OPINION OF ADVOCATE GENERAL

BOT

delivered on 22 September 2016 (1)

Case C?471/15

Sjelle Autogenbrug I/S

v

Skatteministeriet

(Request for a preliminary ruling by the Vestre Landsret (Western Court of Appeal, Denmark)

(Reference for a preliminary ruling — Directive 2006/112/EC — Common system of value added tax — Special arrangements for taxable dealers — Margin scheme — Sale of spare parts for motor vehicle — Definition of ‘second-hand goods’)

1. The question put to the Court in this case is whether spare parts for motor vehicles can be classified as ‘second-hand goods’ within the meaning of Article 311(1)(1) of Directive 2006/112/EC. (2)

2. This request is of not inconsiderable importance to the applicant in the main proceedings since, pursuant to that directive, second-hand goods are subject to a special margin scheme whereby the taxable amount under that scheme, namely the total profit margin made by the taxable dealer, is equal to the difference between the selling price charged by the taxable dealer for the goods and the purchase price.

3. In this Opinion, I will explain why I consider that Article 311(1)(1) of Directive 2006/112 must be interpreted as meaning that the definition of ‘second-hand goods’ covers motor vehicle parts which, after being removed from an end-of-life vehicle acquired by a vehicle reuse undertaking from an individual, are resold as spare parts, thereby rendering the taxable dealer eligible for the margin scheme.

I – **Legal framework**

A – *EU law*

4. Article 1(2) of Directive 2006/112 is worded as follows:

‘The principle of the common system of [value added tax (“VAT”)] entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.

On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.

…’

5. Article 73 of that directive provides:

‘In respect of the supply of goods … the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.’

6. Title XII of the directive, entitled ‘Special schemes’, includes a Chapter 4 entitled ‘Special arrangements for second-hand goods, works of art, collectors’ items and antiques’, consisting of Articles 311 to 343.

7. Article 311(1)(1) and (1)(5) of Directive 2006/112 provides:

‘1. For the purposes of this Chapter, and without prejudice to other Community provisions, the following definitions shall apply:

(1) “second-hand goods” means movable tangible property that is suitable for further use as it is or after repair, other than works of art, collectors’ items or antiques and other than precious metals or precious stones as defined by the Member States;

…

(5) “taxable dealer” means any taxable person who, in the course of his economic activity and with a view to resale, purchases, or applies for the purposes of his business, or imports, second-hand goods, works of art, collectors’ items or antiques, whether that taxable person is acting for himself or on behalf of another person pursuant to a contract under which commission is payable on purchase or sale.’

8. Article 312 of that directive provides:

‘For the purposes of this Subsection, the following definitions shall apply:

(1) “selling price” means everything which constitutes the consideration obtained or to be obtained by the taxable dealer from the customer or from a third party, including subsidies directly linked to the transaction, taxes, duties, levies and charges and incidental expenses such as commission, packaging, transport and insurance costs charged by the taxable dealer to the customer, but excluding the amounts referred to in Article 79;

(2) “purchase price” means everything which constitutes the consideration, for the purposes of point (1), obtained or to be obtained from the taxable dealer by his supplier.’

9. Article 313(1) of the directive provides:

‘In respect of the supply of second-hand goods, works of art, collectors’ items or antiques carried

out by taxable dealers, Member States shall apply a special scheme for taxing the profit margin made by the taxable dealer, in accordance with the provisions of this Subsection.'

10. Article 314 of Directive 2006/112 provides:

'The margin scheme shall apply to the supply by a taxable dealer of second-hand goods, works of art, collectors' items or antiques where those goods have been supplied to him within the Community by one of the following persons:

(a) a non-taxable person;

…'

11. Article 315 of that directive provides:

'The taxable amount in respect of the supply of goods as referred to in Article 314 shall be the profit margin made by the taxable dealer, less the amount of VAT relating to the profit margin.

The profit margin of the taxable dealer shall be equal to the difference between the selling price charged by the taxable dealer for the goods and the purchase price.'

12. Article 318 of the directive is worded as follows:

'1. In order to simplify the procedure for collecting the tax and after consulting the VAT Committee, Member States may provide that, for certain transactions or for certain categories of taxable dealers, the taxable amount in respect of supplies of goods subject to the margin scheme is to be determined for each tax period during which the taxable dealer must submit the VAT return referred to in Article 250.

In the event that such provision is made in accordance with the first subparagraph, the taxable amount in respect of supplies of goods to which the same rate of VAT is applied shall be the total profit margin made by the taxable dealer less the amount of VAT relating to that margin.

2. The total profit margin shall be equal to the difference between the following two amounts:

(a) the total value of supplies of goods subject to the margin scheme and carried out by the taxable dealer during the tax period covered by the return, that is to say, the total of the selling prices;

(b) the total value of purchases of goods, as referred to in Article 314, effected by the taxable dealer during the tax period covered by the return, that is to say, the total of the purchase prices.

3. Member States shall take the measures necessary to ensure that the taxable dealers referred to in paragraph 1 do not enjoy unjustified advantage or sustain unjustified harm.'

B – *Danish law*

13. The Law on VAT (Momsloven) of 23 January 2013 ('the 2013 Law on VAT') transposed Directive 2006/112 into Danish law. In Chapter 17 of that law, entitled 'Special provisions governing second-hand goods, works of art, collectors' items and antiques', Article 69(1)(1) provides that undertakings which, with a view to resale, purchase, inter alia, second-hand goods, works of art, collectors' items and antiques, may, upon resale, pay the tax on the second-hand goods in question under the provisions of that chapter. The application of those rules to, in particular, second-hand goods is conditional on those goods first being supplied by a non-taxable

person from Denmark or another Member State.

14. Article 69(3) of the 2013 Law on VAT defines ‘second-hand goods’ as movable tangible property that is suitable for further use as it is or after repair, other than works of art, collectors’ items or antiques and other than precious metals or stones. Furthermore, under that provision, a means of transport supplied to or from a Member State other than the Kingdom of Denmark is deemed to be second hand in so far as it is not covered by the definition set out in Article 11(6) of that law.

15. The Vestre Landsret (Western Court of Appeal) states that the *travaux préparatoires* of the Momsloven (Law on VAT) of 18 May 1994 show that the purpose of the proposed rules is to avoid VAT being paid in full on the same goods twice or more. This occurs, for example, where traders purchase second-hand goods from individuals with a view to resale. In addition, as is apparent from the *travaux préparatoires*, the definition of ‘second-hand goods’ refers to movable tangible property that is suitable for further use as it is or after repair. It therefore follows that the movable tangible property must retain its identity. (3)

16. In an information circular of 10 February 2006 concerning VAT on scrapped vehicles, the tax authorities stated that the VAT rules applicable to second-hand goods do not apply to the resale of spare parts by an auto scrap dealer as the nature of the vehicle changes in that it becomes spare parts.

II – **The facts in the main proceedings and the question referred for a preliminary ruling**

17. Sjelle Autogenbrug I/S is a vehicle reuse undertaking whose main activity is the resale of used motor vehicle parts which it removes from end-of-life vehicles.

18. Sjelle Autogenbrug also engages in the environmental and waste treatment of end-of-life vehicles, a service for which it charges a standard price. Lastly, a lesser part of the undertaking’s overall turnover derives from the sale of scrap metal remaining after removal of the motor vehicle parts.

19. Sjelle Autogenbrug purchases end-of-life vehicles — which are either vehicles whose lifespan has expired or total write-offs — from individuals and insurance companies who do not declare VAT on sales made.

20. Sjelle Autogenbrug currently declares VAT pursuant to the applicable general rules. On 15 July 2010, it asked the tax authorities to apply the special margin scheme for second-hand goods to its activity of reselling used motor vehicle parts taken from end-of-life vehicles.

21. On 6 August 2010, the tax authorities issued a binding decision to Sjelle Autogenbrug stating that the undertaking was not eligible for such a scheme because the motor vehicle parts in question were not covered by the definition of ‘second-hand goods’ within the meaning of the applicable law.

22. By order of 12 December 2011, the Landsskatteretten (Tax Tribunal) confirmed the tax authorities’ decision. Sjelle Autogenbrug lodged an appeal against that order before the referring court.

23. Since it was uncertain as to how to interpret Article 311(1)(1) of Directive 2006/112, the Vestre Landsret (Western Court of Appeal) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘In the circumstances of the present case, can parts from end-of-life vehicles which a VAT-

registered vehicle reuse undertaking removes from a vehicle with a view to resale as spare parts be regarded as “second-hand goods” as referred to in Article 311(1)(1) of Directive 2006/112?’

III – **Analysis**

24. As a preliminary point, it should be recalled that the general VAT regime currently in place ensures, as a result of a deduction system, that there is complete VAT neutrality for economic operators who are responsible for remitting VAT charged in the course of their economic activities. Thus, for each economic transaction, an economic operator liable for VAT may deduct from the VAT charged on the sale of goods any input VAT paid on purchases used in his business. This deduction system ensures that VAT is a tax on goods and not on the turnover of economic operators and that the end consumer alone bears the VAT burden.

25. As for individuals, in so far as they do not pursue any economic activity, they are not taxable persons for VAT purposes. Therefore, when they sell second-hand goods to another individual or to a taxable person, the transaction is not subject to VAT.

26. A difficulty arises where the purchaser is a taxable dealer. Since the goods are reintroduced into the distribution chain, the taxable dealer is liable for VAT when he resells the goods. However, as the taxable dealer did not pay VAT when he purchased the second-hand goods from the non-taxable individual, he cannot deduct such VAT from the amount to be paid to the State, being an amount comprised exclusively of the VAT charged upon resale of those goods. This results in a lack of VAT neutrality and in the double taxation of the goods.

27. The margin scheme, established by Directive 94/5/EC (4) and incorporated into Articles 311 to 343 of Directive 2006/112, was adopted in order to alleviate that difficulty. It aims to harmonise the rules applicable to the acquisition of new goods subject to VAT which are later resold as second-hand goods and to prevent double taxation and the distortion of competition between taxable persons in the area of second-hand goods. (5)

28. In order to qualify for that scheme, the taxable dealer must therefore offer for sale goods which come under the definition of ‘second-hand goods’, within the meaning of Article 311(1)(1) of Directive 2006/112.

29. In the present case, the referring court specifically enquires, in essence, whether that provision must be interpreted as meaning that the definition of ‘second-hand goods’ covers motor vehicle parts which, after being removed from an end-of-life vehicle acquired by a vehicle reuse undertaking from an individual, are resold as spare parts, thereby rendering the taxable dealer eligible for the margin scheme.

30. The Danish government submits that the use in that provision of the words ‘as it is’ demonstrates that, in order to be classified as ‘second-hand goods’, the goods must retain their identity, which is not the case with spare parts since Sjelle Autogenbrug acquires, first of all, a complete vehicle. Furthermore, it argues that even if those spare parts could be classified as ‘second-hand goods’, it would not be possible to apply the margin scheme because the purchase price of the spare parts cannot be precisely determined.

31. I disagree with that view on the following grounds.

32. I recall that, under Article 311(1)(1) of Directive 2006/112, second-hand goods are defined as ‘movable tangible property that is suitable for further use as it is or after repair, other than works of art, collectors’ items or antiques and other than precious metals or precious stones as defined by the Member States’.

33. There is nothing in that definition or even in the body of the directive to suggest that the EU legislature intended to exclude goods originating from a single whole which could be separated, such as parts taken from end-of-life vehicles.

34. The use of the words ‘suitable for further use’ in that provision shows that, in order to be classified as ‘second-hand goods’, within the meaning of Article 311(1)(1) of Directive 2006/112, the goods must be able to be reused, which clearly excludes new goods. This new use may take place without it being necessary to repair the goods or after they have been repaired. That, in my view, is the meaning to be ascribed to the words ‘as it is or after repair’.

35. In view of the definition given by the EU legislature, the key factor in the classification of goods as ‘second-hand goods’ is, to my mind, that the used goods must retain the characteristics they had when new. Moreover, I note that in Article 2(6) of Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of-life vehicles, (6) the EU legislature defined ‘reuse’ as ‘any operation by which components of end-of-life vehicles are used for the same purpose for which they were conceived’. Motor vehicle parts fall squarely within that definition since, even when separated from the vehicle, they retain their original characteristics as they will be reused for the same purpose in another vehicle. The fact that those parts were removed from the vehicle is therefore of little consequence.

36. It should also be borne in mind that the reuse of parts taken from end-of-life motor vehicles is clearly encouraged by the EU legislature. In recital 5 of Directive 2000/53, the EU legislature states that it is a fundamental principle that waste should be reused and recovered, and that preference be given to reuse and recycling. This objective might be undermined if taxable dealers such as Sjelle Autogenbrug, who purchase motor vehicles in order to recover their parts and subsequently resell them as spare parts, were excluded from the margin scheme.

37. Lastly, if parts taken from end-of-life motor vehicles, sold as spare parts, could not be classified as ‘second-hand goods’, within the meaning of Directive 2006/112, then in so far as they cannot be classified as ‘new goods’, either, the result would be a legal vacuum as regards the tax treatment of such parts.

38. Consequently, motor vehicle parts which, after being removed from an end-of-life vehicle acquired by a vehicle reuse undertaking from an individual, are resold as spare parts must be classified as ‘second-hand goods’.

39. That being said, it is necessary to consider whether the margin scheme can be applied to spare parts. Although the question is concerned solely with the definition of ‘second-hand goods’, it nevertheless arises in the context of the main proceedings, where the question is whether Sjelle Autogenbrug is eligible for the special margin scheme in view of the particularities of the goods at issue. According to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. (7) Therefore, in order to give a helpful answer to the referring court, it is necessary to examine whether the particularities of the second-hand goods at issue prevent the margin scheme being applied to Sjelle Autogenbrug, as argued by the Danish Government.

40. Article 315 of Directive 2006/112 states that the taxable amount under that scheme, that is the profit margin of the taxable dealer, is equal to the difference between the selling price charged by the taxable dealer and the purchase price. The difficulties raised by the situation in the present case are concerned with the determination of the purchase price. The spare parts were purchased not in the form of spare parts, but as part of a whole, namely a vehicle, for which the taxable dealer paid an overall price.

41. The Danish and Greek Governments contend that the complexity of the transaction carried out when the vehicle was scrapped (removal of parts as well as environmental and waste treatment, etc.) makes it impossible to determine the purchase price of the spare parts. The Danish Government submits in particular that, in those circumstances, allowing the special margin scheme to apply would expose that scheme to possible misuse or circumvention, since the undertaking would be able to set the purchase prices in such a way as to secure the lowest possible profit margin, thereby procuring an advantage for the purposes of VAT.

42. I take the view that as soon as goods are classified as ‘second-hand goods’, within the meaning of Article 311(1)(1) of Directive 2006/112, the Member State where the taxable person reselling those goods operates must apply the margin scheme, regardless of the second-hand goods involved.

43. I recall that Article 313(1) of that directive provides that ‘in respect of the supply of second-hand goods … carried out by taxable dealers, Member States *shall apply* a special scheme for taxing the profit margin made by the taxable dealer’. (8) The use of the verb ‘shall’ in that paragraph does not, in my opinion, allow the Member State any discretion as regards the application of the special scheme.

44. The margin scheme ensures full observance of the principle of fiscal neutrality. The Court has stated that this principle is a fundamental principle of the common system of VAT established by the relevant EU law. (9) In addition, it has held that it follows from the Court’s case-law that the principle of fiscal neutrality inherent in the common system of VAT precludes the taxation of a taxable person’s business activities leading to double taxation. (10)

45. The Court has also found that the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle. (11) Furthermore, it has stated that that principle precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes. (12) The Court has pointed out, moreover, that the principle of fiscal neutrality includes the principle of elimination of distortion in competition as a result of differing treatment for VAT purposes. Therefore, distortion is established once it is found that supplies of services are in competition and are treated unequally for the purposes of VAT. (13)

46. The aim of the margin scheme, in the light of the principle of VAT neutrality, is therefore to avoid double taxation and distortions of competition between taxable persons, particularly in the area of second-hand goods. The Court recalled the twofold objective of that scheme in paragraphs 47 and 48 of its judgment of 3 March 2011 in *Auto Nikolovi* (C?203/10, EU:C:2011:118).

47. By taxing not the resale price of the goods, but only the profit margin, the scheme avoids the double taxation of the resold goods and prevents the taxable dealer from having to remit to the State an amount of VAT from which he was unable to deduct input VAT, which would have the effect of distorting competition.

48. Parts taken from a motor vehicle, even though they originally formed part of a single item, were subject to input tax when the vehicle was purchased by the individual. A proportion of the selling price of those parts therefore comprises the purchase price of the end-of-life vehicle in respect of which an amount of VAT has already been paid by the private seller, without that individual or the taxable dealer being able to deduct such amount. Accordingly, the objective of avoiding double taxation would be undermined if second-hand goods, such as spare parts for motor vehicles, were not eligible for the margin scheme. That would directly infringe the principle of VAT neutrality. (14)

49. As regards the objective of avoiding distortions of competition between taxable persons, it should be noted that recital 7 of Directive 2006/112 provides that the common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State, similar goods and services bear the same tax burden, whatever the length of the production and distribution chain.

50. A refusal to apply the margin scheme to an activity such as that at issue in the main proceedings would specifically result in a distortion of competition on the market for the sale of second-hand spare parts between taxable dealers who resell spare parts after removing them from end-of-life vehicles, such as Sjelle Autogenbrug, and taxable dealers who have acquired spare parts in themselves.

51. Since the first set of taxable dealers would not be eligible for the special scheme, they would have to remit to the Member State the VAT charged on the entire selling price of the parts without being entitled to any deduction. Their selling prices would thus necessarily be higher than those of the second set of taxable dealers who are eligible for the margin scheme, thereby resulting in a loss of competitiveness on the market for second-hand spare parts, unless they forgo a proportion of their turnover. That distortion in competition would result in a difference in treatment for the purposes of VAT between two supplies of services which are similar from the point of view of the consumer and meet the same needs of the consumer.

52. As regards the specific application of the margin scheme to second-hand goods such as spare parts for motor vehicles, I take the view that it is for the national court to decide, in the light of the applicable national law, how that scheme applies to the situation at issue. Several Member States have taken measures to overcome the difficulties associated with determining the purchase price of spare parts.

53. In particular, in France and Luxembourg the law provides that, for supplies of works of art, where it is not possible to determine precisely the purchase price paid by the taxable dealer to the seller or where that price is insignificant, the taxable amount may be calculated as a fraction of the selling price equal to 30% thereof. (15)

54. Although, admittedly, that approach concerns works of art, I think it can nevertheless be applied to second-hand goods the purchase price of which is just as difficult to determine.

55. In that connection, I note that paragraph 310 of the *Bulletin officiel des finances publiques-Impôts* (France) (16) provides that ‘purchasers of assorted lots (for example, derelict factories or materials intended for scrap) are required to conduct a sorting exercise following which they shall determine the exact nature of the goods to be resold. Some of those goods may be recovered materials to be introduced into a new manufacturing chain while others may be second-hand goods suitable for further use. *As regards the latter, where the exact purchase price is not known, the taxable amount may be set at one half of the transfer price*’. (17)

56. Furthermore, the application of the general method should also be taken into account as an alternative approach to calculating the profit margin. Article 318 of Directive 2006/112, which was transposed by Article 70(5) of the 2013 Law on VAT, states that the Member States may provide that the taxable amount is to be determined not individually for each supply of goods, but generally for a given period. In those circumstances, the taxable amount is equal, for each reference period, to the difference between the total value of supplies of goods subject to the margin scheme and carried out by the taxable dealer during the tax period covered by the return, that is to say, the total of the selling prices, and the total value of purchases of goods, as referred to in Article 314 of Directive 2006/112, effected by the taxable dealer during the tax period covered by the return, that is to say, the total of the purchase prices.

57. It seems, as Sjelle Autogenbrug submits, that in accordance with Danish practice, this general method can be applied where the taxable dealer purchases goods as part of an estate in respect of which the invoice or billing records include a price not for each of the goods, but for the estate as a whole, the price of the individual goods being unknown.

58. Accordingly, I think that the general method can be applied to the situation at issue in the main proceedings. Thus, the profit margin would be calculated for a given period. It would be equal to the difference between the sum of sales of spare parts effected during that period and the sum of purchases of such spare parts. The latter sum could be calculated by deducting from the sum of purchases of end-of-life motor vehicles the value of environmental and waste treatment, services for which Sjelle Autogenbrug charges a standard price, and the value of sales of scrap or any other services. Consequently, what would be left after deducting all those amounts from the purchase price of the vehicles would be a sum corresponding to the purchase price of all the parts taken from each vehicle for the period in question.

59. In any event, as stated above, it is for the national court to decide how the margin scheme applies to the situation at issue.

60. In the light of all the considerations set out above, I find that Article 311(1)(1) of Directive 2006/112 must be interpreted as meaning that the definition of ‘second-hand goods’ covers motor vehicle parts which, after being removed from an end-of-life vehicle acquired by a vehicle reuse undertaking from an individual, are resold as spare parts, thereby rendering the taxable dealer eligible for the margin scheme.

IV – **Conclusion**

61. In view of the foregoing, I propose that the Court give the following reply to the Vestre Landsret (Western Court of Appeal):

Article 311(1)(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the definition of ‘second-hand goods’ covers motor vehicle parts which, after being removed from an end-of-life vehicle acquired by a vehicle reuse undertaking from an individual, are resold as spare parts, thereby rendering the taxable dealer eligible for the margin scheme.

1 – Original language: French.

2 – Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

3 – See point 2.1 on p. 11 of the order for reference.

4 – Council Directive of 14 February 1994 supplementing the common system of value added tax and amending Directive 77/388/EEC — Special arrangements applicable to second-hand goods, works of art, collectors' items and antiques (OJ 1994 L 60, p. 16).

5 – See recital 51 of Directive 2006/112 as well as judgment of 3 March 2011, *Auto Nikolovi* (C?203/10, EU:C:2011:118, paragraph 47 and the case-law cited).

6 – OJ 2000 L 269, p. 34.

7 – See judgment of 28 April 2016, *Oniors Bio* (C?233/15, EU:C:2016:305, paragraph 30 and the case-law cited).

8 – Emphasis added.

9 – See judgment of 23 April 2015, *GST — Sarviz Germania* (C?111/14, EU:C:2015:267, paragraph 34 and the case-law cited).

10 – See judgment of 2 July 2015, *NLB Leasing* (C?209/14, EU:C:2015:440, paragraph 40 and the case-law cited).

11 – See judgment of 10 November 2011, *The Rank Group* (C?259/10 and C?260/10, EU:C:2011:719, paragraph 36).

12 – See judgment of 19 July 2012, *A* (C?33/11, EU:C:2012:482, paragraph 32 and the case-law cited). Also see judgment of 15 November 2012, *Zimmermann* (C?174/11, EU:C:2012:716, paragraph 48).

13 – See judgment of 19 July 2012, *A* (C?33/11, EU:C:2012:482, paragraph 33 and the case-law cited).

14 – See, to that effect, judgments of 23 April 2009, *Puffer* (C?460/07, EU:C:2009:254, paragraphs 45 and 46 and the case-law cited), and 22 March 2012, *Klub* (C?153/11, EU:C:2012:163, paragraph 42).

15 – See Article 297 A, III, of the General Tax Code (code général des impôts) (France) and Article 56 ter-1, paragraph 4, of the Law on value added tax (loi concernant la taxe sur la valeur ajoutée) (Luxembourg).

16 – BOI-TVA-SECT?90-20-20150506.

17 – Emphasis added.