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Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 12 July 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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Opinion of the Advocate-General

1. The question which the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office) - hereinafter the High Court - has referred to the Court of Justice concerns the interpretation of one of the exemptions for domestic transactions provided for by the Sixth Value Added Tax Directive (hereinafter the Sixth Directive).

2. The issue in the proceedings before the United Kingdom court is whether the services provided by CSC Financial Services Limited (CSC) to a financial institution are subject to value added tax (VAT). In particular, the High Court wishes to ascertain whether those services qualify for the exemption contained in Article 13B(d)(5) of the Sixth Directive.

I - Facts, the main proceedings and the question referred to the Court

3. CSC is a company which offers intermediary services to financial institutions consisting in the receiving and processing of telephone calls on their behalf, through a call centre.

4. This service is, essentially, as follows: a company advertises its financial products, giving the telephone numbers of CSC, which, using specialised staff, provides the information requested and, if appropriate, processes investment applications, but without providing advice or completing the transaction. Up to this point, all contacts between the company offering the product and the public are channelled through the call centre.

5. CSC has provided Sun Alliance Group (Sun Alliance) with services like those described above in relation to a financial product named Daisy Personal Equity Plan or Daisy PEP (hereinafter Daisy), which is a personal scheme for investment in securities producing variable yields.

6. Sun Alliance placed advertisements for Daisy securities in the media, giving the CSC call-centre number. Potential investors who telephoned that number were given information by the operator on behalf of Sun Alliance. If callers decided to invest, CSC processed the applications and its staff verified that the forms had been properly filled in, that the applicants satisfied the eligibility requirements and that the payment was enclosed. This same procedure was followed for cancellations.

7. The formalities for issuing and transferring securities, and for cancellations, were carried out by another company unconnected with CSC.

8. The payment for the services provided by CSC to Sun Alliance comprised two components: one was fixed and the other varied according to the volume of sales and the number and duration of the telephone calls.

9. CSC appealed against the decision of the Commissioners of Customs and Excise of 21 April 1997 that the services which it supplied to Sun Alliance were not exempt from VAT. The appeal was upheld by the London Value Added Tax and Duties Tribunal by judgment of 11 February 1998, which interpreted the exemption provided for in Article 13B(d)(5) of the Sixth Directive as applying to the stages required to be completed prior to the issue or transfer of securities.

10. The Commissioners appealed against the Tribunal's decision to the High Court, arguing that the provision at issue only covers operations relating to securities and does not extend to the preliminary steps taken by a third party on behalf of the issuer. For its part, CSC contends that its services to Sun Alliance were specific to and an essential part of the issue of the Daisy securities, for which reason, in its view, they were transactions concerning securities exempted from VAT by virtue of that provision.

11. The High Court, entertaining doubts as to the scope of the exemption in the abovementioned provision of the Sixth Directive, referred the following questions to the Court of Justice for a preliminary ruling:

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

(1) does the term "transaction in securities" apply only to a transaction in which the party's 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?

II - The Community legislation to be interpreted

12. Title X of the Sixth Directive deals with exemptions. Article 13 is concerned with exemptions within the territory of Member States, distinguishing between those for certain activities in the public interest (part A), those deriving from aspects of economic and financial policy (most of those included in part B) and those which certain writers have referred to as technical exemptions (those set out in subparagraphs (c) and (f) of part B and in part C. The second group includes transactions in securities.

13. The provision of which the High Court seeks an interpretation from the Court of Justice reads as follows:

Exemptions within the territory of the country

...

B. Other exemptions

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 exemption 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 Article 5(3).*

III - Procedure before the Court of Justice

14. Written observations were submitted within the time-limit laid down for that purpose by Article 20 of the EC Statute of the Court of Justice by the United Kingdom Government, CSC and the Commission.

15. The parties presented oral argument at the hearing on 12 July 2001.

IV - Examination of the question submitted

16. The points raised by the High Court concern transactions in securities and, in particular, the question whether that expression must cover only action which affects the substance of the legal relationship inherent in the security and whether it extends to services like those provided by CSC.

1. Interpretative criteria

17. The answer to be given by the Court of Justice must take as its starting point the fact that, as a general rule, VAT applies to all supplies of goods and services effected for consideration within the territory of a Member State by a taxable person. Dispensation is the exception and, like every mitigation of the obligation to pay tax, must be restrictively interpreted. On the contrary, any exclusion from an exception, in so far as it implies a return to the general rule, escapes the principle of strict interpretation.

18. Nor should the fact be overlooked that the provision of which the High Court seeks an interpretation embodies an economic incentive with a negative tinge, which is defined exclusively by reference to criteria of an objective nature. It is the transactions which are exempt, not the persons who carry them out, even if the latter are the beneficiaries.

19. Finally, a common market based on free competition, displaying features similar to those of a real internal market, requires neutrality of the common system of VAT to be ensured and the

system of exemptions impinges in some respect on that neutrality by disregarding the principle of generalised liability to tax. Consequently, in order to reduce exemptions from the tax and, above all, to ensure that arrangements for the tax are coherent and consistent in all the Member States, there must be a consensus that the exemptions provided for in Article 13 of the Sixth Directive are autonomous concepts of Community law.

2. The meaning of transactions in securities

20. This term must be analysed from two points of view: grammatical and teleological.

21. Regarding the grammatical aspect, I set out a number of considerations in my Opinion in SDC, cited above. There I said that the transactions referred to in Article 13B(d) of the Sixth Directive are genuine acts in the law.

22. The romance language versions use a word of rather limited meaning, deriving from the latin verb operari, which means to act, perform or work.

23. For its part, the English text of the Sixth Directive uses a word which, though also of Latin origin, is more specific and therefore more expressive. The word used is transactions which derives from the Latin word transactus, the participle of the verb transigere, which, in turn, originates from agere. Literally, this means cause to pass through something. The German version uses the word Umsätze, which refers to turnover, dealings. However, in Spanish, the second accepted meaning of the word transacciones involves striking a bargain, a deal or a commercial agreement. By definition, every deal alters the pre-existing legal situation and, consequently, is capable of creating, changing and extinguishing rights and obligations. It is not without reason that acts in the law constitute one of the sources of obligations.

24. If I move away from formal aspect and focus on a more substantive issue, such as identification of the aim pursued by the Community legislature in granting an exemption from the tax obligation where the taxable event is any of the operations referred to in Article 13B(d) of the Sixth Directive, I find that the exemption can have no rationale other than that of liberating from the tax regime transactions which, in view of their frequency and habitual nature, are a central component of the financial systems and, therefore, of the economic activities of the Member States. The aim pursued is to avoid a burden on certain services which would be liable to hamper the functioning of the market.

25. That being the aim of the provision, in my opinion the only transactions to be exempted must be those whose exclusion is essential in order to attain that result, in other words those which are capable of altering a legal position by the creation, changing or extinguishment of rights and obligations. Neutral operations, having no impact ad extra, can be taxed, because taxation of them has no impact on the financial system.

26. I pointed out a few lines earlier that exemptions from VAT run counter to the principle of generalised taxation and call in question its neutrality, because they remove the obligation of passing on the burden of taxation. This effect, which negates the central purpose of the common system of VAT, must be reduced to a minimum, so as to apply only to transactions in which the imposition of VAT could place an undesired burden on economic activity.

27. For reasons connected with both the grammatical sense and the purpose of the provision of which an interpretation is sought from the Court of Justice, I consider that the transactions in securities referred to an Article 13B(d)(5) of the Sixth Directive are those transactions which are capable of creating, changing or extinguishing rights and obligations of the parties in relation to securities.

28. CSC made a valiant effort in its written observations to make the SDC judgment say what it does not say. It attributes to that judgment the idea that, for an element of an exempt operation to fall within the exemption, it must constitute a specific, essential and identifiable action, and it contends that the services which it supplies to Sun Alliance display those characteristics. But the judgment says something different. For the Court of Justice, the exemption applies to activities which, involving a change in a legal position, genuinely perform the function of the tax-exempt operation, which means that they actually constitute that operation. It is absolutely clear that the services provided by CSC to Sun Alliance do not fall within that category.

29. Only operations which directly affect the legal relationship embodied in the security and are capable of having an impact on the substance thereof, such as, among others, the issue, transfer, endorsement, payment and redemption of the security, fall within the scope of the tax exemption under review here. Other operations, although making a contribution, are excluded from the exemption. Clear proof of this is apparent in the fact that the provision at issue indicates that the tax advantage is not to apply to the management and safekeeping of securities. Both such operations, safekeeping and management, are legal operations which relate to securities but cannot affect the legal relationship embodied in them.

30. The exception is negotiation in relation to securities, which is indeed exempt, but is, as I shall explain below, so closely linked, subjectively and objectively, with the operations which create, change or extinguish the rights represented by the security that its inclusion within the scope of the tax benefit appears fully justified.

3. The services of providing information on securities and processing investment applications

31. Thus, only actions which create, change or extinguish rights and obligations of the parties in connection with the security are covered by the provision of which an interpretation is sought by the High Court. It is now necessary to consider whether services involving the provision of information about a financial product and, in some cases, the receipt and processing of applications to subscribe for the securities in question fall within that classification.

32. To that end, it is irrelevant that they are provided by a third party operating under a separate legal relationship. The objective nature of the exemption means that the decisive fact for its application is the nature of the transaction and not the status of the person who effects it. There is no objection to the exemption being available to any natural or legal person, distinct from the subjects of the rights and obligations inherent in the securities, if that person performs exempt operations.

33. Consequently, the limitation included by the High Court in the last part of its second question is superfluous. In giving its answer, the Court of Justice must have regard only to the nature of the services, regardless of who carries them out.

34. The activity of providing information about the financial product and processing investment applications, without giving advice or becoming involved in the issue or cancellation of securities, is of a preliminary nature and is not capable of having an impact on the substance of the legal relationship embodied in the security. Therefore, in line with the answer I suggest to the first question submitted by the High Court, the second should be answered in the negative.

35. The operation subject to tax which, under Article 13B(d)(5) of the Sixth Directive, is exempt is the legal operation between Sun Alliance and the person who subscribes for Daisy securities, whether it be the issue of securities, alteration of certain objective and subjective elements, or cancellation. If the contractual authority conferred on CSC includes the powers needed to carry out, on behalf of Sun Alliance, any of those legal operations, I have no doubt whatsoever that they will be exempt from VAT. If, on the contrary, that is not the case - if its involvement is merely

ancillary and preparatory to conclusion of those legal operations - then in my opinion the exemption does not extend to it.

36. The term ancillary service has been considered by the Court of Justice, which defined it as one that does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied. It is not a decisive factor in determining whether a particular operation is exempt from tax, but it provides sufficient guidance for choosing the direction to take. By definition, something which is ancillary to an operation is not a necessary part thereof, but is useful in that it completes and enhances it. If the exemption at issue here is objective, it should in principle apply only to the operation described in the legal provision, and not to others that are merely conducive to the performance of it. The principle that tax exemptions must be strictly interpreted allows that conclusion, which is applicable even to activities that are necessary in order to facilitate the supply of the tax-exempt service.

37. There must be something else, which is to be inferred from the ultimate purpose pursued by tax exemptions. If a particular class of legal operations is exempted from VAT in order to achieve a specific purpose, exemption can be available only for those ancillary operations which fulfil the same purpose. In the words of the Court of Justice itself, the exemption applies only to ancillary services which fulfil the specific, essential functions of the operations described in the provision establishing the exemption; they must be services which in themselves constitute an exempt operation.

38. Services merely involving the provision of information and the processing of applications to subscribe for securities do not meet the specific preconditions for being regarded as serving the actual purpose of the exempt operations referred to in Article 13B(d)(5) of the Sixth Directive. They are ancillary services - and therefore needless to say are not indispensable - which are not in any way substantive and are not capable of altering the rights and obligations deriving from the security. In SDC, to which I have made copious reference, the Court of Justice excluded the provision of financial information from the scope of the exemption. In those circumstances, and in view of the foregoing considerations, I take the view that such operations are not exempt from VAT.

39. Nor can they be brought within the term negotiation and thereby enjoy the tax benefit under review here. The idea of negotiating refers to settling, giving way, and dealing: in short, the idea of managing one's own rights and interests in order to arrive at an agreement. The capacity to dispose of legal rights belongs only to the person vested with those rights or to his representative, either by operation of law (patria potestas or guardianship), or by agreement (power of attorney or other grant of representative capacity).

40. In short, I suggest that, in reply to the second question from the High Court, the Court of Justice rule that the term transactions, including negotiation, in securities appearing in Article 13B(d)(5) of the Sixth Directive does not extend to services which are limited to the provision of information about a financial product and, if appropriate, the receiving and processing of applications to subscribe for the securities concerned, but do not include the issuing of such securities.

V - Conclusion

41. On the basis of the foregoing considerations, I propose that the Court of Justice give the following answer to the questions submitted by the High Court of Justice:

(1) The term transactions in securities in 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, are transactions capable of creating, altering or extinguishing the rights and obligations of the parties in respect of the security.

(2) The term transactions, including negotiation, in securities appearing in that provision does not extend to services which are limited to the provision of information about a financial product and, if appropriate, the receiving and processing of applications to subscribe for the securities concerned, but do not include the issuing of such securities.