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Judgment of the Court (Sixth Chamber) of 24 October 1996. - Elida Gibbs Ltd v Commissioners of Customs and Excise. - Reference for a preliminary ruling: Value Added Tax Tribunal, London - United Kingdom. - Value added tax - Sixth Directive - Money-off and cash-back coupons - Taxable amount. - Case C-317/94.

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Keywords

Tax provisions ° Harmonization of laws ° Turnover taxes ° Common system of value added tax ° Taxable amount ° Sales promotion scheme involving, after purchase by the final consumer, reimbursement from the manufacturer on presentation of a voucher issued by the manufacturer ° Taxable basis constituted by the sale price charged by the manufacturer less the amount reimbursed

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

Summary

Where

° (a) a manufacturer issues a money-off coupon, which is redeemable at the amount stated on the coupon by or at the expense of the manufacturer in favour of the retailer, (b) the coupon, which is distributed to a potential customer in the course of a sales promotion campaign, may be accepted by the retailer in payment for a specified item of goods, (c) the manufacturer has sold the specified item at the "original supplier's price" direct to the retailer and (d) the retailer takes the coupon from the customer on sale of the item, presents it to the manufacturer and is paid the stated amount,

or

° (a) the manufacturer, in the course of a promotion scheme, sells items of goods at the "manufacturer's price" direct to a retailer, (b) a cash-back coupon for an amount stated on the packaging of those items entitles the customer, if he proves purchase of one of those items and

satisfies other conditions printed on the coupon, to present the coupon to the manufacturer in return for payment of the stated amount, and (c) a customer purchases such an item from a retailer, presents the coupon to the manufacturer and is paid the stated amount,

Article 11(A)(1)(a) and Article 11(C)(1) of the Sixth Directive are to be interpreted as meaning that the taxable amount serving as a basis for determination of the value added tax payable by the manufacturer is equal to the selling price charged by the manufacturer, less the amount indicated on the coupon and refunded. The same applies if the original supply is made by the manufacturer to a wholesaler rather than directly to a retailer.

That interpretation necessarily follows from the principle that the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him and from the principle of neutrality of the tax whereby within each country similar goods should bear the same tax burden whatever the length of the production and distribution chain.

The VAT system is not disturbed as a result of that interpretation since there is no need to readjust the taxable amount for the intermediate transactions. That amount remains unchanged since, for those transactions, observance of the principle of neutrality is ensured by application of the conditions for deduction set out in the directive, which enable the intermediate links in the distribution chain, such as wholesalers and retailers, to pay to the tax authorities only the part of the VAT representing the difference between the price paid by each to his supplier and the price at which he supplied the goods to his purchaser.

Parties

In Case C-317/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the VAT and Duties Tribunal, London, for a preliminary ruling in the proceedings pending before that court between

Elida Gibbs Ltd

and

Commissioners of Customs and Excise

on the interpretation of Article 11 of the Sixth Directive, 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: G.F. Mancini, President of the Chamber, C.N. Kakouris (Rapporteur) and G. Hirsch, Judges,

Advocate General: N. Fennelly,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

° Elida Gibbs Ltd, by David Milne QC, instructed by Coopers & Lybrand, Chartered Accountants,

° the United Kingdom Government, by Stephen Braviner, of the Treasury Solicitor's Department, acting as Agent, and Kenneth Parker QC,

° the German Government, by Ernst Roeder, Ministerialrat in the Federal Ministry of the Economy, and Gereon Thiele, Assessor in the same ministry, acting as Agents,

° the French Government, by Edwige Belliard, Deputy Director, Directorate for Legal Affairs, Ministry of Foreign Affairs, and Jean-Louis Falconi, Secretary for Foreign Affairs in the same Directorate, acting as Agents,

° the Italian Government, by Umberto Leanza, Head of the Contentious Diplomatic Affairs Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Maurizio Fiorilli, *Avvocato dello Stato*,

° the Commission of the European Communities, by Peter Oliver and Enrico Traversa, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Elida Gibbs Ltd, represented by David Milne QC and John Arnold, Tax Adviser, the United Kingdom Government, represented by Kenneth Parker QC, the Greek Government, represented by Fokion Georgakopoulos, Legal Adviser in the State Legal Service, and Anna Rokofyllou, Adviser to the Deputy Minister for Foreign Affairs, acting as Agents, the French Government, represented by Gautier Mignot, Secretary for Foreign Affairs in the Directorate for Legal Affairs, Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by Peter Oliver and Enrico Traversa, at the hearing on 25 April 1996,

after hearing the Opinion of the Advocate General at the sitting on 27 June 1996,

gives the following

Judgment

Grounds

1 By order of 30 November 1994, received at the Court Registry on 6 December 1994, the VAT and Duties Tribunal, London, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 11 of the Sixth Directive, 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 have been raised in proceedings brought by Elida Gibbs Ltd (hereinafter "Elida Gibbs") against the Commissioners of Customs and Excise (hereinafter "the Commissioners"), who are responsible for collecting value added tax in the United Kingdom (hereinafter "VAT"), in which Elida Gibbs seeks a refund of sums paid by it in respect of VAT.

The promotion schemes at issue in the main proceedings

3 According to the order for reference, Elida Gibbs, a subsidiary of Unilever, is a manufacturer of toiletries, 70% of which are sold to retailers and the remainder to wholesalers or cash-and-carry traders for resale to retailers.

4 To promote retail sales of its products, Elida Gibbs operates a "money-off coupon" scheme, of which there are two categories, namely the "basic scheme" and the "retailer-specific scheme", and a "cash-back coupon" scheme.

5 Using the money-off coupons under its basic scheme, Elida Gibbs promotes a particular product for a limited period. It arranges for money-off coupons to be distributed to the public, either directly or as cut-out coupons in magazines, newspapers, and similar publications. Each coupon has a face value (for example 15 pence) and carries instructions to consumers, indicating that it may be presented for partial payment for one or more specific Elida Gibbs products. Each coupon also bears instructions to retailers as to how and within what period it should be returned to Elida Gibbs for redemption.

6 In the case of the money-off coupons under the retailer-specific scheme, Elida Gibbs enters into an arrangement with a retailer to organize a promotion scheme for a particular product or a particular line of products. The operation lasts for a limited period. The retailer concerned prints the coupons under contract to Elida Gibbs and distributes them to the public. Again, each coupon has a face value (for example 15 pence) and mentions the product or products for which it may be presented as part payment of the price. The name of the retailer also appears on the voucher, which can be used only in that retailer's shops.

7 Whether the buyer of Elida Gibbs products is a wholesaler or a retailer, Elida Gibbs charges the supply at a specific, VAT inclusive, price, which it invoices to its buyer under both variants of the money-off coupon schemes described above. The amount invoiced for the supply is determined irrespective of any present or future promotion scheme. Thus, the wholesaler or retailer may not know, when purchasing goods from Elida Gibbs, that those goods are, or are to be, the subject of a money-off coupon promotion scheme. At that stage, it may be that no scheme is in existence or even planned.

8 Sales by wholesalers to retailers take place at the wholesaler's prices which are likewise unaffected by any promotion campaign.

9 The retailer puts the specified goods on sale at the shelf price. Where the basic scheme is in operation, the customer buying the product specified on a voucher may present the voucher and the retailer may accept it. In such cases, the retailer receives the shelf price, less 15p, and keeps the voucher. He is not, however, required to accept the voucher in place of the 15p cash. On the other hand, where a retailer has an arrangement with Elida Gibbs under a retailer-specific scheme, it is contractually committed to accept the voucher in place of the 15p in cash.

10 Moreover, under the basic scheme the retailer makes its redemption applications direct to Elida Gibbs. Only the retailer and Elida Gibbs are concerned with this transaction. The retailer is entitled to redemption, provided that he shows that he has made sufficient purchases, that the product in question was bought by him from Elida Gibbs or from a wholesaler, and that it was purchased before or during the period of the promotion campaign. In the case of the retailer-specific scheme, the coupon must be redeemed by Elida Gibbs, irrespective of whether the product in question was sold by Elida Gibbs before or during the period of the promotion scheme.

11 Under the cash-back coupon scheme, the coupon is printed on the packaging of an Elida Gibbs product. It carries Elida Gibbs's offer, subject to certain conditions, to refund the consumer part of the purchase price paid by him to the retailer. That part of the price corresponds to the face value of the voucher which also provides the consumer with proof of purchase. A consumer who purchases the product is entitled to send the voucher direct to Elida Gibbs or to its agents, who will then make the promised cash refund.

The dispute in the main proceedings

12 On 24 August 1992, Unilever, of which Elida Gibbs is a subsidiary company, asked the Commissioners to repay to it 883 894, being VAT wrongly paid, in its view, since 1984 in respect of money-off coupons and cash-back coupons. Unilever considered that the reimbursement of the face value of the coupons constituted a retroactive discount and that the taxable base for calculation of the VAT due by Elida Gibbs should be reduced accordingly.

13 Taking the view that there was no retroactive discount, the Commissioners rejected Unilever's request by decisions of 5 May 1993 as regards money-off coupons and of 8 October 1993 as regards cash-back coupons.

14 In the case of money-off coupons, the Commissioners considered that the amounts that they represented were part of the consideration received by the retailer for supply of the goods to the customer. Being paid by Elida Gibbs, those amounts constituted "third-party consideration" which, under Article 11(A)(1) of the Sixth Directive, was to be included in the taxable amount for VAT in respect of the retailer's supply.

15 As regards cash-back coupons, the Commissioners considered that, since the consumer obtained his refund direct from the manufacturer, after making the appropriate application, the retailer played no part in the transaction. There was therefore no direct link between the supply of goods by the manufacturer to the retailer or wholesaler and the reimbursement from the manufacturer to the consumer.

16 Elida Gibbs challenged those decisions of the Commissioners by two applications to the Value Added Tax Tribunal (now the VAT and Duties Tribunal), London, which were joined.

17 The VAT and Duties Tribunal, entertaining doubts as to the interpretation of the relevant Community provisions, decided to stay proceedings pending a preliminary ruling from the Court of Justice on the following questions:

"1. Money-off coupons

What, on the proper construction of Article 11(A)(1)(a) and 11(C)(1), is the 'taxable amount' of an original supplier in the situation of Elida Gibbs (as found in paragraph 4 of the Interim Decision), namely where:

- (a) the original supplier is a 'manufacturer' who procures the issue of a money-off coupon which is redeemable at the 'stated amount' (as printed on the coupon) by or at the expense of the manufacturer in favour of the retailer,*
- (b) the coupon which is distributed to a potential customer in the course of a sales promotion campaign may be accepted by the retailer when the customer purchases a specified item of goods from the retailer,*
- (c) the manufacturer has sold the specified item of goods at the 'original supplier' s price' either direct to the retailer or to a wholesaler, and*
- (d) the retailer accepts the coupon on sale of the item of goods to the customer, presents it to the manufacturer and is paid the stated amount?*

Is the manufacturer' s taxable amount the manufacturer' s price or that price less the stated amount?

Is the answer to the above question any different if the original supply is made by the manufacturer to a wholesaler rather than directly to a retailer?

2. Cash-back coupons

What, on the proper construction of Article 11(A)(1)(a) and 11(C)(1), is the 'taxable amount' of an original supplier in the situation of Elida Gibbs (as found in paragraph 4 of the Interim Decision), namely where:

(a) in the course of a promotion scheme the original supplier ('the manufacturer') sells items of goods at the 'manufacturer's price' either direct to a retailer or to a wholesaler,

(b) a cash-back coupon for a 'stated amount' is printed on the wrapping of those items of goods entitling the customer, who proves purchase of one of those items of goods and satisfies other conditions printed on the coupon, to present the coupon to the manufacturer in return for payment of the stated amount, and

(c) a customer purchases such an item of goods from a retailer, presents the coupon to the manufacturer and is paid the stated amount?

Is the manufacturer's taxable amount the manufacturer's price or that price less the stated amount?

Is the answer to the above question any different if the original supply is made by the manufacturer to a wholesaler rather than to a retailer?"

General considerations

18 Before replying to these questions, it is appropriate to describe briefly the basic principle of the VAT system and how it operates.

19 The basic principle of the VAT system is that it is intended to tax only the final consumer. Consequently, the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him.

20 Thus, in Case 89/81 Staatssecretaris van Financiën v Hong Kong Trade [1982] ECR 1277, paragraph 6, the Court held that it was apparent from the First Directive (Council Directive 67/227/EEC of 11 April 1967 on the harmonization of the legislation of the Member States concerning turnover tax (OJ, English Special Edition 1967, p. 16) that one of the principles on which the VAT system was based was neutrality, in the sense that within each country similar goods should bear the same tax burden whatever the length of the production and distribution chain.

21 That basic principle clarifies the role and obligations of taxable persons within the machinery established for the collection of VAT.

22 It is not, in fact, the taxable persons who themselves bear the burden of VAT. The sole requirement imposed on them, when they take part in the production and distribution process prior to the stage of final taxation, regardless of the number of transactions involved, is that, at each stage of the process, they collect the tax on behalf of the tax authorities and account for it to them.

23 In order to guarantee complete neutrality of the machinery as far as taxable persons are concerned, the Sixth Directive provides, in Title XI, for a system of deductions designed to ensure that the taxable person is not improperly charged VAT. As the Court held in its judgment in Case

15/81 *Schul v Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409, paragraph 10, a basic feature of the VAT system is that VAT is chargeable on each transaction only after deduction of the amount of VAT borne directly by the cost of the various price components of the goods and services. The procedure for deduction is so arranged that only taxable persons are authorized to deduct from the VAT for which they are liable the VAT which the goods and services have already borne.

24 It follows that, having regard in each case to the machinery of the VAT system, its operation and the role of the intermediaries, the tax authorities may not in any circumstances charge an amount exceeding the tax paid by the final consumer.

25 The questions submitted by the VAT and Duties Tribunal, London, must be considered together in the light of those considerations.

The preliminary questions

26 By virtue of Article 11(A)(1)(a) of the Sixth Directive, the taxable amount for supplies of goods and services within the territory of a state comprises all sums which make up the consideration which has been or is to be obtained by the supplier from the purchaser.

27 According to the Court's settled case-law, that consideration is the "subjective" value, that is to say, the value actually received in each specific case, and not a value estimated according to objective criteria (see *Hong Kong Trade*, cited above, paragraph 13, *Case 230/87 Naturally Yours Cosmetics* [1988] ECR 6365, paragraph 16, and *Case C-126/88 Boots Company v Commissioners of Customs and Excise* [1990] ECR I-1235, paragraph 19).

28 In circumstances such as those in the main proceedings, the manufacturer, who has refunded the value of the money-off coupon to the retailer or the value of the cash-back coupon to the final consumer, receives, on completion of the transaction, a sum corresponding to the sale price paid by the wholesalers or retailers for his goods, less the value of those coupons. It would not therefore be in conformity with the directive for the taxable amount used to calculate the VAT chargeable to the manufacturer, as a taxable person, to exceed the sum finally received by him. Were that the case, the principle of neutrality of VAT vis-à-vis taxable persons, of whom the manufacturer is one, would not be complied with.

29 Consequently, the taxable amount attributable to the manufacturer as a taxable person must be the amount corresponding to the price at which he sold the goods to the wholesalers or retailers, less the value of those coupons.

30 That interpretation is borne out by Article 11(C)(1) of the Sixth Directive which, in order to ensure the neutrality of the taxable person's position, provides that, in the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount is to be reduced accordingly under conditions to be determined by the Member States.

31 It is true that that provision refers to the normal case of contractual relations entered into directly between two contracting parties, which are modified subsequently. The fact remains, however, that the provision is an expression of the principle, emphasized above, that the position of taxable persons must be neutral. It follows therefore from that provision that, in order to ensure observance of the principle of neutrality, account should be taken, when calculating the taxable amount for VAT, of situations where a taxable person who, having no contractual relationship with the final consumer but being the first link in a chain of transactions which ends with the final consumer, grants the consumer a reduction through retailers or by direct repayment of the value of the coupons. Otherwise, the tax authorities would receive by way of VAT a sum greater than that actually paid by the final consumer, at the expense of the taxable person.

32 That interpretation is not invalidated by the arguments advanced by the United Kingdom, German and Greek Governments to the effect that deduction from the taxable amount of reductions granted directly, or of refunds made directly, to the consumer by the initial supplier after delivery to a wholesaler or retailer would upset the functioning of the VAT machinery and render the system unworkable because it would require each wholesaler or retailer in the chain retroactively to adjust the price and, consequently, the amount of VAT they had paid to their own supplier and would require the latter to issue amended invoices.

33 The VAT system is not disturbed as a result of such deduction since there is no need to readjust the taxable amount for the intermediate transactions. On the contrary, that amount remains unchanged since, for those transactions, observance of the principle of neutrality is ensured by application of the conditions for deduction set out in Title XI of the Sixth Directive. Under those conditions, the intermediate links in the distribution chain, such as wholesalers and retailers, may deduct from their own taxable amount the sums paid by each to his own supplier in respect of VAT on the corresponding transaction and thus pass on to the tax authorities the part of the VAT representing the difference between the price paid by each to his supplier and the price at which he supplied the goods to his purchaser.

34 In view of all the foregoing considerations, the answer to the first question submitted must be that Article 11(A)(1)(a) and Article 11(C)(1) of the Sixth Directive are to be interpreted as meaning that where (a) a manufacturer issues a money-off coupon, which is redeemable at the amount stated on the coupon by or at the expense of the manufacturer in favour of the retailer, (b) the coupon, which is distributed to a potential customer in the course of a sales promotion campaign, may be accepted by the retailer in payment for a specified item of goods, (c) the manufacturer has sold the specified item at the "original supplier's price" direct to the retailer and (d) the retailer takes the coupon from the customer on sale of the item, presents it to the manufacturer and is paid the stated amount, the taxable amount is equal to the selling price charged by the manufacturer, less the amount indicated on the voucher and refunded. The same applies if the original supply is made by the manufacturer to a wholesaler rather than directly to a retailer.

35 The answer to the second question must then be that Article 11(A)(1)(a) and Article 11(C)(1) of the Sixth Directive are to be interpreted as meaning that where (a) in the course of a promotion scheme a manufacturer sells items of goods at the "manufacturer's price" direct to a retailer, (b) a cash-back coupon for an amount stated on the packaging of those items entitles the customer, if he proves purchase of one of those items and satisfies other conditions printed on the coupon, to present the coupon to the manufacturer in return for payment of the stated amount, and (c) a customer purchases such an item from a retailer, presents the coupon to the manufacturer and is paid the stated amount, the taxable amount is equal to the selling price charged by the manufacturer, less the amount indicated on the coupon and refunded. The same applies if the original supply is made by the manufacturer to a wholesaler rather than directly to a retailer.

Decision on costs

Costs

36 The costs incurred by the United Kingdom, German, Greek, French and Italian Governments, 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 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 questions referred to it by the VAT and Duties Tribunal, London, by order of 30 November 1994, hereby rules:

1. Article 11(A)(1)(a) and Article 11(C)(1) of the Sixth Directive, 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, are to be interpreted as meaning that where (a) a manufacturer issues a money-off coupon, which is redeemable at the amount stated on the coupon by or at the expense of the manufacturer in favour of the retailer, (b) the coupon, which is distributed to a potential customer in the course of a sales promotion campaign, may be accepted by the retailer in payment for a specified item of goods, (c) the manufacturer has sold the specified item at the "original supplier's price" direct to the retailer and (d) the retailer takes the coupon from the customer on sale of the item, presents it to the manufacturer and is paid the stated amount, the taxable amount is equal to the selling price charged by the manufacturer, less the amount indicated on the voucher and refunded. The same applies if the original supply is made by the manufacturer to a wholesaler rather than directly to a retailer.

2. Article 11(A)(1)(a) and Article 11(C)(1) of the Sixth Directive are to be interpreted as meaning that where (a) in the course of a promotion scheme a manufacturer sells items of goods at the "manufacturer's price" direct to a retailer, (b) a cash-back coupon for an amount stated on the packaging of those items entitles the customer, if he proves purchase of one of those items and satisfies other conditions printed on the coupon, to present the coupon to the manufacturer in return for payment of the stated amount, and (c) a customer purchases such an item from a retailer, presents the coupon to the manufacturer and is paid the stated amount, the taxable amount is equal to the selling price charged by the manufacturer, less the amount indicated on the coupon and refunded. The same applies if the original supply is made by the manufacturer to a wholesaler rather than directly to a retailer.