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Judgment of the Court of 23 November 1988. - Naturally Yours Cosmetics Limited v Commissioners of Customs and Excise. - Reference for a preliminary ruling: Value Added Tax Tribunal, London - United Kingdom. - Common system of value-added tax - Taxable amount - Supplies of goods and services. - Case 230/87.

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Keywords

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Tax provisions - Harmonization of laws - Turnover taxes - Common system of value-added tax - Taxable amount - Supply of goods - Consideration directly linked to the supply, capable of being expressed in monetary terms and constituting a subjective value - Reduction of sale price by way of reward for a service provided by the purchaser

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

Summary

The taxable basis for a supply of goods within the meaning of Article 11 A 1 (a) of the Sixth Directive (77/388) is made up of everything which is received directly in connection with the supply and represents the consideration for it, the latter being a subjective value which must be capable of being expressed in monetary terms .

That provision must therefore be interpreted as meaning that where a supplier (" the wholesaler ") supplies goods (" the inducement ") to another (" the retailer ") for a monetary consideration (namely a sum of money) which is less than that at which he supplies identical goods to the retailer for resale to the public on an undertaking by the retailer to apply the inducement in procuring another person to arrange, or in rewarding another for arranging, a gathering at which further goods of the wholesaler can be sold by the retailer to the public for their mutual benefit, on the understanding that if no such gathering is held the inducement must be returned to the supplier or paid for at its wholesale price, the taxable amount is the sum of the monetary consideration and of

the value of the service provided by the retailer which consists in applying the inducement to procure the services of another person or in rewarding that person for those services; the value of that service must be regarded as being equal to the difference between the price actually paid for that product and its normal wholesale price .

Parties

In Case 230/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the London value-added tax tribunal for a preliminary ruling in the proceedings pending before that tribunal between

Naturally Yours Cosmetics Ltd

and

Commissioners of Customs and Excise

on the interpretation of Article 11 A 1 (a) 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 (Official Journal 1977, L 145, p . 1),

THE COURT

composed of : O . Due, President, T . Koopmans, R . Joliet and T . F . O' Higgins (Presidents of Chambers), C . N . Kakouris, F . A . Schockweiler and J . C . Moitinho de Almeida, Judges,

Advocate General : J . L . da Cruz Vilaça

Registrar : H . A . Ruehl, Principal Administrator

after considering the observations presented on behalf of

the appellant in the main proceedings, by David Vaughan QC and Messrs S . J . Berwin & Co . , solicitors,

the United Kingdom, by Susan Hay, acting as Agent, and John Mummery and Robert Jay, Barristers,

the Portuguese Government, by Luís Inês Fernandes, Maria Helena Brito and Arlindo Correia, acting as Agents,

the Commission of the European Communities, by Johannes Foens Buhl, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 21 June 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 14 July 1988,

gives the following

Judgment

Grounds

1 By order of 13 March 1987, received at the Court on 29 July 1987, the London value-added tax tribunal referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 11 A 1 (a) of the Sixth Council Directive 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 (Official Journal 1977, L 45, p . 1, hereinafter referred to as "the Sixth Directive ").

2 The question was raised in proceedings brought by Naturally Yours Cosmetics Limited (" NYC ") against the Commissioners of Customs and Excise (" the Commissioners ") concerning a decision of the Commissioners with respect to a value-added tax assessment for 1984 .

3 It appears from the order for reference that NYC is a company which carries on business as a wholesaler of cosmetic products for resale by retailers (" beauty consultants ") who approach friends and acquaintances (" hostesses ") for the purpose of organizing private parties at which NYC' s products are offered for sale .

4 The beauty consultants purchase the products from NYC at wholesale prices and sell them at the parties at a retail price recommended by the company; the difference between those two prices constitutes the profit to which the beauty consultants are entitled . It is apparent from the documents before the Court that the beauty consultants are exempted from the payment of VAT under Article 24 of the Sixth Directive because their turnover falls short of the threshold fixed by the United Kingdom legislation .

5 To reward the hostesses for organizing the parties, the beauty consultant gives them one of the products on sale there (" Natural oasis rejuvenating cream ") as a "dating gift " . When the pot of cream is used for that purpose, NYC supplies it to the beauty consultant for UKL 1.50 instead of its normal wholesale price of UKL 10.14 .

6 The Commissioners assessed VAT for 1984 on the basis of the normal wholesale price of UKL 10.14 for each pot of cream, including those intended to be used as gifts; in so doing, they relied upon the relevant United Kingdom legislation, namely Section 10 (3) of the Value-Added Tax Act 1983, which provides that : "If the supply is not for a consideration or is for a consideration not consisting or not wholly consisting of money, the value of the supply shall be taken to be its open market value " . NYC considers that that provision is contrary to Article 11 A 1 (a) of the Sixth Directive and that the taxable amount should be the price of UKL 1.50 actually paid by the beauty consultant for the pots of cream to be used as gifts .

7 Considering that the dispute raised a question of interpretation of Community law, the value-added tax tribunal stayed the proceedings pending a preliminary ruling by the Court on the following question :

"For the purposes of Article 11 A of the Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes (Directive 77/388/EEC of 17 May 1977), where a supplier (' the wholesaler ') supplies goods (' the inducement ') to another (' the retailer ') for a monetary consideration (namely a sum of money) which is less than that at which he supplies identical goods to the retailer for resale to the public on an undertaking by the retailer to apply the inducement in procuring another person to arrange, or in rewarding another for arranging, a gathering at which further goods of the wholesaler can be sold by the retailer to the public for their mutual benefit, is the taxable amount

(a) only the monetary consideration received by the wholesaler for the inducement, or

(b) the monetary consideration at which the wholesaler supplies the identical goods to the retailer for resale to the public, or

(c) such amount as is to be determined in accordance with such criteria which may be determined by the Member State concerned, or

(d) the monetary consideration together with the value of the undertaking by the retailer to apply the inducement in so procuring or rewarding the other person and, if so, how the value of the undertaking is to be determined, or

(e) some other, and if so, what other, amount?"

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or referred to hereinafter only in so far as is necessary for the reasoning of the Court .

9 Article 11 A 1 of the Sixth Directive provides :

"The taxable amount shall be :

(a) in respect of supplies of goods and services ... 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;

(b) ..."

10 In order to interpret Article 11 A 1 (a) of the Sixth Directive, it is necessary, having regard to the common purpose of the Sixth Council Directive and the Second Council Directive (67/228/EEC of 11 April 1967) on the harmonization of legislation of Member States concerning turnover taxes - Structure and procedures for application of the common system of value-added tax (Official Journal, English Special Edition 1967, p . 16, hereinafter referred to as "the Second Directive "), to take account of the decisions of the Court on the latter directive .

11 According to the judgment of 5 February 1981 in Case 154/80 Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats ((1981)) ECR 445, the basis of assessment for a service is everything which makes up the consideration for the service; there must therefore be a direct link between the service provided and the consideration received if the supply of a service is to be taxable under the Second Directive .

12 Such a direct link must also exist between the supply of goods and the consideration received within the meaning of Article 11 A 1 (a) of the Sixth Directive .

13 The question thus arises whether there is a direct link between the goods supplied for a price lower than the normal price and the value of the service which must be provided by the beauty consultant .

14 It is apparent from the order for reference that a feature of the NYC sales method is that beauty consultants operate at private parties which they organize through hostesses . That is why, it is said, NYC agrees to sell the pot of cream to be used as a gift at a very low price . Moreover, it became apparent at the hearing that where the beauty consultant, being unable to find a hostess to organize a party, does not provide the envisaged service, the pot of cream must be returned or paid for at the normal wholesale price . If that is the case - a matter to be decided by the national court - then there is a direct link between the supply of the pot of cream at a very low price and the service provided by the beauty consultant .

15 The national court further asks whether that service must be regarded as part of the consideration for the supply of the goods even though it does not constitute monetary consideration and, if so, how the value of the service is to be determined in cases such as that of the beauty consultant in the present proceedings .

16 From the aforesaid judgment of 5 February 1981 it is clear firstly that the consideration must be capable of being expressed in monetary terms and, secondly, that it is a subjective value, since the basis of assessment is the consideration actually received and not a value estimated according to objective criteria .

17 In the present case, the parties to the contract have reduced the wholesale price of the pot of cream by a specific amount in exchange for the supply of a service by the beauty consultant which consists in procuring hostesses to arrange sales parties by offering them the pots of cream as gifts . In those circumstances, it is possible to ascertain the monetary value which the two parties to the contract attributed to that service; that value must be considered to be the difference between the price actually paid and the normal wholesale price .

18 It must therefore be stated in reply to the question submitted by the national court that Article 11 A 1 (a) of the Sixth Directive must be interpreted as meaning that where a supplier (" the wholesaler ") supplies goods (" the inducement ") to another (" the retailer ") for a monetary consideration (namely a sum of money) which is less than that at which he supplies identical goods to the retailer for resale to the public on an undertaking by the retailer to apply the inducement in procuring another person to arrange, or in rewarding another for arranging, a gathering at which further goods of the wholesaler can be sold by the retailer to the public for their mutual benefit, on the understanding that if no such gathering is held the inducement must be returned to the supplier or paid for at its wholesale price, the taxable amount is the sum of the monetary consideration and of the value of the service provided by the retailer which consists in applying the inducement to procure the services of another person or in rewarding that person for those services; the value of that service must be regarded as being equal to the difference between the price actually paid for that product and its normal wholesale price .

Decision on costs

Costs

19 The costs incurred by the United Kingdom, the Portuguese Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable . As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court .

Operative part

On those grounds,

THE COURT,

in reply to the question submitted to it by the London value-added tax tribunal, by order of 13 March 1987, hereby rules :

Article 11 A 1 (a) of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes must be interpreted as meaning that where a supplier (" the wholesaler ") supplies goods (" the inducement ") to another (" the retailer ") for a monetary consideration (namely a sum of money) which is less than that at which he supplies identical goods to the retailer for resale to the public on an undertaking by the retailer to apply the inducement in procuring another person to arrange, or in rewarding another for arranging, a gathering at which further goods of the wholesaler can be sold by the retailer to the public for their mutual benefit, on the understanding that if no such gathering is held the inducement must be returned to the supplier or paid for at its wholesale price, the taxable amount is the sum of the monetary consideration and of the value of the service provided by the retailer which consists in applying the inducement in procuring the services of another person or in rewarding that person for those services; the value of that service must be regarded as being equal to the difference between the price actually paid for that product and its normal wholesale price .