

61997J0048

Judgment of the Court of 27 April 1999. - Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise. - Reference for a preliminary ruling: Value Added Tax and Duties Tribunal, London - United Kingdom. - Sixth VAT Directive - Sales promotion scheme - Goods supplied on redemption of vouchers - Supply for consideration - Price discounts and rebates - Definition. - Case C-48/97.

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Summary

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Keywords

1 Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Basis of assessment - Rebates and price discounts - Meaning - 100% discount - Not covered

(Council Directive 77/388, Art. 11A(3)(b))

2 Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Taxable transactions - Handing over of goods, offered as gifts, in exchange for vouchers obtained on purchasing a product - Whether taxable - Requirement

(Council Directive 77/388, Art. 5(6))

Summary

1 On a proper construction of Article 11A(3)(b) of the Sixth Directive 77/388, regarding the factors which do not go to make up the taxable amount for VAT purposes, the terms 'rebates' and 'price discounts' cannot be applied to reductions covering the whole cost of supplying redemption goods.

2 Article 5(6) of the Sixth Directive 77/388 treats as a supply made for consideration a taxable person's disposal free of charge of goods forming part of his business assets, where input VAT was deductible on those goods. The application by an oil company of goods which are disposed of to a purchaser of fuel in exchange for vouchers which he has obtained in varying quantities, depending on the volume of fuel purchased, on payment of the full retail price for fuel from the pump - under a sales promotion scheme in the context of which the goods are classed as gifts and no portion of the price paid by the purchaser represents the value of the vouchers or of the goods

for which they are redeemed - constitutes a disposal free of charge and must, where the goods are not of small value, be treated as a supply for consideration on which VAT is payable.

Parties

In Case C-48/97,

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

Kuwait Petroleum (GB) Ltd

and

Commissioners of Customs & Excise,

on the interpretation of Articles 2, point 1, 5(6), 11A(3)(b) and 27 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation 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,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn and G. Hirsch (Rapporteur) (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, C. Gulmann, D.A.O. Edward, L. Sevón and M. Wathelet, Judges,

Advocate General: N. Fennelly,

Registrar: D. Louberman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Kuwait Petroleum (GB) Ltd, by John Walters QC, instructed by Peter Landon FCA,

- the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, with Paul Lasok QC and Philippa J.E. Whipple, Barrister,

- the French Government, by Kareen Rispal-Bellanger, Head of the Subdirectorate for International Economic Law and Community Law in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Gautier Mignot, Foreign Affairs Secretary in that Directorate, acting as Agents,

- the Portuguese Government, by Luís Fernandes, Director of the Legal Service of the Directorate-General for the European Communities of the Ministry of Foreign Affairs, and Angelo Cortesão Seïça Neves, a lawyer in the same Service, acting as Agents,

- the Commission of the European Communities, by Peter Oliver, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Kuwait Petroleum (GB) Ltd, represented by John Walters, instructed by Peter Landon; the United Kingdom Government, represented by John E. Collins, with Paul Lasok; the French Government, represented by Gautier Mignot; and the Commission, represented by Peter Oliver and Hélène Michard, of its Legal Service, and Francesca Riddy, a

national civil servant on secondment to that Service, acting as Agents, at the hearing on 5 May 1998,

after hearing the Opinion of the Advocate General at the sitting on 9 July 1998,

gives the following

Judgment

Grounds

1 By order of 15 January 1997, received at the Court on 6 February 1997, the VAT and Duties Tribunal, London, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty five questions on the interpretation of Articles 2, point 1, 5(6), 11A(3)(b) and 27 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation 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 were raised in proceedings between Kuwait Petroleum (GB) Ltd (hereinafter 'Kuwait Petroleum') and the Commissioners of Customs & Excise (hereinafter 'the Commissioners') - the body responsible for collecting VAT in the United Kingdom - concerning the question whether VAT is payable on certain products offered by Kuwait Petroleum as part of a sales promotion exercise between 1991 and 1996.

The national legislation

3 Schedule 4 to the Value Added Tax Act 1994 defines the transactions which are, or are to be treated as, supplies of goods or services for the purposes of charging VAT. Paragraph 5 of Schedule 4 provides:

'(1) Subject to subparagraph (2) below, where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for consideration, that is a supply by him of goods.

(2) Subparagraph (1) above does not apply where the transfer or disposal is -

(a) a gift of goods made in the course or furtherance of a business (otherwise than as one forming part of a series or succession of gifts made to the same person from time to time) where the cost to the donor is not more than £10; ...'

Community legislation

4 Article 2, point 1, of the Sixth Directive provides:

'The following shall be subject to value added tax:

1. The supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

...' 5 Article 5(6) of the Sixth Directive provides:

'The application by a taxable person of goods forming part of his business assets for his private use or that of his staff, or the disposal thereof free of charge or more generally their application for purposes other than those of his business, where the value added tax on the goods in question or

the component parts thereof was wholly or partly deductible, shall be treated as supplies made for consideration. However, applications for the giving of samples or the making of gifts of small value for the purposes of the taxable person's business shall not be so treated.'

6 Article 11A(3)(b) of the Sixth Directive provides:

`[Within the territory of the country]

...

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.'

The dispute in the main proceedings

7 Fuel marketed by Kuwait Petroleum under the trade mark `Q8' is sold to the public either directly by Kuwait Petroleum, at approximately 110 service stations owned by the company and operated by it or on its behalf, or through some 500 independent retailers to whom Kuwait Petroleum sells Q8 fuel as a wholesaler.

8 Between 1991 and 1996 Kuwait Petroleum operated a sales promotion scheme, in which both the company-owned service stations and approximately 160 independent retailers took part. Under this scheme, customers were offered a `Q8 sail' (hereinafter `a Q8 voucher') with every 12 litres of fuel purchased. Whether or not the customer accepted the vouchers, the price of the fuel was the same. When a customer had collected enough vouchers, he was entitled to redeem them for goods chosen from a `gift catalogue' or occasionally for services - in the form of vouchers, such as theatre tickets - which Kuwait Petroleum undertook to provide within a certain time.

9 The independent retailers taking part in the scheme each undertook to pay Kuwait Petroleum an additional amount per litre, plus VAT, in respect of the total volume of fuel sold during the promotional period. That supplement, originally worth 0.22 pence per litre, was increased to 0.33 pence per litre in 1993.

10 By letter of 16 June 1995, the Commissioners ruled that Kuwait Petroleum, which had deducted the input VAT on goods purchased for exchange with Q8 vouchers (hereinafter `redemption goods'), was liable to account for output VAT on items supplied to customers where the cost of the item exceeded £10, on the ground that those goods were supplied by Kuwait Petroleum `otherwise than for a consideration'.

11 Kuwait Petroleum appealed against that decision to the VAT and Duties Tribunal on the ground that the redemption goods were, on the contrary, supplied for a consideration. That consideration was represented by an indeterminate part of the VAT-inclusive price paid by the consumer, which covered the supply both of the fuel and of goods on subsequent redemption of Q8 vouchers, which meant that Kuwait Petroleum had already paid the VAT due on the transaction.

12 The VAT and Duties Tribunal held that, as a matter of English law, redemption of the customer's Q8 vouchers was to be characterised as a unilateral act separate from the principal transaction, namely the purchase of fuel. The Tribunal concluded also that the Q8 vouchers were obtained free of charge.

13 The VAT and Duties Tribunal observed, nevertheless, that consideration for the purposes of English contract law is a different concept from consideration as the value of a taxable supply in

VAT law. Accordingly, finding that an interpretation of Community law was necessary to enable it to give judgment in the dispute before it, the Tribunal decided to stay proceedings and refer the following questions to the Court:

‘Where a supplier of goods operates a business promotion scheme, under which, in outline:

(i) the promoter provided redemption goods for business purposes in accordance with the terms of the scheme;

(ii) for no payment in money at the point of redemption;

(iii) against the redemption of vouchers to which a purchaser of premium goods became entitled by paying the full retail price of those goods without making any identifiable monetary payment for the vouchers.

1. Is the expression "price discounts and rebates allowed to the customer and accounted for at the time of supply" in Article 11A(3)(b) of the Sixth Council Directive to be interpreted to cover the whole cost of the redemption goods?

2. Are the redemption goods to be treated as "supplies made for consideration" for the purposes of Article 5(6) of that Directive?

3. If the redemption goods are provided otherwise than for consideration or "free of charge", is Article 5(6) to be interpreted as requiring that the provision of the redemption goods be treated as a supply for consideration notwithstanding that such provision is for business purposes?

4. Do any of the foregoing questions require a different answer:

(a) where all the vouchers redeemed for any item of redemption goods were obtained on purchases of premium goods from the promoter of the scheme;

(b) where those vouchers were all obtained on purchases of premium goods from a trader who was a participating dealer in the scheme; or

(c) where the vouchers redeemed were obtained partly on purchases of premium goods from the promoter and partly on purchases of premium goods from one or more participating dealers?

5. If the answer to question 3 is "No", is the United Kingdom entitled pursuant to Article 27 of the Sixth Council Directive and under the derogation obtained by it in 1977 to impose an output tax charge on the promoter which is based on the cost to the promoter of the redemption goods in addition to the output tax included in the full retail price of the premium goods?’

Question 1

14 By its first question, the national court asks essentially whether, on a proper construction of Article 11A(3)(b) of the Sixth Directive, the terms ‘rebates’ and ‘price discounts’ can be applied to reductions covering the whole cost of supplying redemption goods.

15 The first point to note is that Kuwait Petroleum itself does not claim that it granted its customers either a rebate or a price discount within the meaning of that provision. On the contrary, it argues that part of the fuel purchase price represented the customer's payment for redemption goods. Accordingly, Kuwait Petroleum maintains that the first question is irrelevant.

16 As the Governments of the United Kingdom, France and Portugal have rightly pointed out, the grant of a rebate or a price discount presupposes that goods are supplied for consideration. The very terms ‘rebate’ and ‘price discount’ indicate a merely partial reduction of the total price agreed.

Where, on the other hand, a reduction covers 100% of the price, the reality of the situation is that the goods are changing hands free of charge. The disposal of goods free of charge falls within the scope of Article 5(6) of the Sixth Directive.

17 The answer to the first question must therefore be that, on a proper construction of Article 11A(3)(b) of the Sixth Directive, the terms 'rebates' and 'price discounts' cannot be applied to reductions covering the whole cost of supplying redemption goods.

Questions 2, 3 and 4

18 By its second, third and fourth questions, which it is appropriate to consider together, the national court essentially asks whether, upon a proper construction of Article 5(6) of the Sixth Directive, the application by an oil company of goods which are disposed of to a purchaser of fuel in exchange for vouchers which he has obtained in varying quantities, depending on the volume of fuel purchased, on payment of the full retail price for fuel from the pump - under the type of scheme described in paragraphs 7 to 9 above - must be treated as a supply for consideration within the meaning of that provision.

19 The first point to note is that, in the present case, the exchange of goods for Q8 vouchers was effected for business purposes, since - as the national court found - the object of the promotion scheme was, both for Kuwait Petroleum and for the independent retailers taking part, to increase fuel sales. For that reason, a taxable person in the same situation as Kuwait Petroleum is authorised to deduct, in accordance with Article 17(2)(a) of the Sixth Directive, the amount of input VAT paid for the purchase of those goods.

20 In Kuwait Petroleum's submission, the fact that it supplied the goods for business purposes precludes application of Article 5(6) of the Sixth Directive. The first sentence of that paragraph does not cover such applications. Since VAT is a tax on consumption, an output tax charge is necessary where there is an application of assets which constitutes consumption by the taxable person. However, the supply of goods on redemption of vouchers does not constitute consumption of those goods on the part of the undertaking.

21 On that point, it should be noted that the purpose of Article 5(6) of the Sixth Directive is to ensure equal treatment as between a taxable person who applies business assets for private purposes and an ordinary consumer who purchases goods of the same type (see Case C-20/91 *De Jong* [1992] ECR I-2847, paragraph 15, and Case C-230/94 *Enkler* [1996] ECR I-4517, paragraph 33).

22 However, it is clear from the very wording of Article 5(6), first sentence, of the Sixth Directive that this provision treats as a supply made for consideration, and therefore as subject to VAT, a taxable person's disposal free of charge of goods forming part of his business assets, where input VAT was deductible on those goods, it being in principle immaterial whether their disposal was for business purposes. The second sentence of that provision, which precludes taxation of applications for the giving of samples or the making of gifts of small value for the purposes of the taxable person's business would make no sense if the first sentence did not make VAT payable on the disposal free of charge of such goods by the taxable person, even where this is done for business purposes.

23 Furthermore, as the Advocate General pointed out in paragraph 26 of his Opinion, that interpretation is supported by the legislative history of Article 5(6) of the Sixth Directive. Point 6 of Annex A to the Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes - Structure and procedures for application of the common system of value added tax (OJ, English Special Edition 1967, p. 16) and Article 5(3)(a) of the Commission's proposal for the Sixth Directive, submitted to the Council on 29 June 1973 (OJ 1973 C 80, p. 1) provided inter alia that applications for the purposes of giving samples

or making gifts of small value, eligible for classification as general expenses giving tax relief, were not - contrary to the general rule - to be considered as taxable transactions. It follows that, where the gifts are not of small value, such applications must be treated as taxable supplies, even where made for business purposes.

24 Kuwait Petroleum also argues that Article 5(6) of the Sixth Directive does not apply because, on the facts in the main proceedings, there was no disposal free of charge within the meaning of that provision. Consideration for the vouchers, and consequently for the supply of the redemption goods, consisted in an identifiable fraction of the VAT-inclusive price paid by the customer when purchasing fuel, which meant that the customer paid at the same time for the goods obtained through the promotion scheme. That was the bargain made with the final consumer at service stations belonging to Kuwait Petroleum. The terms of that bargain remained essentially the same even where independent retailers were involved in the distribution chain, because, with regard to the redemption of Q8 vouchers and collection of the related fraction of the purchase price, those dealers acted on Kuwait Petroleum's behalf.

25 However, the Governments of the United Kingdom, France and Portugal maintain that, notwithstanding the fact that all taxable persons should endeavour to ensure that income covers expenditure, the customer buying fuel under arrangements such as those at issue does not pay any consideration for the vouchers and gifts.

26 Goods are supplied 'for consideration' within the meaning of Article 2, point 1, of the Sixth Directive only if there is a legal relationship between the supplier and the purchaser entailing reciprocal performance, the price received by the supplier constituting the value actually given in return for the goods supplied (see, to that effect, concerning the supply of services, Case C-16/93 Tolsma [1994] ECR I-743, paragraph 14).

27 It is for the national court to inquire whether, at the time of purchasing the fuel, the customers and Kuwait Petroleum had agreed - through the dealers, as the case may be - that part of the price paid for the fuel, whether identifiable or not, would constitute the value given in return for the Q8 vouchers or the redemption goods. There is nothing, however, in the documents before the Court to suggest that there was in fact any such reciprocal performance by the parties concerned.

28 As the Advocate General pointed out in point 43 of his Opinion, the sale of the fuel and the exchange of goods for vouchers are two separate transactions.

29 Moreover, there are two considerations in the case in the main proceedings which suggest that the exchange of goods for Q8 vouchers is a disposal free of charge, within the meaning of Article 5(6) of the Sixth Directive, and that the application of those goods is therefore to be treated as a supply for consideration and, accordingly, taxable.

30 First, under the sales promotion scheme set up by Kuwait Petroleum, the redemption goods were described as gifts.

31 Second, it is not contested that the retail price of Q8 fuel, whether or not the purchaser accepted the vouchers, was the same, and this was the only price referred to on the invoice relating to the fuel purchase which, pursuant to Article 22(3) of the Sixth Directive, Kuwait Petroleum or the independent retailers had to issue to the customers who were themselves taxable persons. That being so, Kuwait Petroleum cannot reasonably maintain that, contrary to the statements on the invoices which it issued, the price paid by the purchasers of fuel in fact contained a component representing the value of the Q8 vouchers or of the redemption goods.

32 The answer to the second, third and fourth questions must therefore be that, on a proper construction of Article 5(6) of the Sixth Directive, the application by an oil company of goods which are disposed of to a purchaser of fuel in exchange for vouchers which he has obtained in varying

quantities, depending on the volume of fuel purchased, on payment of the full retail price for fuel from the pump - under a sales promotion scheme such as that in issue in the main proceedings - must, where the goods are not of small value, be treated as a supply for consideration within the meaning of that provision.

33 In the light of the answer given to the second, third and fourth questions, there is no need to reply to the fifth question.

Decision on costs

Costs

34 The costs incurred by the United Kingdom, French and Portuguese Governments and the Commission, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT

in answer to the questions referred to it by the VAT and Duties Tribunal, London, by order of 15 January 1997, hereby rules:

- 1. On a proper construction of Article 11A(3)(b) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, the terms 'rebates' and 'price discounts' cannot be applied to reductions covering the whole cost of supplying redemption goods.*
- 2. On a proper construction of Article 5(6) of the Sixth Directive 77/388, the application by an oil company of goods which are disposed of to a purchaser of fuel in exchange for vouchers which he has obtained in varying quantities, depending on the volume of fuel purchased, on payment of the full retail price for fuel from the pump - under a sales promotion scheme such as that in issue in the main proceedings - must, where the goods are not of small value, be treated as a supply for consideration within the meaning of that provision.*