

GRANTON ADVERTISING

EU TAX TRACKER

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Advocate General Kokott opined that the supply of discount cards does not fall under the exemption for either transactions relating to securities referred to in Article 13B(d)(5), or to negotiable instruments referred to in Article 13B(d)(3) of the Sixth VAT Directive (art. 135(1)(d) and (f) of the PVD).

Case stage: Opinion

Background of the case

The applicant sold cards which entitled the holder to a discount at participating restaurants, hotels and theatres for a limited period of time (the 'Granton card'). The typical discount consisted of buying two services for the price of one. However, the Granton card did not provide any right in terms of cash or free services or goods. The applicant took the view that the supply of such a card was exempt from VAT. The Dutch tax authorities denied the exemption considering that the supply was subject to VAT. The applicant brought an action before the referring court which stayed proceedings and referred the question to the Court of Justice of the European Court of Justice ('Court'). The referring court asked whether the supply of the card falls under the exemption for transactions relating to securities referred to in Article 13B(d)(5) (now art. 135(1)(d) of the Principal VAT Directive (PVD)) and to negotiable instruments referred to in Article 13B(d)(3) of the Sixth VAT Directive (now art. 135(1)(f) of the PVD). The United Kingdom submitted observation in support of the Netherlands.

Question referred

"Should the expression 'other securities' in Article 13 B(d)[5] of the Sixth Council Directive 77/388/EEC (as of 1 January 2007, Article 135(1)(f) of the Eighth Directive 2006/112/EC, subsequently amended) 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 the levying of turnover tax?

If not, should the expression 'other negotiable instruments' in Article 13 B(d)(3), of the Sixth Council Directive 77/388/EEC (as of 1 January 2007, Article 135(1)(d) of the Eighth Directive 2006/112/EC, subsequently amended) 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 the levying of turnover tax?

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 the levying of turnover tax that, when that card is used, a levy on (a proportionate part of) the fee paid for it is, for all practical purposes, illusory?

Opinion of Advocate General Kokott

Advocate General Kokott opined that the supply of discount cards, such as the Granton card, is neither a transaction relating to securities referred to in Article 13B(d)(5) (now art. 135(1)(f)) nor a transaction relating to negotiable instruments referred to in Article 13B(d)(3) of the Sixth VAT Directive (now art. 135(1)(d)).

Concept of 'other securities' referred to in Article 13B(d)(5) (now art. 135(1)(f))

The Advocate General recalled that a transaction is exempt under Article 13B(d)(5) (now art. 135(1)(f)) where the transaction:

- (i) modifies the legal and financial situation of the parties; and
- (ii) is carried out on the securities market.

The condition of modification of the legal and financial situation of the parties is satisfied where the transaction underlying the security, and not the security itself, modifies the situation between the parties. In the present case, since the Granton card has been sold, the legal and financial situation of the parties has been modified as regard to the card.

The condition of being carried out on the securities market requires the product, in this case the Granton card, to be a security. The European Court of Justice has not yet ruled on that notion.

The Advocate General first considered that the notion must be interpreted in the light of the notion of 'shares, interests in companies or associations' and 'debentures' expressly mentioned in the Directive. Therefore, the notion of 'security' encompasses rights in a company's capital and debts, including the products sourced from those rights (derivatives). She then noted that specific rights are expressly excluded from the exemption. By analogy, those rights are also liable to be regarded as securities for the purpose of the exemption. Those rights are documents establishing title to goods and the rights and securities referred to in Article 5 (3) (now art. 15(2) of the PVD). The latter article refers to:

- (a) certain interests in immovable property;
- (b) rights in rem giving the holder a right of use over immovable property; and
- (c) shares or interests equivalent to shares giving the holder de jure or de facto rights of ownership or possession over immovable property.

Those rights on immovable property are however only excluded from the exemption for transactions relating to securities if the Member State has not waived the option in Article 5(3) (now art. 15(2)). If the state has waived the option, such rights in immovable properties are, in principle, liable to fall under the exemption. Based on the above, the Advocate General concluded that the notion of 'securities' includes rights in the company's capital, debts and their derivatives; since the first two rights are expressly mentioned in the article, and the notion 'other securities' must refer to the derivatives of those rights.

Advocate General Kokott then interpreted the notion in the light of the objective of the exemption. She confirmed that there is no obvious justification to the exemption for transactions relating to securities. She however recalled that an exemption must be strictly interpreted. Since there is no justification to the exemption, this principle of strict

interpretation applies in an absolute manner. Accordingly, she concluded that the notion of 'securities' must be strictly limited to rights in a company's capital, debts and their derivatives. No rights other than those can be regarded as securities. The reference to Article 5(3) cannot be interpreted as meaning that all rights on immovable properties are covered in the notion of 'securities', but only the rights listed in that article.

In the present case, since the Granton card confers neither rights in a company's capital nor debts nor any derivatives of those rights, it does not constitute an exempt security. The card only confers the possibility to buy a product at a reduced price.

Concept of 'negotiable instruments' referred to in Article 13B(d)(3) (now art. 135(1)(d))

Article 13B(d)(3) (now art. 135(1)(d)) exempts from VAT 'transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring'. The Advocate General observed that all the examples mentioned in that article refer to a right on a sum of money. Therefore the notion of 'negotiable instruments' covers all instruments which give rights on a sum of money other than a debt or a cheque.

Moreover, the exemption for transactions relating to 'negotiable instruments' aims at treating similarly for VAT purposes rights which are assimilated by the public as money and the remittance of money. Those rights are exempt from VAT.

In the present case, the Granton card does not aim at conferring a right on a sum of money and cannot be assimilated to money by the public. Therefore, the card at issue is not a 'negotiable instrument' exempt from VAT.

Taxation of the Granton card

The referring court observed that it is impossible to determine when the card is used, the part of the consideration which represents the portion of the fee paid for it. Therefore, if the Court ruled that the Granton card is either an exempt security or an exempt negotiable instrument, it is impossible to determine the exempt part of the sale. The referring court sought to ascertain whether that element is relevant to the question of whether the issuing and sale of the discount card is exempt.

The Advocate General recalled that the taxable amount of a transaction carried out with a discount card is the consideration paid. In two situations the value of a voucher is included in the taxable amount of a transaction, notably:

- where the taxpayer who accepts the voucher has the possibility to exchange that voucher against money from a third person;
- where the taxpayer who accepts the voucher has previously sold that voucher.

In those situations, the voucher is regarded as a means of payment and its value is included in the taxable amount for VAT purposes. In the present case, the Granton card does not fall within any of those situations. The traders in agreement with Granton do not sell the card themselves and the card does not confer on them a debt payable by a third party. Therefore,

no proportionate part of a fee paid for the Granton card is included in the taxable amount of the transactions paid with that card and no VAT is levied on that amount.

At the time of writing, the Advocate-General's Opinion was not available in English. The above summary is an unofficial translation.

Comment from Maric Glaser

There is currently a proposal relating to the treatment of vouchers for VAT purposes ([Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of vouchers](#)) but discount vouchers of the nature described in this case are not covered. The proposal comments about these that –

“A right to a discount on all purchases over a period of time, even if granted against payment, is not however considered here to be a voucher because the entitlement is independent of the purchase transactions. The open-ended nature of such a right (even if restricted in time) is quite different to a discount voucher where the right is once-off and linked to a specific supply. This however does not mean that such a service will not be taxed.”

The situation in this case is different to that in the case of conventional vouchers in which, from an economic perspective, the voucher can be said to be evidence of a payment in advance that can be set off either against a specific supply of goods or services or against a choice of goods and services.

National law at issue

Wet OB 1968, art. 11(1)(i)(2) and (j)(2) and art. 20(1)

European law at issue

art. 13B(3) of Directive 77/388/EEC (now art. 135(1)(d) of Dir. 2006/112)

art. 13B(d)(5) of Directive 77/388/EEC (now art. 135(1)(f) of Dir. 2006/112)

Referring Court

The Netherlands: Gerechtshof 's-Hertogenbosch, Granton Advertising BV / Inspecteur van de Belastingdienst/Haaglande, Kantoor Den Haag, decision of 11 October 2012

UNITED KINGDOM

UK legislation

Comment by Maric Glaser

The card, which is the subject of this case, appears to be of the same type as that issued by the taxable person in the UK case of *Customs and Excise Commissioners v Granton Marketing Ltd* [1996] STC 1049 (CA). In that case, the taxable person (Granton Marketing) issued a card that was sold for consideration through intermediaries to the public. The card

entitled the holder to a complimentary main meal at participating restaurants if certain conditions were met. The case was decided on UK law at the time, in particular, VATA 1983, Sch 4, para 6.

That legislation has since been replaced by VATA 1994, Sch 10A, which deals with the treatment of vouchers. The issue of whether or not a voucher of the nature of that issued fell within the exemption for other securities or negotiable instruments was not considered by the Court of Appeal. The case should help shed more light on the question of whether or not the issue of a voucher involves the making of a supply and if it is whether that supply is taxable or exempt. The Commission has published proposals for the treatment of vouchers (http://europa.eu/rapid/press-release_IP-12-464_en.htm).