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Judgment of the Court (Sixth Chamber) of 25 May 1993. - Chaussures Bally SA v Belgian State, Minister for Finance. - Reference for a preliminary ruling: Tribunal de première instance de Bruxelles - Belgium. - Value added tax - Sixth directive - Taxable amount. - Case C-18/92.

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Keywords

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Tax provisions ° Harmonization of laws ° Turnover taxes ° Common system of value added tax ° Taxable amount ° Transaction of sale with payment by credit card ° Commission retained by the issuer of the card ° Inclusion in the taxable amount

(Council Directive 77/388, Art. 11A(1)(a))

Summary

Article 11A(1)(a) of the Sixth Directive on the harmonization of the laws of the Member States relating to turnover taxes must be interpreted as meaning that where, in the context of a transaction of sale, the price of the goods is met by the purchaser by means of a credit card and paid to the supplier by the organization which has issued the card, after deduction of a percentage as commission in payment for the service rendered by the latter to the supplier of the goods, the sum so deducted must be included in the taxable amount on which the supplier, as the taxable person, must pay tax to the revenue authorities.

Parties

In Case C-18/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Première Instance, Brussels, for a preliminary ruling in the proceedings pending before that court between

Chaussures Bally SA

and

Belgian State

on the interpretation of 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 COURT (Sixth Chamber),

composed of: C.N. Kakouris, President of the Chamber, G.F. Mancini, F.A. Schockweiler, M. Diez de Velasco and P.J.G. Kapteyn, Judges,

Advocate General: C. Gulmann,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

° SA Chaussures Bally, by Luc Simonet, of the Brussels Bar,

° the Belgian State, by Ignace Maselis, of the Brussels Bar,

° the Government of the United Kingdom, by John Collins, of the Treasury Solicitor' s Department, acting as Agent, assisted by David Anderson, Barrister,

° the Commission of the European Communities, by Henri Étienne, Principal Legal Adviser, and Johannes Fons Buhl, Legal Adviser, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of SA Chaussures Bally, the Belgian State, the Government of the United Kingdom, represented by David Anderson and Susan Cochrane, of the Treasury Solicitor' s Department, acting as Agents, and the Commission of the European Communities, at the hearing on 14 January 1993,

after hearing the Opinion of the Advocate General at the sitting on 3 March 1993,

gives the following

Judgment

Grounds

1 By judgment of 10 January 1992, received at the Court on 23 January 1992, the Tribunal de Première Instance (Court of First Instance), Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of 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) (hereinafter "the Sixth Directive").

2 Those questions arose in proceedings between SA Chaussures Bally ("Bally") and the Belgian State on the subject of the repayment of sums paid by Bally to the Belgian State as value added tax ("VAT").

3 It may be seen from the judgment ordering the reference that Bally, which markets shoes bearing the trade-mark "Bally" acepts payment from its customers for their purchases either in cash or by cheque or by credit card. For the latter case Bally concluded, with various organizations issuing credit cards, agreements providing that when the customer, the credit card holder, purchases an article using the card, the organization issuing the card pays the supplier the price of the article and retains a commission amounting usually to some 5% of the payment.

4 Bally, which is a taxable person for VAT purposes under Article 4 of the Belgian VAT Code, was unsure whether it owed the tax on the net amount which it received from the card-issuing organizations after deduction of their commission or on the gross amount, that is, the price of the goods before deduction of that commission. However, Bally always paid the VAT on the net amount until 1988 when, following a tax inspection relating to previous years going back to 1984, the Special Inspector of Taxes, after regularizing the position for the years 1984 to 1987, decided that "for the calculation of the taxable amount commission is not deductible from the price" and demanded from Bally an additional payment of BFR 2 206 000 by way of VAT, plus fiscal fines and interest.

5 Bally paid the sum demanded, though with reservations, and, whilst paying VAT on the gross amount as from 1989, brought an action before the Tribunal de Première Instance, Brussels, claiming repayment of the whole amount levied, in its view illegally, by way of VAT plus legal interest, and damages.

6 The Tribunal de Première Instance, Brussels, being of the opinion that the decision in the case turned on the interpretation of the Sixth Directive, decided, by an interim judgment inter partes of 10 January 1992, to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

"1. Article 11(1)(a) of the directive:

In the context of a sale in which the payment is made by credit card, must not the view be taken that the consideration obtained from the credit organization by the affiliated trader for the delivery of a product is restricted solely to the amount received from that organization by the affiliated trader?

or

2. Article 11(3)(c) of the Sixth Directive:

Must the amount of the commission or discount retained by the issuing organization from the price displayed be regarded as payment for the expense incurred on behalf of the affiliated trader so as to ensure him a guaranteed payment and accordingly not form part of the taxable amount under Article 11(3)(c) of the Sixth Directive?"

7 Reference is made to the Report for the Hearing for a fuller account of the Community rules, the facts of the main proceedings, the course of the procedure and the written observations submitted to the Court, which are hereinafter mentioned or discussed only in so far as is necessary for the reasoning of the Court.

The factual and legal background

8 In order to usefully give an answer in response to the problem of interpretation raised by the questions referred to the Court, the problem must be defined in the light of the factual and legal context resulting from the findings of the national court.

9 The documents submitted to the Court show that, when the purchaser pays the price of the goods by means of a credit card, there are two transactions: on the one hand the sale of the goods by the supplier, who calculates in the total price demanded the VAT which will be paid by the purchaser as the final consumer and which is charged by the supplier on behalf of the revenue authorities, and on the other hand the service performed for the supplier by the organization issuing the credit card. The latter service is that of guaranteeing payment for the goods purchased by means of the card, the promotion of the supplier' s business by enabling him to acquire new customers, possible publicity on his behalf or the like.

10 The documents before the Court also show that the second transaction described above is exempt from VAT in Belgium pursuant to Article 13B(d) of the Sixth Directive, which allows Member States to exempt inter alia certain transactions relating to the granting and negotiation of credit and the management of credit by the person granting it, the negotiation of or any dealings in credit guarantees or any other security or guarantee.

First question

11 By the first question the national court asks substantially whether Article 11A(1)(a) of the Sixth Directive must be understood as meaning that where, in the context of a sale transaction, the price of the goods is met by the purchaser by means of a credit card and paid to the supplier by the organization issuing the card after the retention of a percentage as commission in payment for a service rendered by the latter to the supplier of the goods, the sum retained must be included in the taxable amount for the tax which the supplier, as a taxable person, has to pay to the revenue authorities.

12 According to Article 11A(1)(a) of the Sixth Directive, within the territory of the country the taxable amount is, in respect of supplies of goods, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party. The purpose of that provision is therefore, as may be seen from the ninth recital in the preamble to the Sixth Directive, to harmonize the taxable amount.

13 Bally states that where payment is made by credit card the consideration which serves to determine the taxable amount should consist of the net sum actually received by the supplier after the organization issuing the card has deducted its commission because otherwise a supplier who arranges to be paid by the issuer of the card a sum less than the full price would thus be bearing improperly the consequences of the exemption from VAT granted in Belgium to the card-issuing organizations.

14 That argument cannot be upheld. The harmonization sought by Article 11A(1)(a) of the Sixth Directive could not be achieved if the taxable amount varied according to whether the calculation was for the VAT to be borne by the final consumer or for determining the sum to be paid to the revenue authorities by the taxable person. It follows that when the supplier has calculated on the full price the VAT to be paid by the purchaser so as to charge it on behalf of the revenue authorities it is the same taxable amount which must be taken into account to determine the corresponding amount of VAT which the supplier as a taxable person is to pay to the revenue authorities.

15 Bally also claims that the supplier is compelled for reasons of competition to accept payment by card and that it is not therefore the supplier who is the beneficiary of any service rendered by the organization issuing the card but the purchaser, the card-holder, and that the percentage of the price retained by the issuing organization does not represent the consideration for a service rendered to the supplier by that organization.

16 It should be pointed out in that respect that the fact that the purchaser did not pay the price agreed direct to the supplier but through the intermediary of the organization issuing the card, which retained a percentage calculated on the price, cannot change the taxable amount. That deduction made by the card-issuing organization represents the consideration for a service rendered by it to the supplier. That service represents an independent transaction in respect of which the purchaser is a third party.

17 It should be added that the method of payment used in the relations between the purchaser and the supplier cannot alter the taxable amount. The payment of the consideration for the delivery of goods may be made, according to Article 11A(1)(a), not only by the purchaser but also by a third party, in this case the organization issuing the card.

18 Consequently the answer to the first question should be that Article 11A(1)(a) of the Sixth Directive must be interpreted as meaning that where, in the context of a transaction of sale, the price of the goods is met by the purchaser by means of a credit card and paid to the supplier by the organization issuing the card, after deduction of a percentage as commission in payment for the service rendered by the latter to the supplier of the goods, the sum so deducted must be included in the taxable amount on which the supplier, as the taxable person, must pay tax to the revenue authorities.

Second question

19 By the second question the national court asks essentially for an interpretation of Article 11A(3)(c) of the Sixth Directive which it would find relevant if the percentage retained by the organization issuing the card were to represent, within the meaning of that provision, expenses paid out by the latter in the name and for the account of the supplier.

20 In that regard, it should be stated that the national court' s findings, on the basis of which it has raised the first question, run counter to the supposition on which that question is based.

21 In those circumstances there is no need to reply to the second question.

Decision on costs

Costs

22 The costs incurred by the Belgian Government, the Government of the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action/proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Tribunal de Première Instance, Brussels, by judgment of 10 January 1992, hereby rules:

Article 11A(1)(a) of the Sixth Directive must be interpreted as meaning that where, in the context of a transaction of sale, the price of the goods is met by the purchaser by means of a credit card and paid to the supplier by the organization which has issued the card, after deduction of a percentage as commission in payment for the service rendered by the latter to the supplier of the goods, the sum so deducted must be included in the taxable amount on which the supplier, as the taxable person, must pay tax to the revenue authorities.