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Judgment of the Court (Third Chamber) of 13 June 2002. - Keeping Newcastle Warm Limited v Commissioners of Customs and Excise. - Reference for a preliminary ruling: VAT and Duties Tribunal, Manchester - United Kingdom. - Sixth VAT Directive - Article 11A(1)(a) - Taxable amount - Consideration for goods or services - Subsidy. - Case C-353/00.

European Court reports 2002 Page I-05419

Summary
Parties
Grounds
Decision on costs
Operative part

Keywords

Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Taxable amount - Supply of services - Payment made as a subsidy that is part of the consideration to an economic operator in connection with a service provided to certain categories of beneficiaries - Payment - Inclusion in the taxable amount

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

Summary

$$Article 11A(1)(a) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes is to be interpreted as meaning that a sum paid in the context of a subsidy scheme by a public authority to an economic operator in connection with the service of energy advice supplied by the latter to certain categories of householders constitutes part of the consideration for the supply of services and forms part of the taxable amount in respect of that supply for the purposes of value added tax.

(see para 28, operative part)

Parties

In Case C-353/00,

REFERENCE to the Court under Article 234 EC by the VAT and Duties Tribunal, Manchester (United Kingdom), for a preliminary ruling in the proceedings pending before that court between

Keeping Newcastle Warm Limited

and

Commissioners of Customs & Excise,

on the interpretation of Article 11A(1)(a) of 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 (Third Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann (Rapporteur) and J.-P. Puissochet, Judges,

Advocate General: C. Stix-Hackl,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Keeping Newcastle Warm Limited, by D. Ewart, Barrister, instructed by Somerton & Fletcher, Solicitors,

- the United Kingdom Government, by G. Amodeo, acting as Agent, assisted by P. Whipple, Barrister,

- the Commission of the European Communities, by R. Lyal, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Keeping Newcastle Warm Limited, represented by D. Ewart, of the United Kingdom Government, represented by J.E. Collins, acting as Agent, assisted by P. Whipple, and the Commission, represented by R. Lyal, at the hearing on 13 December 2001,

after hearing the Opinion of the Advocate General at the sitting on 5 February 2002,

gives the following

Judgment

Grounds

1 By a decision of 8 September 2000, received at the Court on 25 September 2000, the VAT and Duties Tribunal, Manchester, referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Article 11A(1)(a) of 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 Keeping Newcastle Warm Limited (hereinafter KNW) and the Commissioners of Customs & Excise (hereinafter the Commissioners),

who are responsible for the collection of value added tax (hereinafter VAT) in the United Kingdom, relating to an application for a refund of the VAT paid by KNW on sums received pursuant to a grant scheme.

Legal background

Community law

3 Article 11A(1)(a) of the Sixth Directive provides:

The taxable amount shall be:

(a) in respect of supplies and services other than those referred to in (b), (c) and (d) below, 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 for such supplies including subsidies directly linked to the price of such supplies.

National legislation

4 The Home Energy Efficiency Grants Regulations 1992 (hereinafter the Regulations) provide for the award of grants to improve energy efficiency in dwellings occupied by certain categories of persons.

5 In particular, Regulation 5 provides that a grant may be awarded for various kinds of work, including energy advice, which is defined as advice relating to thermal insulation or to the economic and efficient use of domestic appliances or of facilities for lighting, or for space or water heating.

6 Regulation 7(1) provides that, when an application has been made to the network installer for the locality for a grant, he is to consider whether the applicant is to be eligible for the grant.

7 Regulation 7(3) provides:

If the network installer is satisfied that there is eligibility for grant, he shall

(a) send the application to the administering agency for the area for determination, and at the same time certify to the administering agency in writing that he has carried out such verification as to the eligibility of a grant as may be laid down from time to time by that administering agency; and

(b) decide whether, pending determination of the application by that administering agency, he is prepared to carry out the work on the basis that, subject to the liability of the applicant as described in (i) below, he will, in the event that the administering agency should not approve the grant, bear the cost of the work; and

(i) if he is so prepared, notify the applicant in writing that he is prepared to carry out the work on the basis that, unless the application for grant is not approved or the claim not paid by the administering agency for the area on grounds of material misrepresentation, the applicant shall be liable to pay in respect of the work only such amount as has been agreed in writing between the applicant and the network installer before the making of the application as representing the amount by which the full costs of the work exceeds the sum of the grant ...

8 Regulation 9 specifies that the maximum amount of grants for energy advice is GBP 10.

9 Regulation 10 provides that where the conditions for payment of a grant are satisfied, and the work was carried out by a network installer, the administering agency for the area is to pay the grant to the network installer.

10 Under the Regulations, the Energy Action Grants Agency (hereinafter the EAGA) was appointed administering agency for England, Scotland and Wales. It administers the programme for improving energy efficiency in dwellings in those areas. KNW has been appointed network installer for an area including Tyne and Wear, Northumberland, Cumbria and parts of the Scottish borders.

11 In the context of the grant scheme established by the Regulations, the EAGA requires, inter alia, that a standard-form agreement be entered into by the applicant for the grant and the network installer. Under the standard-form agreement, the network installer must carry out the work for the price stated and, if he does so, is entitled to be paid that price by the other party, and to receive the grant where the EAGA pays the grant to the network installer. If the network installer carries out the work and the EAGA does not approve the grant application, or does not pay the grant on the grounds of material misrepresentation, then the applicant for the grant has to pay the network installer the full price of the work.

The main proceedings and the questions referred

12 KNW has for several years carried out work in the context of the grant scheme established by the Regulations, including the provision of energy advice. It has declared and paid VAT on the amounts paid to it by the EAGA in the form of energy advice grants, in the amount of GBP 10 per piece of advice.

13 KNW brought proceedings before the VAT and Duties Tribunal for a refund of the VAT so paid by it between 1 April 1991 and 31 August 1996. KNW submitted that the grant for energy advice was not directly linked to the price of the supply, within the meaning of Article 11A(1)(a) of the Sixth Directive, and accordingly did not form part of the taxable amount for that supply. It claimed that the grant of GBP 10 was paid without reference to the price which would have been charged for the energy advice if it had not been provided to the consumer for free.

14 The Commissioners submitted that the amount of GBP 10 was not a standard sum but was linked to the amount properly charged for the energy advice and that in any event it constituted the consideration for the supply.

15 The main proceedings related to a preliminary issue submitted for determination to the VAT and Duties Tribunal by the parties to those proceedings; the Tribunal, by interim decision of 17 December 1998, determined that the payments of GBP 10 were part of the taxable amount as being consideration for the supplies, whether or not those payments were also subsidies within the meaning of Article 11 of the Sixth Directive.

16 KNW appealed against that decision to the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office).

17 KNW acknowledged before the High Court that the GBP 10 received by it from the EAGA for each piece of energy advice it provided constituted consideration, as the Commissioners contended. It none the less argued that the words including subsidies directly linked to the price of such supplies in Article 11A(1)(a) of the Sixth Directive could only have force if, apart from them, all other subsidies were excluded from the taxable amount. All subsidies directly linked to the price of such supplies are payments made in return for the supplies and so normally form part of the consideration.

18 The Commissioners claimed that, since it was plain that the grants in question were part of the consideration, they must form part of the taxable amount.

19 In those circumstances the VAT and Duties Tribunal, Manchester, pursuant to an order of the High Court, referred the following questions to the Court :

(1) Is a payment made by the Energy Action Grants Agency to the Appellant, which receives it in respect of energy advice given to an eligible householder, a subsidy within the meaning of that word in Article 11A(1)(a) of the EC Sixth Council Directive (77/388/EEC)?

(2) If the answer to the first Question is yes, is that payment also directly linked to the price of the supply of energy advice, so as to form part of the taxable amount of that supply by reason of the concluding words of Article 11A(1)(a)?

(3) If the answer to Question (2) is no, is that payment none the less part of the taxable amount by reason of constituting the consideration (or part of the consideration) for a supply?

The questions referred

Observations submitted to the Court

20 KNW argues that the sum of GBP 10 awarded by the EAGA in respect of each piece of energy advice constitutes a subsidy, but one which is not directly linked to the price of the supply because the amount in practice always corresponds to the ceiling set for it. Furthermore, since the supply of energy advice to consumers is free, the grant is in fact in the nature of a flat-rate subsidy to the operating costs of KNW and is not directly linked to any cost. Accordingly, the grant does not form part of the consideration for the supply within the meaning of Article 11A(1)(a) of the Sixth Directive.

21 Relying inter alia on the Court's judgments in Coöperatieve Aardappelenbewaarplaats (Case 154/80 [1981] ECR 445) and Tolsma (Case C-16/93 [1994] ECR I-743), the United Kingdom contends that the financial assistance at issue in the main proceedings constitutes consideration within the meaning of Article 11A(1)(a) of the Sixth Directive and that that concludes the dispute before the national court. In any event there is a direct link between the subsidy and the services supplied by KNW. The contract between KNW and the householder sets out the nature and cost of the work which KNW will carry out and deducts the amount of financial assistance available to the householder from the amount payable by the householder. But if for some reason the financial assistance is not forthcoming, the householder is obliged to pay KNW for the whole of the work.

22 The Commission submits that the purpose of Article 11A(1)(a) of the Sixth Directive is to ensure that the taxable basis includes the whole of the consideration paid in respect of the supply of goods or services, whether the consideration is paid by the recipient or by a third party, which may be a public authority. Accordingly, where a third party, including, as is the case in the main proceedings, a public authority, contributes a sum of money for a specific service provided to an individual, that sum is part of the taxable amount, irrespective of whether the payment constitutes a subsidy directly linked to the price of the supply. It does not follow from the fact that the sum paid

systematically amounts to GBP 10 that the subsidy is not directly linked to the price. In that regard, the Commission points out that the grant is awarded to cover the total cost of energy advice, subject to a ceiling of GBP 10. Even if it were a flat-rate subsidy and the only payment made in relation to the energy advice, it would be inconsistent with Article 11A(1)(a) of the Sixth Directive to view it as not forming part of the taxable amount, with the result that no VAT would be charged on the supply.

The Court's reply

23 Article 11A(1)(a) of the Sixth Directive deals, inter alia, with situations where three parties are involved: the authority which grants the subsidy, the body which benefits from it and the purchaser of the goods or services delivered or supplied by the subsidised body (see, to that effect, judgment of 22 November 2001 Case C-184/00 Office des produits wallons [2001] ECR I-9115, paragraph 10).

24 In that context, the sum paid by a public authority such as the EAGA to an economic operator such as KNW in connection with the service of energy advice supplied by KNW to certain categories of householders may constitute a subsidy within the meaning of Article 11A(1)(a) of the Sixth Directive.

25 In any event it must be noted that the taxable amount in respect of a supply of services is everything which makes up the consideration for the service (see, inter alia, Tolsma, cited above, paragraph 13).

26 It is clear that the sum paid by the EAGA to KNW is received by the latter in consideration for the service supplied by it to certain categories of recipient.

27 As consideration in respect of a supply, that sum forms part of the taxable amount within the meaning of Article 11A(1)(a) of the Sixth Directive.

28 Accordingly the answer to be given to the questions referred to the Court must be that Article 11A(1)(a) of the Sixth Directive is to be interpreted as meaning that a sum such as that paid in the case in the main proceedings constitutes part of the consideration for the supply of services and forms part of the taxable amount in respect of that supply for the purposes of VAT.

Decision on costs

Costs

29 The costs incurred by the United Kingdom Government and by 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 (Third Chamber),

in answer to the questions referred to it by the VAT and Duties Tribunal, Manchester, by decision of 8 September 2000, hereby rules:

Article 11A(1)(a) 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 is to be interpreted as meaning that a sum such as that paid in the case in the main proceedings constitutes part of the consideration for the supply of services and forms part of the taxable amount in respect of that supply for the purposes of value added tax.