

JUDGMENT OF THE COURT (Fifth Chamber)

12 June 2014 (*)

Reference for a preliminary ruling — Sixth VAT Directive — Exemptions — Article 13(B)(d)(3) and (5) — ‘Other securities’ and ‘other negotiable instruments’ — Sales promotion scheme — Discount card — Taxable amount)

In Case C-461/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Gerechtshof te's-Hertogenbosch (Netherlands), made by decision of 11 October 2012, received at the Court on 15 October 2012, in the proceedings

Granton Advertising BV

v

Inspecteur van de Belastingdienst Haaglanden/kantoor Den Haag,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, A. Rosas (Rapporteur), D. Šváby and C. Vajda, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Netherlands Government, by M. Noort and C. Wissels, acting as Agents,
- the United Kingdom Government, by C. Murrell, acting as Agent, assisted by R. Hill, Barrister,
- the European Commission, by A. Cordewener and E. Manhaeve, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 October 2013

gives the following,

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; ‘the Sixth Directive’).

- 2 The request has been made in proceedings between Granton Advertising BV ('Granton Advertising') and the Inspecteur van de Belastingdienst Haaglanden/kantoor den Haag (Tax inspector, Haaglanden/The Hague Tax Office; 'the Inspector'), concerning the levying of value added tax ('VAT') on sales of discount cards by Granton Advertising between 2001 and 2005.

Legal context

EU law

- 3 Under Title VIII 'Taxable amount' of the Sixth Directive, Article 11(A), entitled 'Within the territory of the country', provides, in paragraph 3:

'The taxable amount shall not include:

...

(b) price discounts and rebates allowed to the customer and accounted for at the time of the supply;

...'

- 4 Under Title X 'Exemptions' of that directive, Article 13, entitled 'Exemptions within the territory of the country', comprises parts A ('Exemptions for certain activities in the public interest'), B ('Other exemptions') and C ('Options').

- 5 According to Article 13(B) of that directive:

'Without prejudice to other Community provisions, Member States shall exempt ...:

...

(d) the following transactions:

...

3. transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring;

...

5. transactions, including negotiation, excluding management and safekeeping, in shares, interests in companies or associations, debentures and other securities, excluding:

- documents establishing title to goods,
- the rights or securities referred to in Article 5(3);

...'

Netherlands law

- 6 Article 11 of the Law on turnover tax (Wet op de omzetbelasting) of 28 June 1968 (*Staasblad* 1968, No 329), in the version applicable in the main proceedings ('the 1968 Law'), provides:

'1. Subject to conditions to be laid down by public administrative regulation the following shall be exempt from tax:

...

i. the following supplies and services:

...

2. transactions, including negotiation, but excluding management and safekeeping, in shares and other securities, excluding documents establishing title to goods;

...

j. the following services:

...

2. transactions, including negotiation, concerning giro, deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring;

...'

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

- 7 The facts in the main proceedings took place between 2001 and 2005, during which time Granton Advertising, a company incorporated under Netherlands law (known until 7 June 2004 as Granton Marketing BV), issued and sold 'Granton' cards ('the Granton cards'). Those cards — which were sold to consumers at a price of between EUR 15 and EUR 25 — entitled their holder to a certain number of goods and services on preferential terms from retailers and businesses, such as restaurants, cinemas, hotels or saunas, which had concluded an agreement to that effect with Granton Advertising ('the affiliated businesses'). The Granton cards were available in sales offices which were paid by Granton Advertising for each Granton card sold.
- 8 It can be seen from the terms of the model agreement concluded between Granton Advertising and the affiliated business, quoted by the referring court, that the affiliated businesses' objective, in collaborating with Granton Advertising, was to attract customers to purchase their goods and services. For that purpose, the affiliated businesses agreed to accept valid Granton cards presented to them and to provide the goods and/or services specified on each Granton card, up to the maximum upper limit on the value of transactions indicated on that card.
- 9 It can be seen, moreover, from the terms of that model agreement that Granton Advertising was responsible for the manufacture, production, promotion and sale

of the Granton cards. Once the agreement was signed, Granton Advertising did not charge the affiliated businesses anything in respect of the Granton cards, nor did it receive any fees from those businesses.

- 10 As regards the characteristics of those cards, the referring court indicates that each Granton card entitled its holder to a discount on orders from the businesses specified on the card in question. The discount was given on the offers specified on each card, which differed depending on the arrangements agreed between the affiliated business and Granton Advertising. Those discounts were obtained by presenting the card, by surrendering a coupon which accompanied the card or by having the card signed by the affiliated business concerned. In many cases, Granton card holders could also obtain, as other benefits, two units of the good or service proposed for the price of one. Furthermore, the Granton cards were designed in such a way that the holder benefited even if it were used only once. In a certain number of cases, during the period of validity of the card, often six months, the offer or offers specified thereon could be used several times or even daily.
- 11 In addition, the Granton cards were not personal but transferable. They could not, however, be exchanged for money or goods.
- 12 In 2005, the Inspector carried out an audit of Granton Advertising's accounts. Considering that the sale of Granton cards by that company constituted a transaction subject to VAT, the Inspector sent it an additional VAT assessment. After the lodging of the objection made by Granton Advertising, the amount of that additional assessment was set at EUR 643 567.
- 13 Granton Advertising, taking the view that the sale of Granton cards was exempt from VAT, brought an action before the Rechtbank Breda (Court of First Instance, Breda) against the Inspector's decision. However, the Rechtbank Breda dismissed Granton Advertising's action, holding that the Granton cards did not constitute 'other securities' or 'other negotiable instruments' within the meaning of the Sixth Directive, given, *inter alia*, the context in which those concepts are used in the directive and their meaning in Dutch as well as in other language versions of the directive. Moreover, according to the Rechtbank Breda, those concepts must be interpreted restrictively.
- 14 Granton Advertising brought an appeal against that decision of the Rechtbank Breda before the referring court, the Gerechtshof te's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch). That court takes the view that the concepts 'other securities' or 'other negotiable instruments' could be given a broader interpretation than that adopted by the Rechtbank Breda. That court nevertheless considers that neither the legislative history of the directive, nor the academic literature, nor the existing case-law allows the scope of those concepts to be determined in a context such as that of the main proceedings.
- 15 In those circumstances, the Gerechtshof te's-Hertogenbosch decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:
 - '1. Should the expression 'other securities' in Article 13(B)(d)[5] of the Sixth Directive ... be interpreted as covering a Granton card, being a transferable card which is used for the (partial) payment for goods and services, and if so, is the issuing and sale of such a card therefore exempt from VAT?

2. If not, should the expression 'other negotiable instruments' in Article 13(B)(d)(3), of the Sixth Directive ... be interpreted as covering a Granton card, being a transferable card which is used for the (partial) payment for goods and services, and if so, is the issuing and sale of such a card therefore exempt from VAT?
3. If a Granton card is an 'other security' or 'other negotiable instrument' in the aforementioned sense, is it important for the question of whether the issuing and sale thereof is exempt from VAT that, when that card is used, a levy on (a proportionate part of) the fee paid for it is, for all practical purposes, illusory?'

Consideration of the questions referred

- 16 By its questions, which should be examined together, the referring court asks, in essence, whether Article 13(B)(d) of the Sixth Directive must be interpreted as meaning that the sale of a discount card, such as that at issue in the main proceedings, constitutes a transaction in 'other securities' or concerning 'other negotiable instruments' within the meaning, respectively, of paragraphs 5 and 3 of that provision, which refers to certain transactions that the Member States must exempt from VAT.

Preliminary observations

- 17 The issue of whether the Granton cards are subject to VAT and of the possible calculation of that VAT depends on the legal and financial characteristics of those cards (see, to that effect, Case C-427/98 *Commission v Germany* EU:C:2002:581, paragraph 57 and the case-law cited). Accordingly, although the questions raised by the referring court concern, inter alia, the issue of the possible exemption of the transaction consisting in the sale of such cards, it is necessary to determine, as a preliminary, the conditions governing the sale of those cards, in so far as those conditions have an effect on the identification of the taxable transaction and the assessment of the nature of that transaction.
- 18 In that respect, it can be seen from the order for reference that a Granton card holder may obtain goods or services offered by the affiliated businesses on preferential terms, agreed between those businesses and Granton Advertising, including, inter alia, price reductions. While the wording of the questions referred indicates that the Granton card is 'used for the (partial) payment' for goods and services, it can be seen from other information in the order for reference that upon presentation of that card by its holder, the affiliated business refrains from charging a part of the normal price, with the result that the card holder does not pay the amount of that reduction.
- 19 The fact that the affiliated business agrees to forego the sum represented by the discount obtained under those preferential terms constitutes, as the European Commission noted in its written observations, a price discount, within the meaning of Article 11(A)(3)(b) of the Sixth Directive. In accordance with the Court's case-law, such a discount covers, in particular, the difference between the normal retail selling price of the goods supplied and the sum of money actually received by the retailer and is not to be included in the taxable amount of the transaction in question (see, to that effect, Case C-126/88 *Boots Company* EU:C:1990:136, paragraph 22, and Case C-288/94 *Argos Distributors* EU:C:1996:398, paragraph 16).

- 20 Moreover, as regards the taxable amount of the transaction consisting in the sale of Granton cards, it must be noted that the amounts paid by the consumers to Granton Advertising in order to acquire a Granton card cannot be considered as indirectly constituting the consideration, or a part thereof, for the benefits that those consumers may subsequently receive from the affiliated businesses. There is no sufficiently direct link between the amount paid by those consumers in order to obtain the Granton card and the goods or services which may be obtained by those consumers from the affiliated businesses (see, to that effect, Case 154/80 *Coöperatieve Aardappelenbewaarplaats* EU:C:1981:38, paragraph 12, and Case C-412/03 *Hotel Scandic Gåsabäck* EU:C:2005:47, paragraph 22).
- 21 In that respect, aside from the fact that there is no contract between the Granton card holders and the affiliated businesses and that those businesses do not receive any part of the revenue obtained by Granton Advertising from the sale of those cards, the necessary link does not exist between the payment by the consumer to Granton Advertising in order to obtain a Granton card and the amount of the reductions which that consumer may subsequently obtain from the affiliated businesses. The amount of the reductions that may be obtained, which depends, inter alia, on the use of the card and on the availability of offers from the affiliated businesses, is uncertain and practically impossible to determine in advance (see, by analogy, Case C-520/10 *Lebara* EU:C:2012:264, paragraph 38).
- 22 In those circumstances, it must be held, first, that, contrary to what is indicated by the referring court, the use of a Granton card cannot be considered a 'payment' for the purpose of the Sixth Directive, since it is actually a price reduction, secondly, that the price discounts granted by the affiliated businesses are not included in the taxable amount of any transactions between those businesses and Granton card holders, and, thirdly, that the purpose of the questions raised by that court is to determine, in particular, whether or not the transaction consisting in the sale of Granton cards to consumers — irrespective of other potential transactions between those consumers and the affiliated businesses — must be exempted from VAT.

The exemption of the sale of Granton cards

- 23 As regards the question whether or not the transaction consisting in the sale of Granton cards should be exempted from VAT, it must be determined whether such discount cards fall within the scope of the concept of 'other securities' or of 'other negotiable instruments' set out, respectively, in paragraphs 5 and 3 of Article 13(B)(d) of the Sixth Directive.
- 24 All the parties that submitted written observations to the Court, namely the Netherlands and United Kingdom governments and the European Commission, take the view that discount cards, such as the Granton cards, do not fall within the scope of those concepts and, accordingly, that their sale does not constitute a transaction exempt from VAT.
- 25 It must be pointed out that, in accordance with the case-law of the Court, the terms used to specify the exemptions referred to in Article 13 of the Sixth Directive constitute independent concepts of EU law whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another (Case C-350/10 *Nordea Pankki Suomi* EU:C:2011:532, paragraph 22 and the case-law cited), and that those terms are to be interpreted strictly, since those exemptions constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (Case

348/87 *Stichting Uitvoering Financiële Acties* EU:C:1989:246, paragraph 13, and Case C-540/09 *Skandinaviska Enskilda Banken* EU:C:2011:137, paragraph 20).

- 26 In order to determine whether discount cards, such as the Granton cards, fall within the scope of the concept of ‘other securities’ or of ‘other negotiable instruments’ as set out in Article 13(B)(d) of the Sixth Directive, it is necessary to consider, *inter alia*, the wording of that provision, the context in which those concepts appear and the objectives pursued by the exemption provided for therein (see, *inter alia*, to that effect, Case 292/82 *Merck* EU:C:1983:335, paragraph 12; Case C-112/11 *ebookers.com Deutschland* EU:C:2012:487, paragraph 12, and Case C-243/11 *RVS Levensverzekeringen* EU:C:2013:85, paragraph 23).

Whether the Granton cards fall within the scope of the concept of ‘other securities’

- 27 As regards the wording of the provision providing for the exemption at issue, it must be noted that, under Article 13(B)(d)(5) of the Sixth Directive, the Member States are to exempt, *inter alia*, transactions in ‘shares, interests in companies or associations, debentures and other securities’. While that exemption thus refers specifically to securities conferring a property right over legal persons and securities representing a debt, it is still the case that the ‘other securities’ referred to in that provision have to be regarded, at the very least, as also being ‘securities’. Accordingly, they have to be regarded as being comparable in nature to the other securities specifically mentioned in that provision.

- 28 The latter finding is supported by the securities expressly excluded from the exemption provided for in that provision, namely (i) documents establishing title to goods and (ii) shares or interests equivalent to shares giving the holder thereof *de jure* or *de facto* rights of ownership or possession over immovable property or part thereof, in so far as those shares or interests are considered to be tangible property by the Member State in accordance with Article 5(3)(c) of the Sixth Directive (see, to that effect, Case C-259/11 *DTZ Zadelhoff* EU:C:2012:423, paragraph 42). The nature of those shares or interests as ‘securities’, in that they represent, *inter alia*, rights of ownership over movable or immovable property, constitutes an indication of what is to be understood by ‘security’ for the purpose of Article 13(B)(d)(5) of the Sixth Directive, notwithstanding their exclusion from the exemption provided for in that provision.

- 29 As regards the context of that provision, it must be borne in mind that, in accordance with the Court’s case-law, transactions exempt from VAT under Article 13(B)(d) of the Sixth Directive are, by their nature, financial transactions. Although those transactions, defined according to the nature of the services provided, do not necessarily have to be carried out by banks or other financial institutions, they relate, nevertheless, as a whole, to the sphere of financial transactions (see, to that effect, Case C-455/05 *Velvet & Steel Immobilien* EU:C:2007:232, paragraphs 21 and 22 and the case-law cited).

- 30 It should be added, as regards the objectives of that provision, that it is clear from the Court’s case-law that the purpose of the exemption for financial transactions listed in Article 13(B)(d)(5) of the Sixth Directive is, *inter alia*, to alleviate the difficulties connected with determining the taxable amount and the amount of VAT deductible (*Velvet & Steel Immobilien* EU:C:2007:232, paragraph 24, and *Skandinaviska Enskilda Banken* EU:C:2011:137, paragraph 21).

- 31 As regards the question whether, in the present case, discount cards, such as the Granton cards, must be considered as being ‘other securities’ within the meaning of Article 13(B)(d)(5) of the Sixth Directive, it must be pointed out, first of all, that when a consumer purchases such a card, he acquires neither a right of ownership over the company Granton Advertising, nor a claim against that company, nor any related right. The Granton card confers on its holder only a right to obtain reductions in the prices of goods and services offered by the affiliated businesses.
- 32 It is clear from an examination of the main features of the Granton card, as they can be seen from the file submitted to the Court, that it has no nominal value and that it cannot be exchanged for money or goods from the affiliated businesses. In those circumstances, the sale of such a card to consumers does not constitute, by its nature, a financial transaction within the meaning of the Court’s case-law concerning Article 13(B)(d) of the Sixth Directive (see, to that effect, *Velvet & Steel Immobilien* EU:C:2007:232, paragraphs 22 and 23, and *Nordea Pankki Suomi* EU:C:2011:532, paragraphs 24 to 27).
- 33 Lastly, since the taxable amount of the taxable transaction corresponds to the consideration paid by the consumers in order to acquire the Granton cards, the calculation of the VAT on that basis should not entail any particular difficulties.
- 34 Given that the terms of the exemption provided for in Article 13(B)(d) of the Sixth Directive must be interpreted strictly, as noted in paragraph 25 of the present judgment, it must be held that discount cards, such as those at issue in the main proceedings, do not fall within the scope of ‘other securities’, within the meaning of Article 13(B)(d)(5) of that directive.
- Whether the Granton cards fall within the scope of the concept of ‘other negotiable instruments’
- 35 Under Article 13(B)(d)(3) of the Sixth Directive, the Member States are to exempt transactions concerning, inter alia, ‘deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments’.
- 36 In line with paragraph 29 of the present judgment, regarding the concept of ‘other securities’ referred to in Article 13(B)(d)(5) of the Sixth Directive, it must be held that transactions that are exempt from VAT under paragraph 3 of that provision also relate to the sphere of financial transactions (see, to that effect, *Velvet & Steel Immobilien* EU:C:2007:232, paragraph 22).
- 37 It must be pointed out that Article 13(B)(d)(3) of the Sixth Directive concerns, inter alia, payment instruments such as cheques. As noted in paragraphs 18 and 31 of the present judgment, although the Granton cards entitle their holder to price reductions, they do not constitute, in themselves, a payment instrument for the purpose of that directive. As the United Kingdom government noted, even if such cards are transferrable and may be resold at a certain price, they do not operate as a way of transferring money, unlike payments, transfers and cheques.
- 38 In those circumstances, given that the terms of the exemption provided for in Article 13(B)(d) of the Sixth Directive must be interpreted strictly, as noted in paragraph 25 of the present judgment, it must be held that discount cards, such as those at issue in the main proceedings, do not fall within the scope of ‘other negotiable instruments’ within the meaning of Article 13(B)(d)(3) of that directive.

- 39 In the light of all the foregoing considerations, the answer to the questions referred is that Article 13(B)(d) of the Sixth Directive must be interpreted as meaning that the sale of a discount card, such as that at issue in the main proceedings, does not constitute a transaction in 'other securities' or concerning 'other negotiable instruments', within the meaning, respectively, of paragraphs 5 and 3 of that provision, which refers to certain transactions which the Member States must exempt from VAT.

Costs

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

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 13(B)(d) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment must be interpreted as meaning that the sale of a discount card, such as that at issue in the main proceedings, does not constitute a transaction in 'other securities' or concerning 'other negotiable instruments', within the meaning, respectively, of paragraphs 5 and 3 of that provision, which refers to certain transactions which the Member States must exempt from value added tax.