I-4027, paragraphs 66 to 69).

21 However, in order to be regarded as ‘exempt transactions’ for the purposes of Article 13B(d)(6) of the Sixth Directive, management services provided by a third-party manager must, viewed broadly, form a distinct whole and be specific to, and essential for, the management of special investment funds (see, to this effect, *Abbey National*, paragraphs 70 to 72).

22 As regards, next, transactions which are specific to the activities of collective investment undertakings, it follows from Article 1(2) of Directive 85/611 that the transactions carried out by UCITS consist in the collective investment in transferable securities of capital raised from the public. With the capital provided by subscribers when they purchase units, UCITS assemble and manage, on behalf of the subscribers and for a fee, portfolios consisting of transferable securities (see, to this effect, Case C-8/03 *BBL* [2004] ECR I-10157, paragraph 42; *Abbey National*, paragraph 61; and Case C-44/11 *Deutsche Bank* [2012] ECR, paragraph 32). Functions specific to collective investment undertakings include, apart from investment management functions, functions for administering the collective investment undertakings themselves, such as those set out, under the heading ‘Administration’, in Annex II to Directive 85/611 as amended by Directive 2001/107 (see *Abbey National*, paragraph 64).

23 It follows from the foregoing that, in order to determine whether advisory services provided by a third party to an IMC concerning investment in transferable securities fall within the concept of ‘management of special investment funds’ for the purposes of the exemption laid down in Article 13B(d)(6) of the Sixth Directive, it is necessary, as the Advocate General has observed in points 27 and 31 of his Opinion, to examine whether the advisory service provided by a third party concerning investment in transferable securities is intrinsically connected to the activity characteristic of an IMC, so that it has the effect of performing the specific and essential functions of management of a special investment fund.

24 It is to be observed in this regard that services consisting in giving recommendations to an

IMC to purchase and sell assets are intrinsically connected to the activity characteristic of the IMC, which, as has been noted in paragraph 22 of the present judgment, consists in the collective investment in transferable securities of capital raised from the public.

25 The fact that advisory and information services are not listed in Annex II to Directive 85/611 as amended by Directive 2001/107 does not preclude their inclusion in the category of specific services falling within activities for 'management' of a special investment fund within the meaning of Article 13B(d)(6) of the Sixth Directive, since Article 5(2) of Directive 85/611 as amended by Directive 2001/107 states itself that the list in the annex is 'not exhaustive'.

26 The fact that advisory and information services provided by a third party do not alter the fund's legal and financial position likewise does not preclude them from falling within the concept of 'management' of a special investment fund, within the meaning of Article 13B(d)(6) of the Sixth Directive.

27 The Court held in *Abbey National*, paragraphs 26, 63 and 64, that not only investment management involving the selection and disposal of the assets under management but also administration and accounting services – such as computing the amount of income and the price of units or shares, the valuation of assets, accounting, the preparation of statements for the distribution of income, the provision of information and documentation for periodic accounts and for tax, statistical and VAT returns, and the preparation of income forecasts – fall within the concept of 'management' of a special investment fund. It is therefore not important that, as in the case in the main proceedings, it was for the IMC in question to implement the recommendations provided by GfBk to purchase and sell assets, after checking that they complied with investment limits.

28 Furthermore, the wording of Article 13B(d)(6) of the Sixth Directive does not in principle preclude the management of special investment funds from being broken down into a number of separate services which may then fall within the meaning of 'management of special investment funds' in that provision, and may benefit from the exemption under it, even where they are provided by a third-party manager (*Abbey National*, paragraph 67), so long as each of those services has the effect of performing the specific and essential functions of management of a special investment fund. As has been pointed out in paragraph 24 of the present judgment, that is so in the case of recommendations provided by a third party to an IMC to purchase and sell assets.

29 Also, the inclusion of advisory and information services in the category of specific services falling within activities for 'management' of a special investment fund, within the meaning of Article 13B(d)(6) of the Sixth Directive, cannot offend against the principle of fiscal neutrality on the ground that advisory services provided to natural or legal persons who invest their money in securities directly are, by contrast, subject to VAT.

30 It should indeed be recalled that persons who invest their assets in securities directly are not liable for VAT and that the purpose of the exemption, under Article 13B(d)(6) of the Sixth Directive, of transactions connected with the management of special investment funds is to facilitate investment in securities for small investors by means of collective investment undertakings by excluding the cost of VAT, in order to ensure 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 Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* [2007] ECR I-5517, paragraph 45).

31 Furthermore if investment advice services provided by a third party were subject to VAT,

that would have the effect of giving IMCs with their own investment advisers an advantage over IMCs which decide to have recourse to third parties. It follows from the principle of fiscal neutrality that operators must be able to choose the form of organisation which, from the strictly commercial point of view, best suits them, without running the risk of having their transactions excluded from the exemption under Article 13B(d)(6) of the Sixth Directive (*Abbey National*, paragraph 68).

32 Finally, the fact that the external manager has not acted on the basis of a mandate within the meaning of Article 5g of Directive 85/611 as amended by Directive 2001/107 cannot affect the inclusion of advisory and information services provided by that external manager in the category of specific services falling within activities for 'management' of a special investment fund within the meaning of Article 13B(d)(6) of the Sixth Directive. It is true that in the main proceedings the advisory services were provided by GfBk although the version of Directive 85/611 in force did not authorise management companies to delegate to third parties for the purpose of a more efficient conduct of their business. It is clear, however, from settled case-law that the principle of fiscal neutrality precludes a distinction from being drawn in the levying of VAT between lawful and unlawful transactions (see, inter alia, Case C-283/95 *Fischer* [1998] ECR I-3369, paragraph 21, and the order of 7 July 2010 in Case C-381/09 *Curia*, paragraphs 18, 21 and 23).

33 In the light of the foregoing considerations, the answer to the question referred is that Article 13B(d)(6) of the Sixth Directive must be interpreted as meaning that advisory services concerning investment in transferable securities, provided by a third party to an IMC which is the manager of a special investment fund, fall within the concept of 'management of special investment funds' for the purposes of the exemption laid down in that provision, even if the third party has not acted on the basis of a mandate within the meaning of Article 5g of Directive 85/611 as amended by Directive 2001/107.

**Costs**

34 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (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 must be interpreted as meaning that advisory services concerning investment in transferable securities, provided by a third party to an investment management company which is the manager of a special investment fund, fall within the concept of 'management of special investment funds' for the purposes of the exemption laid down in that provision, even if the third party has not acted on the basis of a mandate within the meaning of Article 5g of 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) as amended by Directive 2001/107/EC of the European Parliament and of the Council of 21 January 2002.**

[Signatures]

* Language of the case: German.