

VAT (Consumption Taxation) – Financial Services  
General Principles-Introduction to the Case Law

10th Assembly of the IATJ  
Cambridge

Caroline Vanderkerken

Court of Appeals Brussels  
University Hasselt

## ART 135 VAT DIRECTIVE

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax-(previously „6th VAT-Directive“)

- Art. 135 (1) especially (d) and (e) : exemption of VAT of transactions regarding bank accounts, payments, notes, ..., in general : transactions regarding „financial services“ („money and finance“)
- Art. 137 : option for taxation of a range of financial transactions possible (EU MS legislation)
- Art 168 - Exemption „without right to deduct (input VAT)“

— Case 26 May 2016 Bookit C-607/14 : Cons. 55 : „Second, if the exemption provided for in Article 135(1)(d) of the VAT Directive were to be granted to a card handling service, such as that at issue in the main proceedings, that would be at odds with the purpose of the exemption for financial transactions, which is to alleviate the difficulties connected with determining the tax base and the amount of VAT deductible and to avoid an increase in the cost of consumer credit (judgment of 19 April 2007, Velvet & Steel Immobilien, C-455/05, EU:C:2007:232, paragraph 24, and order of 14 May 2008, Tiercé Ladbroke and Derby, C-231/07 and C-232/07, not published, EU:C:2007:332, paragraph 24).“

- Financial services-transactions : historically exempt (rules date from 1977)

## What kind of services are exempt ?

- Transactions concerning : deposit and current accounts; payments and transfers; debts; cheques; ...
- Transactions (and negotiation concerning) currency; bank notes used as a legal tender; coins used as a legal tender
- Transactions in shares (shares; other interests in companies or associations; debentures and other instruments)
- The management of special investment funds

## „Input VAT“ : no recovery of VAT

- Financial services-transaction is exempt of VAT ?
- Result : no recovery of VAT incurred on the purchases of associated goods or services related to transaction
- Distortion of neutrality of the VAT System ?
- Problem 1 : extra cost to business : cost passed on to „customer“ of bank (hidden VAT-cost increases cost of business in EU)-problem has increased with outsourcing of costs by banks;
- Problem 2 : inconsistent application in EU-MS's;
- Resulted in a) questions preliminary ruling ECJ and b) Commission Proposal for Directive in 2007, withdrawn in 2016

## Cases (ECJ) regarding nature of transaction which is exempt (1)

- Case 27 October 1993 *Muys* C-281/91 : „granting of loans and credit, irrespective of whether the grantor of credit is a financial institution“ (granted by a building contractor) : exempt“
- Case 5 June 1997 *SDC* C-2/95 : „transactions exempted are defined according to nature of services provided and not according to the person supplying of receiving the services (Danish firm providing assistance in management to credits by „members“-credit institutions)“

## Cases (ECJ) regarding nature of transaction which is exempt (2)

Case 5 June 1997 *SDC* C-2/95 :  
Cons. 33-35

„ ... 33 The fact that the identity of the persons effecting the transactions is irrelevant in determining the transactions exempt under points 3 and 5 of Article 13B(d) is confirmed by points 1 and 2 of Article 13B(d), which refer to 'the persons granting it' and to 'the person who is granting the credit'.

34 In paragraph 13 of its judgment in Case C-281/91 *Muys' en De Winter's Bouw-en Aannemingsbedrijf* [1993] EC R 1-5405 the Court stated that where the identity of the lender or the borrower is not specified, the expression 'the granting and the negotiation of credit' in point 1 of Article 13B(d) of the Sixth Directive is in principle sufficiently broad to include credit granted by a supplier of goods in the form of deferral of payment. The Court also considered that the wording of that provision in no way suggested that the scope of that provision was limited only to loans and credits granted by banking and financial institutions.

35 As regards, more specifically, the legal form of the company supplying or receiving services, referred to in the sixth question, it must be concluded that, if the identity of the persons involved is immaterial in determining whether the service in question is exempt from VAT under points 3 and 5 of Article 13B(d), the type of legal person represented by the operators concerned is a fortiori immaterial....“

## Cases (ECJ) regarding nature of transaction which is exempt (3)

Case 5 June 1997 *SDC C-2/95* :  
Other cons.

- Cons. 37 : „...It must be stated in regard to this point that the specific manner in which the service is performed, electronically, automatically or manually, does not affect the application of the exemption. ...“

- Cons. 55-57 : „... 55 The contractual links between the bank and its customer do not diminish the role of the data-handling centre. It is from those links that the customer derives the right to have transactions effected, even if they are invoiced as services provided to the bank and also alter the bank's financial situation.

56 Moreover, if point 3 of Article 13B(d) of the Sixth Directive covered only the service which a financial institution provides to the end customer, only certain acts concerning transfer transactions could be exempt. Such an interpretation would restrict the exemption in a way which is not supported by the wording of the provision in question. That wording does not restrict the exemption to that relation and it is sufficiently broad to include services provided by operators other than banks to persons other than their end customers.

57 It follows from the foregoing that an interpretation restricting application of the exemption provided for by point 3 of Article 13B(d) to services provided directly to an end customer is unfounded....“

## Cases (ECJ) regarding nature of transaction which is exempt (4)

- Case 13 December 2001 *CSC Financial Services C-235/00* : call center providing services with regard to transactions in securities : no exemption of VAT
- Case 4 May 2006 *Abbey National C-169/04* : services rendered with regard to management and bookkeeping of investments and investment funds (sphere of trusts) : no exemption of VAT
- Case 21 June 2007 *Volker Ludwig C-453/05* : services of an independent investment advisor

## Effect of partly exempt financial services businesses (provider-side)

- recovery of proportion of VAT incurred : proportional deduction of input VAT
- sectoral attribution-direct attribution-global attribution/transaction based or value based method of recovery of VAT
- calculations by financial institutions may be complex-additional compliance burden-has resulted in more ECJ-cases (6 April 1995 *BLP Group* C-4/94; 8 June 2000 *Midland Bank* C-98/98; 4 May 2006 *Abbey National* C-408/98)
- ECJ 18 October 2018 *Volkswagen Financial Services UK* C-153/17 (granting and negotiation of credit, management of credit) : general costs (overhead costs) are component of price of supply (consisting of interest due in finance part of transaction) : method of apportionment used to calculate deduction of input VAT must take into account these costs

VAT/GST-Case Law

9

## EU : general principles : recent developments in case-law with regard to financial transactions VAT-exemption

- ECJ 26 May 2016 *Bookit* C-604/14

### Facts of the case :

Bookit is a company wholly owned by Odeon Cinemas (operates chain of cinemas in UK); Bookit's activity consists of processing debit and credit card payment (card handling) for customers of Odeon (counter or internet) ; supplies made by Bookit to customers of Odeon (buying Odeon tickets) are, according to UK tax administration, not exempt „transfer of money“-VAT transactions (similar to those meant in art 135 (1) (b) VAT Directive)

VAT/GST-Case Law

10

## ECJ "BOOKIT" (1)

Way in which payment is handled : customer provides Bookit with card data; Bookit transfers data to company called „Data Cash“, Data Cash transmits data to merchant acquirer, who contacts card issuer, who provides, via Data Cash, authorisation code to Bookit, Odeon confirms reservation; Bookit receives payment, transfers ticket sale revenue to Odeon, minus „card handling fees“

Legal positions :

Bookit : entire transaction exempt under „article 135“

Tax administration : transfers of funds carried out by merchant acquirer-services provided by Bookit subject to standard rate VAT

31/07/2019

VAT/GST-Case Law

## ECJ „BOOKIT“ (2)

Questions referred for preliminary ruling (summarised) :

*„a) Does the exemption of art 135 apply to such services which result in a transfer of funds but which do not include the task of making a debit to one account and a corresponding credit to another account?*

*b) Does entitlement to exemption depend on whether service provider itself obtains authorisation codes directly from cardholder's bank, or alternatively obtains those codes via its merchant acquirer's bank ?“*

VAT/GST-Case Law

12

## ECJ "BOOKIT"

Cons. 51 :

"... It follows from all the foregoing that the provider of a card handling service, such as that at issue in the main proceedings, plays no specific and essential part in achieving the changes in the legal and financial situation that are the result of a transfer of ownership of the funds concerned and that, according to the Court's case-law, can be said to be characteristic of a transaction concerning payments or transfers that is exempted under Article 135(1)(d) of the VAT Directive, but does no more than provide technical and administrative assistance for the obtaining of information and the communication of that information to its merchant acquirer, and to receive, by the same means, the communication of information that enables it to effect a sale and to receive the corresponding funds...."

Cons. 53 :

"... A card handling service, such as that at issue in the main proceedings, which accordingly consists, in essence, in an exchange of information between a trader and its merchant acquirer, with a view to receiving payment for a product or service offered for sale, cannot fall within the scope of the exemption provided in Article 135(1)(d) of the VAT Directive for transactions concerning payments and transfers...."

Decision : exemption art 135 (1) (d) EU Directive not applicable to a "card handling" service

31/07/2019

VAT/GST-Case Law

## ECJ „NEC“ (1)

ECJ 26 May 2016 *National Exhibition Centre Limited* C-130/15

cfr. *Bookit*

facts slightly different (other way of processing payment : NEC hires venue to third party, sells tickets, invoices them, processes payment via remote payment or credit card, refunded promoter minus „booking fee“)

### Decision

Cons. 18-22 :

„...The Court, however, has already held that the additional charges invoiced by a service provider to its customers, where the latter pay for those services by credit card, debit card, cheque or cash over the counter at a bank or authorised payment agent acting on behalf of that service provider, do not constitute consideration for a supply of services distinct and independent from the principal supply of services in respect of which that payment was made (see, to that effect, judgment of 2 December 2010 in *Everything Everywhere*, C-276/09, EU:C:2010:730, paragraph 32).

19 ... the making available to customers, by the principal service provider, of an infrastructure enabling them to pay the price of that service, inter alia, by bank card does not constitute for those customers an end in itself and that the supposed supply of services, which those customers are unable to access separately from the purchase of the main service, can have no interest for such consumers that is independent of that service (see, to that effect, judgment of 2 December 2010 in *Everything Everywhere*, C-276/09, EU:C:2010:730, paragraph 27). ...

VAT/GST-Case Law

14

## ECJ „NEC“ (2)

ECJ 26 May 2016 *National Exhibition Centre Limited* C-130/15

...

20 ... *the receipt of a payment and the handling of that payment are intrinsically linked to any supply of services provided for consideration and that it is inherent in such a supply that the provider should seek payment and make appropriate efforts to ensure that the customer can make effective payment in consideration for the service supplied, the Court holding that, in principle, any method of payment for a supply of services involves the provider taking certain steps in the handling of the payment, even if the extent of those steps may vary from one method of payment to another (see, to that effect, judgment of 2 December 2010 in Everything Everywhere, C-276/09, EU:C:2010:730, paragraph 28).*

21 ...*the fact that a separate price for the supposed financial service is identified in the contract document and itemised separately in the invoices issued to customers is not decisive in that regard, the Court holding that the fact that a single price is invoiced, or that separate prices were contractually stipulated, has no decisive significance for the purposes of determining whether it is necessary to find that there are two or more distinct and independent transactions or only a single economic transaction (see, to that effect, judgment of 2 December 2010, Everything Everywhere, C-276/09, EU:C:2010:730, paragraph 29 and the case-law cited)..."*

## ECJ „NEC“ (3)

ECJ 26 May 2016 *National Exhibition Centre Limited* C-130/15

cfr. *Bookit*

Cons. 52 :

„ ... *In the light of all the foregoing considerations, the answer to the first question and the sub-questions is that Article 13B(d)(3) of the Sixth Directive must be interpreted as meaning that the VAT exemption which is provided in respect of transactions concerning payments and transfers does not apply to a service described as 'processing of payment by debit or credit card', such as that at issue in the main proceedings, carried out by a taxable person, the provider of that service, where an individual buys, via that provider, a ticket for a show or other event which the provider sells in the name and on behalf of another entity which that individual pays for by debit or credit card..."*

No exemption under article 13 B (d) (3) 6<sup>th</sup> Council Directive (77/388/EEC) of service described as "processing of payment by debit or credit card"



## ECJ „DPAS Limited“ 25 July 2018 C-5/17 (1)

### Facts of the case :

DPAS manages „dental plans“ in UK (for dentists and patients) : direct debit account patient to DPAS – amount partly due to (a) dentist, (b) insurer and (c) DPAS

(rearrangement of contractual arrangements due to ECJ 28 October 2010 *Axa UK* C-175/09)

Tax administration (by letter of 17 April 2012) : „*supply to dentist : standard VAT rate; supply to patients : standard VAT rate*“

## ECJ „DPAS Limited“ (2)

### Legal position DPAS :

Supply of service to dentists : VAT

Supply of service to patients : VAT exempt (art. 135 (1) (d) VAT Directive

### Questions referred for preliminary ruling (summarised)

„*Is such a service (direct debit from account, passed to dentist and insurer by DPAS) exempt under art. 135 (1) (d)-Is it „debt collection“*“

## ECJ „DPAS Limited“ (3)

Cons. 49-51 :

“...49 It is also not apparent from that judgment whether the Court thereby wished to broaden the concept of ‘transactions ... concerning ... payments [and] transfers’, within the meaning of those provisions, which it had already defined by its previous case-law, so as to include transactions which do not, in themselves, make the legal and financial changes which are characteristic of the transfer of a sum of money, or to redefine that concept by establishing new criteria.”

50 In the light of those factors, no conclusion in favour of the exemption of the supply of services at issue in the main proceedings, on the ground that it constitutes a transaction concerning payments or transfers, within the meaning of the Court’s case-law, can be drawn from that judgment.

51 In the light of all of the foregoing considerations, the answer to the first question is that Article 135(1)(d) of the VAT Directive must be interpreted as meaning that the VAT exemption which is provided for therein for transactions concerning payments and transfers does not apply to a supply of services, such as that at issue in the main proceedings, which consists for the taxable person in requesting from the relevant financial institutions, first, that a sum of money be transferred from a patient’s bank account to that of the taxable person pursuant to a direct debit mandate and, second, that that sum, after deduction of the remuneration due to that taxable person, be transferred from the latter’s bank account to the respective bank accounts of that patient’s dentist and insurer....”

## Belgium : exemption of VAT on financial services-recovery of input VAT

- More or less same notions of „financial transactions“ as in art 135 VAT-Directive (administrative commentaries : „transactions usually made by banks and financial institutions“ : nature of transaction prevails, without regard to person performing it)
- Adm. Comm. : credit transactions, payments, debt recovery, foreign currency transactions, primary and secondary market transactions with regard to financial instruments, securities, deposit accounts, management of credit securities, money, shares ...
- Banking world was opposed to exemption due to „hidden VAT problem“ with regard to absence of right to recovery of „input VAT“- (irrevocable) option for taxation possible (only) with regard to „payment transactions“-widely chosen for by banks
- Input VAT (if exemption) : recovery, as a rule : proportional deduction/exception : transaction based (clear determination of sectoral activities of bank required by the fiscal administration : bookkeeping ! structuring of bank !)

## Belgium : exemption of VAT on financial services

- Complex transactions (exempt financial transactions and non exempt non-financial transaction or supply of non-financial services-single supply or a supply which can not be separated from the principal service?) : characterization of the supply : ?
- No general rule
- Legal certainty only in specific cases : e.g. interests included in periodic payments or instalments : separate mentioning in invoice required, if so : exempt of VAT

## Belgium : outsourcing of banking activities : ?

- Administrative position : principles of ECJ-cases *SDC* and *CSC* are „followed“
- No clear position
- (cost-sharing VAT exemption: however not for financial services : ECJ in 21 September 2017 *Aviva* C-605/15, 21 September 2017 *DNB BANKA* C-326/15 and 21 September 2017 *Commission v Germany* C-616/15)

## Belgium : case law (limited)

- Court of First Instance Antwerp 9 June 2017 : share transaction : „project-corporation“ established by property investment corporation : transfer of shares after completion of building : exempt – or sham ? (concerned „reality“ of share transaction-no real issue regarding principle of exemption of share transaction itself)
- Court of Appeals Brussels 18 January 2017 : sham or real share transactions regarding acquisition of shares of corporation active in IT