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OPINION OF ADVOCATE GENERAL

MENGOZZI

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Case C?29/08

Skatteverket

v

AB SKF

(Reference for a preliminary ruling from the Regeringsrätten (Sweden))

(VAT – Interpretation of Articles 2, 4, 13B(d)(5) and 17 of the Sixth Directive, and of Articles 2, 9, 135(1)(f), 168 and 169 of Directive 2006/112/EC – Disposal by a parent company of shares in a subsidiary and of its remaining holding in another company, for the purposes of group restructuring – Deductibility of VAT paid on supplies of services acquired by the parent company as part of the share disposal transactions)

I – **Introduction**

1. This reference for a preliminary ruling relates to the interpretation of Articles 2, 4, 13B(d)(5) and 17 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, (2) as last amended by Council Directive 2006/18/EC of 14 February 2006 (3) ('the Sixth Directive'), and to the interpretation of Articles 2, 9, 135(1)(f) and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. (4)

2. This reference was made in proceedings where the opposing parties are the Skatteverket (Swedish local tax board), the applicant in the main proceedings, and the company AB SKF ('SKF'), the defendant in the main proceedings, relating to a tax preliminary decision (5) issued by the Skatterättsnämnden (Revenue Law Commission) on the right to deduct input value added tax (VAT) on supplies of services acquired by SKF as part of its disposal of its entire shareholding in a subsidiary ('the subsidiary') and of its remaining holding in another company ('the controlled company'), in the course of tax years in which both the Sixth Directive and Directive 2006/112 were in force.

II – **Legal background**

A – *Community legislation*

3. Under Article 2(1) of the Sixth Directive the supply of goods and services effected for consideration within the territory of the country by a taxable person acting as such is subject to

VAT.

4. Article 4 of the Sixth Directive is worded as follows:

‘1. “Taxable person” shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

…’

5. Under the first indent of the second subparagraph of Article 6(1) of the Sixth Directive, a supply of services may consist, inter alia, of an assignment of intangible property whether or not it is the subject of a document establishing title.

6. Article 13B(d)(5) of the Sixth Directive provides that Member States may exempt from VAT ‘transactions, including negotiation, excluding management and safekeeping, in shares, interests in companies or associations, debentures and other securities …’.

7. Article 17 relates to the origin and scope of the right to deduct. Paragraphs (1), (2), (3) and (5) are worded as follows:

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

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

(a) the [VAT] due or paid within the territory of the Member State in respect of goods or services supplied or to be supplied to him by another taxable person;

…

3. Member States shall also grant to every taxable person the right to a deduction or refund of [VAT] referred to in paragraph 2 in so far as the goods and services are used for the purposes of:

…

(c) any of the transactions exempted under Article 13B(a) and (d), paragraphs 1 to 5, when the customer is established outside the Community or when these transactions are directly linked with goods intended to be exported to a country outside the Community.

…

5. As regards goods and services to be used by a taxable person both for transactions covered by paragraphs 2 and 3, in respect of which [VAT] is deductible, and for transactions in respect of which [VAT] is not deductible, only such proportion of [VAT] shall be deductible as is attributable to the former transactions.

…’.

8. The Sixth Directive was repealed by Directive 2006/112. In accordance with its Article 413, Directive 2006/112 entered into force on 1 January 2007.

9. Articles 2(1), 9(1), 25(a), 135(1)(f), 168(a), 169(c), and 173(1) respectively of Directive 2006/112 are essentially identical to Articles 2(1), 4(1) and (2), 6(1), second paragraph, 13B(d)(5) and 17(2),(3)(c) and (5), first paragraph, of the Sixth Directive.

B – *National legislation*

10. The Mervärdesskattelagen (1994:200) (6) (Law No 200 of 30 March 1994 on VAT, 'the ML') provides in Chapter 1, Paragraph 1, that VAT is to be paid to the State on taxable supplies of goods or services which are made within Swedish territory as part of a professional activity.

11. Chapter 3, Paragraph 9, of the ML exempts, inter alia, transactions in transferable securities, such as the supply and trading, as an intermediary, of shares, other interests and debts, whether or not represented by securities, and the management of investment funds.

12. Under Chapter 8, Paragraph 3, of the ML, in so far as goods and services are used for the purposes of his business, the taxable person has the right to deduct input VAT on acquisitions or imports.

III – **The facts of the main proceedings and the questions referred for a preliminary ruling**

13. The share company SKF is the parent company of an industrial group which carries on activities in a number of countries. It takes an active part in the management of its subsidiaries and supplies to them, for a consideration, services, including management, administration and marketing policy. Those services are invoiced to the subsidiaries and SKF is liable for VAT on them.

14. SKF intends to restructure the group and, in that connection, to dispose of the business of its subsidiary by transferring all the shares in the latter. In addition, SKF will dispose of its 26.5% shareholding in the controlled company, which was in the past wholly owned and to which SKF also supplied, as the parent company, services subject to VAT. The reason for those disposals is to obtain funds to finance other activities of the group. In order to carry out those disposals, SKF envisages requiring supplies of services in the area of valuation of shares, assistance with negotiations and specialised legal advice for the drafting of the contracts. Those supplies of services will be subject to VAT.

15. In order to clarify the tax consequences of those disposals, SKF applied to the Skatterättsnämnden for a preliminary decision on the right to deduct input VAT on the supplies of services acquired as part of the disposal of shares in the subsidiary and the controlled company.

16. In its decision of 12 January 2007 the Skatterättsnämnden held that, in both cases, SKF was entitled to deduct the input VAT on those supplies of services. It considered that the supplies of services provided by SKF to the subsidiary and to the controlled company were part of an economic activity and that the VAT paid on costs incurred when those companies were acquired was deductible. In the same way, the VAT paid on its costs when that activity was brought to an end ought also to be deductible. The fact that the activity of the controlled company was to be brought to an end gradually did not affect that assessment.

17. The Skatteverket brought an appeal against that decision before the Regeringsrätten, claiming that the VAT paid on the supplies of the services acquired was not deductible. SKF, for its part, contended that the decision of the Skatterättsnämnden should be upheld.

18. It was in those circumstances that the Regeringsrätten decided to stay proceedings and to refer to the Court of Justice the following questions for a preliminary ruling:

‘(1) Are Articles 2 and 4 of the Sixth Directive … and Articles 2 and 9 of Directive 2006/112 to be interpreted as meaning that, where a taxable person liable for [VAT] on supplies of services to a subsidiary disposes of shares in that subsidiary that disposal is a transaction subject to VAT?

(2) If the answer to the first question is that the disposal constitutes a taxable transaction, is it then covered by the exemption provided for by Article 13B(d)(5) of the [Sixth] Directive … and Article 135(1)(f) of Council Directive 2006/12 in respect of transactions in shares?

(3) Irrespective of the answer to the above two questions, can there be a right to deduct for expenditure directly attributable to the disposal transaction, in the same way as there is for general overheads?

(4) Is it of significance for the answers to the above questions if the disposal of interests in a subsidiary takes place in stages?’

IV – **Procedure before the Court**

19. Pursuant to Article 23 of the Statute of the Court of Justice, the Skatteverket, SKF, the German Government, the United Kingdom Government and the Commission of the European Communities have submitted written observations. The oral arguments of those parties, with the exception of the Skatteverket and the United Kingdom Government which were not represented, and also of the Swedish Government, were presented at the hearing which took place on 4 December 2008.

V – **Analysis**

A – *Preliminary remarks*

20. As stated above, the issue in the main proceedings is whether SKF can deduct the VAT payable on the supplies of services which it has acquired in the spheres of valuation of shares, assistance in negotiations and legal advice in relation to the disposal of shares in a subsidiary and in a controlled company.

21. Generally, it should be recalled that the common system of VAT ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT. (7)

22. It is settled case-law that under Article 17(5) of the Sixth Directive, read in the light of paragraph (2) of that article, before there can be a right to deduct VAT the goods or services acquired must have a direct and immediate link with the output transactions which give rise to the right to deduct. (8) In other words, in principle, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to the right to deduct is necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. (9)

23. The Court has however accepted that a taxable person has a right to deduct even where

there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the costs of the services in question are part of his general overheads and are, as such, components of the price of the goods or services which he supplies. (10)

24. The first three questions referred by the national court relate to the abovementioned conditions governing whether there is a right to deduct, namely: (a) whether the disposal of shares, the output transaction, is an economic transaction which is within the scope of the Sixth Directive (and of Directive 2006/112); (b) if the answer is that it is, whether that transaction gives rise to the right to deduct, which is to say, whether that transaction is such that it is not covered by any exemption provided for by the Sixth Directive (and by Directive 2006/112), and (c) whether the right to deduct input VAT on the supplies of services acquired by SKF is available for costs which, although directly attributable to the share disposal transactions, may be part of the taxable person's overheads. The fourth question, rather, relates to whether breaking up the share disposals into several transactions would affect the answers to the preceding questions.

B – *The first question referred for a preliminary ruling*

25. As correctly pointed out by all of the parties that have submitted observations to the Court, the referring court's first question essentially seeks to establish whether disposals of shares, such as those at issue in the main proceedings, are transactions falling within the scope of the Sixth Directive and Directive 2006/112.

26. Contrary to SKF's argument at the hearing, to the effect that a disposal of financial holdings, including that at issue in the main proceedings, is not subject to VAT, the answer to that question must, to my mind, be affirmative, which is moreover the position of the Skatteverket, the three Governments which have submitted observations in this case and the Commission.

27. Admittedly, it is clear from the case-law that the disposal of financial holdings held by a company in other undertakings does not, *as a general rule*, constitute an economic activity for the purposes of the Sixth Directive and therefore does not fall within the scope of that directive. (11)

28. However, the Court has held that, whenever, for example, a transaction relating to shares or holdings in a company is carried out in the course of trading in securities (12) or to achieve a direct or indirect involvement in the management of the companies concerned, without prejudice to the rights held by the holding company as shareholder, (13) that transaction may fall within the scope of VAT.

29. Accordingly, in relation to the acquisition of holdings accompanied by direct or indirect involvement in the management of the companies where those transactions have taken place, the Court has ruled that such involvement in the management of subsidiaries must be regarded as an economic activity within the meaning of Article 4(2) of the Sixth Directive, where it entails carrying out transactions which are subject to VAT by virtue of Article 2 of that directive, such as the supply by a holding company of administrative, financial, commercial and technical services to those subsidiaries. (14)

30. However, in the main proceedings, it is common ground that SKF, the parent company of an industrial group, was involved in the management of the subsidiary and the controlled company specified in the order for reference, by providing for consideration to those two companies various supplies of services, inter alia, of an administrative, accounting or commercial nature, on which SKF is liable for VAT. As correctly submitted by the Swedish Government at the hearing, such an involvement demonstrates that SFK has financial interests in the subsidiary and the controlled company which are greater than those of a mere shareholder.

31. True, as observed by the German Government, doubt may remain as to whether a disposal of shares, such as that at issue in the main proceedings, is a transaction included within the scope of the Sixth Directive, inasmuch as, unlike acquisition or retention of holdings, such a transaction, strictly speaking, assists not the involvement in the management of the subsidiary and of the controlled company but, rather, the termination of that activity.

32. For the following reasons, however, such doubt can be dispelled.

33. First, I agree with the German Government that a disposal of shares, such as that at issue in the main proceedings, constitutes, in the final analysis, the greatest possible involvement in the activity of the subsidiary and the controlled company inasmuch as it is a management measure within a group of companies as part of the restructuring of that group by the parent company. In that respect, the case-law mentioned in point 29 of this Opinion appears to be of equal relevance in relation to such a disposal of shares.

34. Then, and on any view of the matter, just as the Court has very clearly extended its assessment of the non-economic nature of simple acquisition of holdings to simple sales of holdings, (15) the principles of equal treatment and tax neutrality require, in my opinion, the Court’s findings concerning the recognition of the economic nature of the acquisition of holdings accompanied by an involvement by the parent company in the management of its subsidiaries and of companies controlled by it to be extended to the disposal of holdings which bring about the end of such involvement.

35. Since those considerations are equally relevant to the interpretation of Directive 2006/112, I propose to answer the first question referred for a preliminary ruling as follows: Articles 2(1) and 4(1) and (2) of the Sixth Directive and Articles 2(1) and 9(1) of Directive 2006/112 must be interpreted to mean that the disposal of the entire shareholding which a parent company retains in the share capital of a subsidiary and in that of a controlled company, in the management of which companies that parent company has directly or indirectly taken part by providing to them for consideration various supplies of services of an administrative, accounting and commercial nature on which that parent company is liable for VAT, is a transaction which constitutes an economic activity.

C – *The second question*

36. In the event that the disposal of shares held by the parent company in the share capital of the subsidiary and in that of the controlled company falls within the scope of the provisions of the Sixth Directive and of Directive 2006/112 – a supposition which is, as I have just asserted, to be confirmed – the referring court wishes, by its second question, to know whether that disposal is covered by the exemption provided for by Article 13B(d)(5) of the Sixth Directive and by Article 135(1)(f) of Directive 2006/112.

37. The Skatteverket and the three Governments which have submitted observations to the Court consider that the answer to be given to that question should be in the affirmative.

38. On the other hand, while the SKF claims that an answer to that question is unnecessary in the light of the answer which it suggests should be given to the first question, the Commission maintains, for its part, that the sale of a company's entire shareholding ought to be regarded as a strategic redeployment of assets carried out with the aim of obtaining funds to finance other activities of the group. Consequently, in the opinion of the Commission, because that transaction can be likened to a complete or partial transfer of the totality of an undertaking, it is not covered by the exemption provided for by Article 13B(d)(5) of the Sixth Directive and by Article 135(1)(f) of Directive 2006/112. As was particularly emphasised in argument at the hearing, the Commission also considers, referring to paragraph 20 of *Kretztechnik*, that only commercial transactions in securities are covered by the abovementioned exemption.

39. That argument is not persuasive.

40. It must be noted that, under the two provisions referred to above, Member States are to exempt from VAT transactions in shares, interests in companies or associations, debentures and other securities.

41. It appears to follow from *Wellcome Trust* that the exemption provided for by Article 13B(d)(5) of the Sixth Directive covers 'transactions in shares' carried out to achieve a direct or indirect involvement in the management of the companies in which the acquisition of a holding has been made. (16)

42. True, no one can fail to realise that reference to Article 13B(d)(5) of the Sixth Directive in that judgment was employed by the Court in order to demonstrate that the acquisition of holdings accompanied by an involvement in the management of the subsidiaries in question was an economic activity and not, strictly speaking, to define the exact scope of the exemption provided for by that provision.

43. However, unlike the Commission, I do not believe that the scope of Article 13B(d)(5) of the Sixth Directive (and that of Article 135(1)(f) of Directive 2006/112) can be restricted solely to commercial share dealing transactions, excluding therefore a disposal of shares by a parent company in a subsidiary and in a controlled company of the nature of the transactions in the main proceedings.

44. First, no such distinction is applied in either Article 13B(d)(5) of the Sixth Directive or, moreover, Article 135(1)(f) of Directive 2006/112 to transactions in shares which come within the scope of those directives.

45. Secondly, in my opinion, it is impossible to infer from paragraph 20 of *Kretztechnik* what is deduced from it by the Commission. In fact, in that paragraph of that judgment, the Court merely noted, in the context of ascertaining whether a share issue was an economic transaction capable of falling within the scope of the Sixth Directive, that the scope of that directive extends to 'transactions that consist in obtaining income on a continuing basis from activities which go beyond the compass of the simple acquisition and sale of securities, *such as* transactions carried out in the course of a business trading in securities, but [those transactions] are exempted from VAT under Article 13B(d)(5) of that directive'. (17)

46. Consequently, that paragraph appears in no way to restrict the scope of the exemption provided for by Article 13B(d)(5) of the Sixth Directive to commercial share-dealing transactions.

47. On the contrary, the abovementioned exemption extends, first, to all transactions in securities provided that they go beyond simple acquisition and sale, the latter transactions, as stated in point 27 of this Opinion, being outside the scope of the Sixth Directive. That requirement, as I have stated above, is satisfied in a situation such as that in the main proceedings.

48. Secondly, a characteristic of transactions covered by the exemption provided for by Article 13B(d)(5) of the Sixth Directive must be that they obtain income on a continuing basis. In the main proceedings, it seems to me that the fact that the revenue obtained from the disposals will be used for the restructuring of the industrial group of companies led by SKF adequately satisfies the criterion of continuing income, since that income is allocated to a transaction which is structural, necessarily long-lasting and extensive.

49. It appears to me that inclusion within the scope of Article 13B(d)(5) of the Sixth Directive of share disposal transactions, such as those in the main proceedings, is also supported by the reasoning set out in paragraph 16 of *Harnas & Helm*, where the Court, referring, in particular, to *Wellcome Trust*, acknowledged that 'transactions *referred to* in Article 13B(d)(5) of the Sixth Directive may fall within the scope of VAT *where they* are effected as part of a commercial share-dealing activity, in order to secure a direct or indirect involvement in the management of the companies in which the holding has been acquired *or* where they constitute the direct, permanent and necessary extension of the taxable activity'. (18)

50. The exemption provided for by Article 13B(d)(5) of the Sixth Directive appears therefore to extend, in accordance with its wording, to all transactions 'in shares' referred to in that provision which fall within the scope of that directive. The fact that, as submitted by the Commission, Article 13B of the Sixth Directive, as a provision derogating from the principle that VAT is payable on all services supplied for consideration by a taxable person, should be interpreted strictly, (19) cannot however, in my opinion, lead to the result that the actual wording of that provision is ignored.

51. To my mind, that assessment cannot be invalidated by the Commission's additional argument that a disposal of shares, such as that in the main proceedings, should be compared to a transfer for consideration of a totality of the assets or part thereof of an undertaking, within the meaning of Article 5(8) of the Sixth Directive, a transaction which is in principle taxable, with the consequence that that disposal does not enjoy the exemption provided for by Article 13B(d)(5) of the Sixth Directive.

52. First, as a general point, I find it hardly conceivable that Article 5(8) of the Sixth Directive, which is to be found under the definition of 'supply of goods' in Article 5 of that directive, can cover disposals of holdings which involve a 'supply of services' defined in Article 6(1) of that directive to include 'assignment[s] of intangible property whether or not it is the subject of a document establishing title'. It may also be noted, in that regard, that in *Kretztechnik* the Court rejected the possibility of considering an issue of new shares to be a supply of goods for consideration, on the ground that those shares are securities representing intangible property which come under the definition of supplies of services for consideration. (20) In the same way, Article 5(8) of the Sixth Directive appears, to my mind, to relate to the total or partial disposal of the assets of an undertaking, rather than to the disposal of shares or financial holdings in a company. (21)

53. Next, in *BLP Group,* which concerned the sale by a holding company of 95% of the shares held by it in one of its subsidiaries, the Court did not reject the national court's assessment that such a sale was an exempt transaction, (22) without qualifying its assessment so as to take

account of any situations involving disposals of financial holdings which would have come under the concept of ‘transfer for consideration of a totality of the assets or part thereof’, within the meaning of Article 5(8) of the Sixth Directive.

54. Further, as SKF observed at the hearing and even though, I concede, the following argument is not in itself entirely determinative for the interpretation of an expression of Community law, under the law of contracts the proprietor of the shares of a company does not necessarily have any authority to transfer the assets of the undertaking, the latter itself remaining, as a general rule, the only party capable of concluding such a transaction.

55. Lastly, and in any event, even if the interpretation of Article 5(8) of the Sixth Directive proposed by the Commission should be regarded as correct, it remains no less true, that, as regards the law applicable in the main proceedings, as was stated by both the Swedish Government and SKF in response to a specific question on that point put to them by the Court at the hearing, the Kingdom of Sweden has chosen to make use of the option provided for in Article 5(8) of the Sixth Directive, namely to consider that on the occasion of the transfer of a totality of the assets or part thereof there has been no supply of goods. The result of the use of that option by a Member State is that, in accordance with Article 2 of the Sixth Directive, such a transfer is not subject to VAT. (23)

56. It follows that, contrary to what is suggested by the Commission, accepting the disposal of shares at issue in the main proceedings as a transfer of the totality of the undertaking, within the meaning of Article 5(8) of the Sixth Directive, could not ‘neutralise’ the application of the exemption provided for by Article 13B(d)(5) of the Sixth Directive, since, in Sweden, such a transfer falls outside the scope of the Sixth Directive.

57. Consequently, in my opinion, a disposal of shares in a subsidiary and a controlled company, as in the main proceedings, is a transaction which is covered by the exemption provided for by Article 13B(d)(5) of the Sixth Directive and Article 135(1)(f) of Directive 2006/112.

58. If the Court were to disagree with that proposition and were to consider, in line with the position upheld by the Commission, that such a transaction is comparable to the transfer of a totality or part thereof of an undertaking, within the meaning of Article 5(8) of the Sixth Directive (and Article 19(1) of Directive 2006/112), that transaction will in any event be outside the scope of those directives, having regard to the option, offered by the abovementioned provisions and made use of by the Kingdom of Sweden, to treat such a transfer as not involving any supply of goods.

D – *The third question*

59. It is clear, both from the wording of the third question and from the reasoning set out by the national court intended to clarify it, that the national court seeks to know whether, although the expenditure incurred in the acquisition of supplies of services, the input transaction, is directly linked to the share disposal transactions, there may none the less be a right to deduct the input VAT to the extent that that expenditure forms part of the taxable person’s general overheads in the overall context of its economic activity. That question is more explicable in the light of the fact that the disposal of shares in the subsidiary and in the controlled company was, it seems, be carried out in the wider context of the restructuring of the group led by SKF, thereby enabling SKF to free resources which could be used for the realignment of its industrial activity.

60. As I have previously underlined in my preliminary remarks, before input VAT can be deductible, it is, as a general rule, necessary for the transactions on which VAT is payable to have a direct and immediate link with one or more output transactions. (24)

61. As the Court has previously had occasion to clarify, such a right to deduct VAT presupposes that the expenditure incurred in obtaining the goods or services in question was part of the cost components of the output taxable transactions giving rise to the right to deduct. (25)

62. Further, the Court held in *Midland Bank* that it is not realistic to attempt to find a form of words which is more specific than the 'direct and immediate link' test, because in view of the diversity of commercial and professional transactions, it is impossible to give a more appropriate reply as to the method of determining in every case the necessary relationship which must exist between the input and output transactions in order for input VAT to become deductible. (26) The Court added in the same judgment that it is for the national courts to apply that test to the facts of each case before them. (27)

63. In the main proceedings, the national court has made the finding of fact that the services acquired by SKF are directly linked to the disposal of the shares in the subsidiary and in the controlled company. Those services deal with the valuation of the shares to be disposed of, assistance in disposal negotiations and the drawing up of contractual documents, and were therefore acquired in order to carry out that disposal. Correctly, therefore, the Skatteverket, the Governments which submitted observations to the Court and the Commission also consider, in light of the findings of fact made by the national court, that there is a direct and immediate link between the input services acquired and the output transaction which is the disposal of shares. (28)

64. The disposal of shares being, as I suggest in the answer to the second question analysed above, a transaction which is an exempted activity under Article 13B(d)(5) of the Sixth Directive, the VAT payable on the supplies of services acquired in order to carry out that transaction cannot therefore, in all logic, be deducted, since those services constitute part of the costs of the exempt transaction. (29)

65. That moreover was the conclusion reached by the Court in *BLP Group*. The Court held that the VAT payable on the professional services acquired by BLP Group in connection with the disposal of one of its subsidiaries could not be deducted since the services in question had been used to carry out an exempt transaction, in that case the disposal of shares in that subsidiary. (30)

66. The Court also stated, in the same judgment, that that rule applied even 'if the ultimate purpose of the [exempt] transaction is the carrying out of a taxable transaction'. (31)

67. That statement must be understood against the background of the facts of *BLP Group* and the argument set out by that company before the Court. As is clear from the narration of the facts of that case, the primary objective of the disposal of shares in the subsidiary was to realise funds in order to clear debts resulting from BLP Group's taxed transactions. Before the Court, BLP Group submitted, inter alia, that the VAT paid on the supplies of services acquired to carry out the disposal of shares in question ought, consequently, to be deducted even if those services were indirectly linked to its taxable output transactions. (32)

68. BLP Group's argument was clearly rejected by the Court, which emphasised that before there can be a right to deduct input VAT, the goods or services in question must have a direct and immediate link with taxable transactions, and the ultimate aim pursued by the taxable person is irrelevant (33) even, therefore, when that aim is the carrying out of a taxable transaction. The Court's rejection of BLP Group's argument was also based on considerations of the need to ensure legal certainty and to facilitate measures required for the application of VAT, for the tax authorities cannot be expected to determine the taxable person's intentions when the services are not objectively linked to taxable transactions. (34)

69. As was very appositely pointed out by Advocate General Jacobs in his Opinion in *Abbey National* ,(35) it is therefore clear from BLP Group, that the 'VAT chain-breaking' effect which is an inherent feature of an exempt transaction will always prevent VAT incurred on supplies used for such a transaction from being deductible from VAT to be paid on a subsequent output supply of which the exempt transaction forms a cost component. The need for a direct and immediate link thus does not refer exclusively to the very next link in the chain but serves to exclude situations where the chain has been broken by an exempt supply. (36)

70. It seems to me that the conclusion reached in *BLP Group*, and the reasoning behind it as set out above, may validly be transposed to the present case. Deduction of input VAT on the services acquired by SKF should be refused since those services have a direct and immediate link with an exempt transaction, in this case the disposal of shares in the subsidiary and in the controlled company, a transaction which breaks the VAT chain, even where the transaction contributes to the objective of restructuring the industrial activities of the group led by SKF.

71. The referring court seeks to know however whether the case-law of the Court, referred to in point 23 of this Opinion, according to which deduction of input VAT is none the less possible when the costs of the services acquired form part of the taxable person's general overheads and therefore have a direct and immediate link with the whole of his economic activity, is applicable in a case such as that in the main proceedings.

72. To my mind, the answer to that question must be no.

73. The relevant judgments in which the Court has recognised the possibility, stated in point 71 of this Opinion, of deducting input VAT, related to transactions which, contrary to the premiss on which the *BLP Group* judgment was based, were linked with output transactions which *fellentirely outside the scope of VAT* (because they were not considered to be either supplies of goods or supplies of services) and which, accordingly, were irrelevant to the determination of whether there was or was not a right to deduct. (37) It was therefore permissible, in those circumstances, to look for not only one or more output transactions where the right to deduct might arise with which the input transaction had the closest links, but also, therefore, where appropriate, links with the taxable person's general economic activity.

74. Particularly enlightening on that point is the assessment set out by the Court in paragraph 36 of *Kretztechnik* to the effect that 'in view of the fact that, first, a share issue is *an operation not falling within the scope of the Sixth Directive* and, second, that operation was carried out by Kretztechnik in order to increase its capital for the benefit of its economic activity in general, it must be considered that the costs of the supplies acquired by that company in connection with the operation concerned form part of its overheads and are therefore, as such, component parts of the price of its products. Those supplies have a direct and immediate link with the whole economic activity of the taxable person'. (38)

75. It appears necessary to read that explanation by the Court, in terms of which the

transaction in question fell outside the scope of the Sixth Directive, in the light of the Opinion of Advocate General Jacobs in *Kretztechnik*. The Advocate General considered, first, that if the issue of shares were to be regarded as an exempt transaction, there could be no deduction of VAT payable on services directly and immediately linked to that transaction, and, secondly, if the output transaction fell entirely outside the scope of VAT, and, consequently, was irrelevant for the purpose of determining deductibility, the question to be asked was whether the input services could be linked to one or more taxed output transactions or rather to the company's economic activity as a whole, a possibility which, in the opinion of the Advocate General, was, on the facts of that case, quite likely. (39)

76. It appears to me that the Court has accepted the distinction made by Advocate General Jacobs in his Opinion referred to above between, on the one hand, output transactions exempted from payment of VAT, and, on the other hand, those which entirely escape any VAT liability, because the latter cannot be deemed to be either supplies of goods or supplies of services, and has accordingly also confirmed the decision made in *BLP Group*, on which, moreover, the Advocate General's argument was based.

77. The approach outlined above, which seems to me to be that adopted in the case-law, may appear to treat share disposal transactions which fall outside the scope of VAT more favourably than those which, although within its scope, are exempted from VAT under the provisions of the Sixth Directive (and/or those of Directive 2006/112). Whereas the right to deduct may arise on services acquired to carry out a transaction outside the scope of VAT when such services are regarded as directly and immediately linked to the general economic activity of the taxable person, (40) the VAT payable on services acquired to carry out an exempt transaction, on the other hand, cannot be deducted.

78. However, that situation is no more than the consequence inherent in the common system established by the Sixth Directive (confirmed by Directive 2006/112) and in the dividing line which must be drawn as clearly as possible between taxable transactions, on the one hand, and exempt transactions, on the other; hence the direct and immediate link test (41) and the breaking of the VAT chain when an input transaction on which VAT is payable is directly and immediately related to an output transaction which is exempted from VAT.

79. Moreover, since the VAT chain is not broken when the share disposal transaction is one which falls entirely outside the scope of VAT, there is equally, to my mind, no difference in treatment which adversely discriminates against the taxable person who acquires supplies of services in order to carry out disposal transactions which are covered by the exemption from VAT provided for in Article 13B(d)(5) of the Sixth Directive and who, consequently, does not have the right to deduct the input VAT, even in respect of general overheads which that taxable person has incurred.

80. Further, the consequence of allowing a right to deduct input VAT when the transaction on which VAT is charged has a direct and immediate link to an output share disposal transaction covered by the exemption of Article 13B(d)(5) of the Sixth Directive, would be that a new opportunity to deduct input VAT would be created by judicial decision. Under the actual provisions of Article 17(3)(c) of that directive, such a deduction is *solely* possible when the goods and services are used for the purposes of 'transactions exempted under Article 13B(a) and (d), paragraphs 1 to 5, when the customer is established outside the Community or when these transactions are directly linked with goods intended to be exported outside the Community', conditions which do not at all appear to correspond to the information in the case documents and which moreover have not been relied on by SKF before the Court.

81. Therefore, I consider that the answer to be given to the national court's third question is that

a taxable person who has acquired supplies of services to carry out a disposal of shares in a subsidiary and in a controlled company, which is a transaction covered by the exemption provided for by Article 13B(d)(5) of the Sixth Directive and by Article 135(1)(f) of Directive 2006/112, and with which those services have a direct and immediate link, does not have the right to deduct input VAT on those services.

E – *The fourth question*

82. By its fourth and last question, the national court asks essentially whether the answers to the preceding questions may be affected by the fact that the share disposal transaction is to be carried out at intervals over a period of time.

83. It must be noted that the national court does not set out the factual circumstances which lead it to refer a question to the Court on that point, although one can imagine that the issue is connected to the sale of the last block of shares in the controlled company. (42)

84. In any event, I share the opinion of all the parties who have submitted observations to the Court: the fact that the disposal of shares is made in several successive transactions cannot affect the answers offered to the first three questions.

85. True, as stated correctly by the Commission, the transferor will find it more difficult to prove that the various blocks of share disposals are part of a single larger transaction consisting of the disposal of all the shares in a subsidiary. However, where such proof has been provided by the transferor, there is no reason why the tax treatment of comparable share disposal transactions should be different.

86. Moreover, since the relevant provisions of the Sixth Directive have essentially been reproduced in Directive 2006/112, the tax treatment of a share disposal transaction which takes place partly within the scope of the former and partly within the scope of the latter cannot change.

87. Therefore, if, as I suggest, the share disposal transaction is exempted from payment of VAT, whether under the aegis of the Sixth Directive or under Directive 2006/112, the fact that that transaction is carried out, for example, in two or three successive stages is of no relevance in relation to the impossibility of deducting input VAT on supplies of services linked directly and immediately to that transaction. To decide otherwise would amount to introducing a difference in treatment of otherwise comparable transactions.

88. My proposed answer therefore to the fourth question is that the answers to the first three questions are not affected by the fact that the disposal of shares in the subsidiary and/or in the controlled company is carried out in several successive transactions.

VI – **Conclusion**

89. For the reasons set out above, I propose that the Court answer the questions referred by the Regeringsrätten for a preliminary ruling as follows:

(1) Articles 2(1) and 4(1) and (2) 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, as amended, latterly, by Council Directive 2006/18/EC of 14 February 2006, and Articles 2(1) and 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be interpreted to mean that the disposal of the totality of shares which a parent company holds in the share capital of a subsidiary and in that of a controlled company, in the management of which companies that parent

company has directly or indirectly taken part, by providing to them for consideration various supplies of services of an administrative, accounting and commercial nature for which that parent company is liable for value added tax, constitutes an economic activity.

(2) A disposal of shares in a subsidiary and in a controlled company, such as that at issue in the main proceedings, is a transaction covered by the exemption provided for by Article 13B(d)(5) of Sixth Directive 77/388, as amended by Directive 2006/18, and by Article 135(1)(f) of Directive 2006/112.

(3) A taxable person who has acquired supplies of services in order to carry out a disposal of shares in a subsidiary and in a controlled company, a transaction which is covered by the exemption provided for by Article 13B(d)(5) of Sixth Directive 77/388, as amended by Directive 2006/18, and by Article 135(1)(f) of Directive 2006/112, and with which those services have a direct and immediate link, does not have the right to deduct input value added tax on those services, even when the disposal of shares is a transaction which contributes to the objective of restructuring the taxable person's industrial activities.

(4) The answers to the first three questions are not affected by the fact that the disposal of shares in the subsidiary and/or the controlled company is carried out in several successive transactions.

1 – Original language: French.

2 – OJ 1977 L 145, p. 1.

3 – OJ 2006 L 51, p. 12.

4 – OJ 2006 L 347, p. 1.

5 – Generally speaking, a tax preliminary decision is a formal statement by the authorities of their opinion on the application of a particular provision of tax legislation to the factual circumstances of a taxable person. As regards the Kingdom of Sweden, this procedure has previously led to reference to the Court for a preliminary ruling of questions relating to VAT (see Case C?291/07 *Kollektivavtalsstiftelsen TRR Trygghetsrådet* [2008] ECR I?000, paragraph 16).

6 – SFS 1994:200.

7 – See, in that regard, Case C?435/05 *Investrand* [2007] ECR I?1315, paragraph 22 and case-law cited.

8 – See, inter alia, Case C?408/98 *Abbey National* [2001] ECR I?1361, paragraph 25 and case-law cited.

9 – *Abbey National* (paragraph 26) and *Investrand* (paragraph 23).

10 – See *Investrand,* (paragraph 24 and case-law cited).

11 – See Case C?155/94 *Wellcome Trust* [1996] ECR I?3013, paragraph 33; Case C?442/01 *KapHag* [2003] ECR I?6851, paragraph 40; Case C?77/01 *EDM* [2004] ECR I?4295, paragraphs 57 to 59; Case C?8/03 *BBL* [2004] ECR I?10157, paragraph 38; Case C?465/03 *Kretztechnik* [2005] ECR I?4357, paragraph 19; and *Investrand*, paragraph 25. In the light of that case-law, no authoritative importance *onthat point* can be accorded to Case C?4/94 *BLP Group* [1995] ECR I?983), where the Court did not rebut the finding by the national court that a disposal of shares constituted, in the main proceedings, an 'exempt transaction', presupposing therefore that it was

an economic activity within the scope of the Sixth Directive. In fact, in that case the Court appears to have confined itself to answering the questions as they were presented by the national court.

12 – See, inter alia, *Wellcome Trust* (paragraph 25), *EDM* (paragraph 59), *BBL* (paragraph 41) and *Kretztechnik* (paragraph 20).

13 – See, in that regard, on the acquisition of holdings, Case C?60/90 *Polysar Investments Netherlands* [1991] ECR I?3111, paragraph 14; Case C?142/99 *Floridienne and Berginvest* [2000] ECR I?9567, paragraph 18; and Case C?16/00 *Cibo Holdings* [2001] ECR I?6663, paragraph 20, and on the disposal of holdings, *Wellcome Trust*, paragraph 35. See also Case C?80/95 *Harnas & Helm* [1997] ECR I?745, paragraph 16.

14 – See *Floridienne and Berginvest* (paragraph 19) and *Cibo Holdings* (paragraph 21).

15 – See, inter alia, *Wellcome Trust* (paragraph 33) and *Kretztechnik* (paragraph 19).

16 – See *Wellcome Trust* (paragraph 35).

17 – *Kretztechnik*, (paragraph 20) (the italics are mine).

18 – *Harnas & Helm*, (paragraph 16) (the italics are mine).

19 – See, recently, Order of 14 May 2008 in Joined Cases C?231/07 and C?232/07 *Tiercé Ladbroke* [2008] ECR I?000, paragraph 15 and case-law cited.

20 – *Kretztechnik*, (paragraphs 22 and 23).

21 – See also, to that effect, point 26 of Advocate General Jacobs's Opinion in *Abbey National*. See also Case C?497/01 *Zita Modes* [2003] ECR I?14393, paragraph 39, which interprets the reasoning of Article 5(8) of the Sixth Directive as intended to facilitate 'transfers of undertakings or parts of undertakings'.

22 – As is clear from the Opinion of Advocate General Lenz in *BLP Group*, the national court considered (as apparently did the Advocate General) that the disposal of shares was covered by the exemption provided for by Article 13B(d)(5) of the Sixth Directive (see, in particular, points 24 and 35 of that Opinion). In point 33 of his Opinion in *Abbey National*, Advocate General Jacobs also interpreted Article 13B(d)(5) of the Sixth Directive as covering the disposals of financial holdings.

23 – See *Abbey National* (paragraph 30) and *Zita Modes* (paragraph 29). That is undoubtedly why the national court in this case has not referred to the Court a question on the interpretation of Article 5(8) of the Sixth Directive, although it raised, in paragraph 26 of the order for reference, the issue of transfer of the totality of an undertaking.

24 – See, inter alia, *Cibo Holdings*, paragraph 26 and case-law cited.

25 – See Case C?98/98 *Midland Bank* [2000] ECR I?4177 (paragraph 30); *Abbey National* (paragraph 28); *Cibo Holdings* (paragraph 31) and *Kretztechnik* (paragraph 35).

26 – *Midland Bank* (paragraph 25).

27 – Idem.

28 – As stated above, the Commission however considers the transaction of disposal of shares to be equivalent to a transfer of the totality of the undertaking.

29 – See, to that effect, point 36 of the Opinion of Advocate General Lenz in *BLP Group*. It cannot be entirely excluded that, in certain circumstances, in particular when the shares are quoted on a transferable securities market and their cost is solely a reflection of that quotation, VAT paid on input services acquired may with difficulty be capable of incorporation in the costs of the disposal. None the less, not only does the national court consider that there is a direct link between the input services acquired and the output services to be performed, but the issue that I have outlined in this footnote does not appear to correspond to the situation in the main proceedings.

30 – *BLP Group* (paragraph 27).

31 – Idem (paragraph 28 and operative part of judgment).

32 – *BLP Group* (paragraphs 3, 4, 12 and 13).

33 – *BLP Group* (paragraph 19).

34 – *BLP Group*, (paragraph 24).

35 – Opinion of 13 April 2000 (paragraph 35).

36 – See also, to that effect, points 30 to 39 of the Opinion of Advocate General Lenz in *BLP Group* .

37 – See: *Abbey National* (paragraphs 35 and 36), in which the output transaction consisted of a transfer of the totality of its assets, within the meaning of Article 5(8) of the Sixth Directive on the territory of a Member State which had made use of the option provided by that provision to treat such a transaction as not involving any supply of goods, and therefore, to fall outside the scope of VAT; *Kretztechnik* (paragraph 36) in which the output transaction was a share issue which was expressly described by the Court as a transaction outside the scope of the Sixth Directive; *Cibo Holdings*, where the output transaction in question was an acquisition of a holding, while the reference of the question for a preliminary ruling on deductibility from general overheads of input VAT was made solely on the basis that acquisition of a holding was outside the scope of VAT: see, in that regard, paragraph 32 of the Opinion of Advocate General Stix-Hackl in *Cibo Holdings*. See also *Investrand* (paragraphs 28 and 29), where the Court examined whether the costs engendered by the input transactions on which VAT was payable constituted general overheads, after determining that the output transactions, with which the input transactions had a direct and immediate link, were entirely outside the scope of the Sixth Directive.

38 – *Kretztechnik*, (paragraph 36) (the italics are mine).

39 – See, respectively, points 29 and 74 to 76 of the Opinion in *Kretztechnik*.

40 – This could possibly be the case in the main proceedings if, contrary to the analysis set out in this Opinion, the Court were to consider that, first, there is a transfer of the totality of the assets, within the meaning of Article 5(8) of the Sixth Directive, a transaction which, as bears repeating, is not, because of the option made use of by the Kingdom of Sweden, a supply of goods within the scope of VAT in the territory of that Member State and, secondly, the services acquired to carry out such a transfer were directly and immediately linked to SKF’s general economic activity.

41 – See, in that regard, inter alia, *BLP Group* (paragraphs 18 and 19); *Abbey National* (paragraph

25) and *Cibo Holdings* (paragraph 28).

42 – See, in that regard, the end of point 16 of this Opinion.