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Judgment of the Court (Fifth Chamber) of 14 July 1998. - Commissioners of Customs & Excise v First National Bank of Chicago. - Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division - United Kingdom. - Sixth VAT Directive - Scope - Foreign exchange transactions. - Case C-172/96.

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Keywords

1 Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Supply of services for consideration - Concept - Foreign exchange transactions - Included

(Council Directive 77/388, Art. 2(1))

2 Tax provisions - Harmonisation of laws - Turnover taxes - Common system of value added tax - Taxable amount - Supply of services - Foreign exchange transactions - Taxable amount consisting of the overall result of the transactions of the supplier of the services over a given period of time

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

Summary

1 Foreign exchange transactions, performed even without commission or direct fees, are supplies of services provided in return for consideration, that is to say supplies of services effected for consideration within the meaning of Article 2(1) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes. More particularly, transactions between parties for the purchase by one party of an agreed amount in one currency against the sale by it to the other party of an agreed amount in another currency, both such amounts being deliverable on the same value date, and in respect of which transactions the parties have agreed (whether orally, electronically or in writing) the currencies involved, the amounts of such currencies to be purchased and sold, which party will purchase which currency and the value date, constitute supplies of services effected for consideration within the meaning of Article 2(1) of the Sixth Directive.

2 Article 11A(1)(a) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes must be construed as meaning that, in foreign exchange transactions in which no fees or commission are calculated with regard to certain specific transactions, the taxable amount is the overall result of the transactions of the supplier of the services over a given period of time. Article 11A(1)(a) of the Sixth Directive provides that the taxable amount is, in respect of supplies of services, that which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser for such supplies. Determining the consideration comes down to determining what the bank in question receives for foreign exchange transactions, that is to say the remuneration on foreign exchange transactions which it can actually take for itself.

Parties

In Case C-172/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the High Court of Justice of England and Wales, Queen's Bench Division, for a preliminary ruling in the proceedings pending before that court between

The Commissioners of Customs and Excise

and

First National Bank of Chicago

on the interpretation 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

(Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet, J.C. Moitinho de Almeida, P. Jann and L. Sevón (Rapporteur), Judges,

Advocate General: C.O. Lenz,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- First National Bank of Chicago, by Paul Lasok QC, instructed by Garretts, Solicitors,

- the United Kingdom Government, by Stephanie Ridley, of the Treasury Solicitor's Department, acting as Agent, Nigel Pleming QC and Christopher Vajda, Barrister,

- the French Government, by Catherine de Salins, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Gautier Mignot, Foreign Affairs Secretary in that Directorate, acting as Agents,

- 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 First National Bank of Chicago, represented by David Goy QC; the United Kingdom Government, represented by John E. Collins, Assistant Treasury Solicitor, acting as Agent, Nigel Pleming and Christopher Vajda; and the Commission, represented by Peter Oliver, at the hearing on 25 June 1997,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1997,

gives the following

Judgment

Grounds

1 By order of 13 May 1996, received at the Court on 20 May 1996, the High Court of Justice, Queen's Bench Division, referred for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation 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 have been raised in proceedings between First National Bank of Chicago (`the Bank') and the Commissioners of Customs and Excise (`the Commissioners') concerning deduction of input tax on certain foreign exchange transactions.

3 Article 2 of the Sixth Directive provides as follows:

`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;

2. the importation of goods.'

4 Article 5(1) defines the supply of goods in these terms:

`1. "Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.'

5 The supply of services is defined in Article 6(1) as follows:

`1. "Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.'

6 Article 11A(1)(a) is worded as follows:

`The taxable amount shall be:

(a) in respect of supplies of goods 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'.

7 Article 13B(d)(4) provides as follows:

`Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(d) the following transactions:

...

4. transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors' items; "collectors' items" shall be taken to mean gold, silver or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest.'

8 Article 13C(b), however, makes it possible for Member States to allow their taxpayers a right of option for taxation in respect of the transactions covered by, inter alia, Article 13B(d).

9 Article 17(3)(c) of the Sixth Directive provides as follows:

`3. Member States shall also grant to every taxable person the right to a deduction or refund of the value added tax referred to in paragraph 2 in so far as the goods and services are used for the purposes of:

...

(c) any of the transactions exempted under Article 13B(a) and (d), paragraphs 1 to 5, when the customer is established outside the Community or when these transactions are directly linked with goods intended to be exported to a country outside the Community.'

10 According to the order for reference, the Bank is registered for value added tax (`VAT') in the United Kingdom and carries on a wide range of banking activities, including foreign exchange dealing. It is a market maker, being at all times willing to provide and receive those currencies in which it specialises.

11 The Bank quotes prices at which it is willing to trade in currencies as `bid' or `offer' prices. At any one specific time it will bid, that is to say offer to buy a currency, at one price expressed as a rate of exchange and at the same time will offer to sell the currency in the same denomination and the same amount at a slightly higher price expressed as a rate of exchange, the difference

between the two prices being known as `the spread'.

12 Foreign exchange transactions consist of either `spot' or `forward' transactions. A spot transaction is the purchase of one currency against the sale of another currency, with the delivery and sale normally being completed on the second subsequent business day, which is known as the settlement date or value date. A forward transaction differs from a spot transaction in that the delivery and sale of currencies are completed only on a future value date, the amounts, however, being fixed by reference to the rates of exchange agreed on the deal date.

13 The national court points out that no money is delivered physically in the form of coin, note or other chattel in the foreign exchange transactions entered into by the Bank. What is delivered is the availability of drawing on an account opened with a bank in the currency `delivered'.

14 No transaction fee or commission is charged for or invoiced by the Bank for the transactions at issue in the main proceedings. The Bank seeks to make a profit out of its foreign exchange dealings as a result of the spread between its bid and offer quotes. Each of its traders will have his or her book of particular currencies and will be expected to make a profit over appropriate periods. This profit is a result of all of their dealings over a particular period.

15 The Bank is partly exempt for VAT purposes. It does, however, have the right to deduct input tax corresponding to transactions completed with counterparties established outside the Community. In order to determine the deductible amount, the Bank has agreed with the Commissioners a special partial exemption method under Regulation 31 of the Value Added Tax (General) Regulations 1985 (SI 1985 No 886). The recoverable proportion of input tax which the agreed method allocates to the Bank is determined by reference to the number of foreign exchange transactions carried out as represented by the fraction in which the numerator is the number of transactions with counterparties outside the European Union and the denominator is the total number of transactions.

16 In its return for the period from 1 May 1994 to 31 July 1994, which included its annual adjustment for the period from April 1993 to April 1994, the Bank took into account, in determining the numerator and denominator of the relevant fraction, the foreign exchange transactions into which it had entered over the period from April 1993 to July 1994. It calculated that the input tax credit to which it was entitled over that extended 15-month period attributable to foreign exchange transactions with counterparties established in countries outside the Community amounted to £251 454.90.

17 By decision of 26 September 1994, the Commissioners reduced the input tax credit which the Bank was claiming by disallowing the portion corresponding to the foreign exchange transactions concluded with those counterparties.

18 The Bank appealed to the Value Added Tax Tribunal. The appeal was heard on the agreed limited issue of whether or not the relevant foreign exchange transactions were supplies of services or goods for VAT purposes. By a decision of 12 September 1995, the Value Added Tax Tribunal allowed that appeal.

19 The Commissioners appealed to the High Court of Justice against that decision.

20 Taking the view that resolution of the case depended on an interpretation of the Sixth Directive, the High Court of Justice decided to stay proceedings and refer the following questions to the Court:

`On the proper interpretation of Council Directive 77/388 of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover tax (the Sixth VAT Directive)

and in relation to transactions of foreign exchange as defined by the British Bankers' Association (as set out at paragraph 1 of the Findings of Fact)

1. Do such foreign exchange transactions constitute the supply of goods or services effected for consideration?

2. If there has been a supply of goods or services effected for consideration, what is the nature of the consideration in relation to such transaction?'

21 The definition referred to in the question reads as follows:

Foreign exchange transactions are `transactions between parties for the purchase by one party of an agreed amount in one currency against the sale by it to the other of an agreed amount in another currency, both such amounts being deliverable on the same value date, and in respect of which transactions the parties have agreed (whether orally, electronically or in writing) the currencies involved, the amounts of such currencies to be purchased and sold, which party will purchase which currency and the value date'.

The first question

22 By its first question, the High Court of Justice is asking essentially whether transactions between parties for the purchase by one party of an agreed amount in one currency against the sale by it to the other party of an agreed amount in another currency, both such amounts being deliverable on the same value date, and in respect of which transactions the parties have agreed (whether orally, electronically or in writing) the currencies involved, the amounts of such currencies to be purchased and sold, which party will purchase which currency and the value date, constitute supplies of goods or services effected for consideration within the meaning of Article 2(1) of the Sixth Directive.

23 The Bank, the French Government and the Commission take the view that foreign exchange transactions constitute supplies of services. Since they are effected for consideration, they come within the Sixth Directive.

24 The United Kingdom Government, on the other hand, considers that, in the absence of consideration, a foreign exchange transaction entered into without the charging of a commission or a fee does not constitute a supply of goods or services for consideration within the meaning of the Sixth Directive but is simply the exchange of one means of payment for another.

25 On this question, the Court observes first of all that the currencies which are exchanged against other currencies in a foreign exchange transaction cannot be regarded as `tangible property' within the meaning of Article 5 of the Sixth Directive, since money used as legal tender is involved. Foreign exchange transactions are thus supplies of services within the meaning of Article 6 of the Sixth Directive.

26 With regard, second, to the question whether services are supplied for consideration, the Court has already held that a supply of services is effected `for consideration' within the meaning of Article 2(1) of the Sixth Directive, and is therefore taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (Case C-16/93 Tolsma v Inspecteur der Omzetbelasting [1994] ECR I-743, paragraph 14).

27 Only where a person's activity consists exclusively in providing services for no direct consideration is there no basis of assessment and the services are therefore not subject to VAT (Tolsma, cited above, paragraph 12).

28 In the present case, it cannot be disputed that a bilateral legal relationship exists between the Bank and its counterparty under which the two parties to the transaction give reciprocal undertakings to transfer amounts in a given currency and to receive the countervalue in another currency.

29 Apart from the actual exchange transaction, the service provided by the Bank is characterised by the Bank's preparedness to conclude such transactions in the currencies in which it specialises.

30 From the mere fact that no fees or commission are charged by the Bank upon a specific foreign exchange transaction it does not follow that no consideration is given.

31 Moreover, any technical difficulties which exist in determining the amount of consideration cannot by themselves justify the conclusion that no consideration exists.

32 In addition, it is apparent from the case-file that the rates at which the Bank is prepared to sell or purchase currencies are different and are separated by a spread. The conclusion must therefore be that, in return for the service which it provides, the Bank takes for itself a consideration which it includes in the calculation of those rates.

33 To hold that currency transactions are taxable only when effected in return for payment of a commission or specific fees, which would thus allow a trader to avoid taxation if he sought to be remunerated for his services by providing for a spread between the proposed transaction rates rather than by charging such sums, would be a solution incompatible with the system put in place by the Sixth Directive and would be liable to place traders on an unequal footing for purposes of taxation.

34 It must therefore be held that foreign exchange transactions, performed even without commission or direct fees, are supplies of services provided in return for consideration, that is to say supplies of services effected for consideration within the meaning of Article 2(1) of the Sixth Directive.

35 The answer to be given to the first question must therefore be that transactions between parties for the purchase by one party of an agreed amount in one currency against the sale by it to the other party of an agreed amount in another currency, both such amounts being deliverable on the same value date, and in respect of which transactions the parties have agreed (whether orally, electronically or in writing) the currencies involved, the amounts of such currencies to be purchased and sold, which party will purchase which currency and the value date, constitute supplies of services effected for consideration within the meaning of Article 2(1) of the Sixth Directive.

The second question

36 By its second question, the High Court of Justice essentially seeks to ascertain the precise nature of the consideration. The question must therefore be understood as seeking to determine the taxable amount.

37 The Bank submits that the consideration is everything which is received in the course of foreign exchange transactions, that is to say the turnover representing the total value of the currencies supplied in the course of foreign exchange transactions.

38 The Commission and the French Government, on the other hand, take the view that the consideration is the amount of exchange profit realised and the other remuneration obtained by the supplier.

39 The Commission points out that it had prepared a proposal for a directive containing a provision specifically relating to foreign exchange transactions (Proposal for a 19th Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes, amending Directive 77/388/EEC - common system of value added tax (COM(84) 648 final (OJ 1984 C 347, p. 5)). The proposed amendment would have added the following sentences to the second indent of Article 19(1):

`The amount to be included in the denominator shall be reduced by the purchase price of transfers of currency and securities exempted pursuant to Article 13B(d) (4) and (5); this amount shall include, where appropriate, commission and expenses incurred by the purchaser. Where the taxable person cannot determine the purchase price he may substitute therefor the purchase price of currency or securities acquired during the same period, provided those currencies or securities are identical with those sold.'

40 The Commission explains that it withdrew this proposal for reasons unconnected with that provision.

41 The United Kingdom Government considers that, should the Court take the view that the foreign exchange transactions at issue are a service provided for consideration, any valuation based on the spread between the bid and the offer prices would be incorrect for two reasons. First, the Bank does not charge any customer that spread. Second, such valuation would be tantamount to levying VAT on profit rather than turnover. The United Kingdom Government also submits that it is impossible to identify any consideration in foreign exchange transactions, since the profits or receipts of the Bank arise from its participation in a series of transactions, all at different exchange rates, and not from profit on any individual transaction. Finally, the currencies exchanged do not constitute consideration one for the other.

42 It should be borne in mind that Article 11A(1)(a) of the Sixth Directive provides that the taxable amount is, in respect of supplies of services, that which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser for such supplies.

43 While they are the subject of a supply, the currencies transferred to a trader by his counterparty in the course of a foreign exchange transaction cannot be regarded as constituting remuneration for the service of exchanging currencies for other currencies or consequently as constituting consideration for that service.

44 Determining the consideration therefore comes down to determining what the Bank receives for foreign exchange transactions, that is to say the remuneration on foreign exchange transactions which it can actually take for itself (see, in this regard, Case C-38/93 Glawe v Finanzamt Hamburg-Barmbek-Uhlenhorst [1994] ECR I-1679, paragraph 9).

45 In this regard, the spread representing the difference between the bid price and the offer price is only the notional price which the Bank would obtain if it were to conclude, at the same instant and on similar conditions, two corresponding purchase and sale transactions for the same amounts and the same currencies.

46 However, these are simply theoretical considerations, since the Bank carries out a large number of transactions relating to different amounts and involving different currencies, the rates of which are in constant fluctuation. A trader cannot normally foresee, when concluding one particular transaction, at what moment and at what price he may subsequently effect one or more transactions enabling him to eliminate or fix, at a specific amount, the risk of a change in rate to which he is exposed following the first transaction.

47 So, the consideration, that is to say the amount which the Bank can actually apply to its own use, must be regarded as consisting of the overall result of its transactions over a given period of time.

48 It should be borne in mind in this regard that, in the case of transactions which are effected for consideration but the actual consideration for which depends on future factors such as passage of time, the Court has already ruled that the taxable amount must be defined on the basis of, in particular, the interest accrued over a deferred payment period, which was not yet known when the taxable transaction was concluded (Case C-281/91 Muys' en De Winter's Bouw- en Aannemingsbedrijf v Staatssecretaris van Financiën [1993] ECR I-5405, paragraph 18).

49 Nor is it necessary for either the taxable person supplying the goods or performing the service or the other party to the transaction to know the exact amount of the consideration serving as the taxable amount in order for it to be possible to tax a particular type of transaction (Case C-288/94 Argos Distributors v Commissioners of Customs and Excise [1996] ECR I-5311, paragraphs 21 and 22). Consequently, it does not matter that when the transaction is concluded the parties do not know the basis on which VAT will be charged and that it remains unknown, even afterwards, to the recipient of the service.

50 The answer to be given to the second question must therefore be that Article 11A(1)(a) of the Sixth Directive is to be construed as meaning that, in foreign exchange transactions in which no fees or commission are calculated with regard to certain specific transactions, the taxable amount is the overall result of the transactions of the supplier of the services over a given period of time.

Decision on costs

Costs

51 The costs incurred by the United Kingdom and French 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

(Fifth Chamber),

in answer to the questions referred to it by the High Court of Justice, Queen's Bench Division, by order of 13 May 1996, hereby rules:

1. Transactions between parties for the purchase by one party of an agreed amount in one currency against the sale by it to the other party of an agreed amount in another currency, both such amounts being deliverable on the same value date, and in respect of which transactions the parties have agreed (whether orally, electronically or in writing) the currencies involved, the amounts of such currencies to be purchased and sold, which party will purchase which currency and the value date, constitute supplies of services effected for consideration within the meaning of Article 2(1) 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.

2. Article 11A(1)(a) of the Sixth Directive must be construed as meaning that, in foreign exchange transactions in which no fees or commission are calculated with regard to certain specific transactions, the taxable amount is the overall result of the transactions of the supplier of the services over a given period of time.