Case C-419/02

BUPA Hospitals Ltd

and

Goldsborough Developments Ltd

v

Commissioners of Customs & Excise

(Reference for a preliminary ruling from the High Court of Justice of England and Wales, Chancery Division)

(Sixth VAT Directive – Article 10(2) – Chargeability of VAT – Payment of amounts on account – Prepayments for future supplies of pharmaceutical products and prostheses)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Chargeable event and chargeability of tax

(Council Directive 77/388, Art. 10(2), second para.)

The second subparagraph of Article 10(2) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, as amended by Directive 95/7, as a derogation from the rule laid down in the first subparagraph of that provision, provides that, where payments are made on account before the goods are delivered or the services are performed, the tax becomes chargeable on receipt of payment and on the amount received. Prepayments of lump sums paid for goods referred to in general terms in a list which may be altered at any time by agreement between the buyer and the seller and from which the buyer may possibly select articles, on the basis of an agreement which he may unilaterally resile from at any time, thereupon recovering the unused balance of the prepayments, do not fall within the scope of that provision.

In order for the tax to become chargeable where an amount is paid on account without the supply or service having been provided, all the relevant information concerning the chargeable event, namely the future delivery or future performance, must already be known and therefore, in particular, when the payment on account is made the goods or services must be precisely identified.

(see paras 45, 48, 51, operative part)

JUDGMENT OF THE COURT (Grand Chamber)

21 February 2006 (*)

(Sixth VAT Directive – Article 10(2) – Chargeability of VAT – Payment of amounts on account – Prepayments for future supplies of pharmaceutical products and prostheses)

In Case C-419/02,

REFERENCE to the Court under Article 234 EC for a preliminary ruling, brought by the High Court of Justice of England and Wales, Chancery Division, by decision of 8 November 2002, received at the Court on 20 November 2002, in the proceedings

BUPA Hospitals Ltd,

Goldsborough Developments Ltd

v

Commissioners of Customs & Excise,

THE COURT (Grand Chamber)

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Schiemann, J. Makarczyk, Presidents of Chambers, S. von Bahr (Rapporteur), J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Lenaerts, P. K?ris, E. Juhász and G. Arestis, Judges,

Advocate General: M. Poiares Maduro,

Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 23 November 2004,

after considering the observations submitted on behalf of:

– BUPA Hospitals Ltd and Goldsborough Developments Ltd, by R. Venables QC, and by T. Lyons, Barrister, instructed by D. Garcia, Solicitor,

– the United Kingdom Government, by R. Caudwell, acting as Agent, and by C. Vajda QC,

– Ireland, by D.J. O'Hagan, acting as Agent, and by A.M. Collins, SC,

– the Netherlands Government, by H.G. Sevenster, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 7 April 2005,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Articles 2(1), 4(1) and (2), 5(1), 10(2) and 17 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), as amended by Council Directive 95/7/EC of 10 April 1995 (OJ 1995 L 102, p. 18, hereinafter 'the Sixth Directive').

2 The reference was made in proceedings brought by BUPA Hospitals Ltd ('BUPA Hospitals') and Goldsborough Developments Ltd ('Goldsborough Developments'), two companies in the BUPA group, against the Commissioners of Customs & Excise ('the Commissioners') in relation to the latter's refusal to permit the deduction by BUPA Hospitals or by Goldsborough Developments of the sum of GBP 17.5 million (approximately EUR 26.2 million) paid by way of input value added tax ('VAT') on payments on account for future supplies to be made by two other companies in the BUPA group.

Legal framework

Community law

3 Article 2(1) of the Sixth Directive provides that the supply of goods and services effected for valuable consideration within the territory of the country by a taxable person acting as such is to be subject to VAT.

4 Under Article 4(1) of that directive, 'taxable person' means any person who independently carries out any economic activity specified in Article 4(2). 'Economic activities' are defined in Article 4(2) as comprising all activities of producers, traders and persons supplying services, including the exploitation of tangible or intangible property for the purpose of obtaining trading income therefrom on a continuing basis.

5 The second subparagraph of Article 4(4) of the Sixth Directive states:

'Subject to the consultations provided for in Article 29, each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links.'

6 Article 5(1) of the Sixth Directive states that '"supply of goods" means the transfer of the right to dispose of tangible property as owner'.

7 Article 10(1) and (2) of the Sixth Directive are worded as follows:

'1. (a) "Chargeable event" shall mean the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled.

(b) The tax becomes "chargeable" when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred.

2. The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed. Deliveries of goods other than those referred to in Article 5(4)(b) and supplies of services which give rise to successive statements of account or payments shall be regarded as being completed at the time when the periods to which such statements of account or payments pertain expire.

However, where a payment is to be made on account before the goods are delivered or the services are performed, the tax shall become chargeable on receipt of the payment and on the amount received.

By way of derogation from the above provisions, Member States may provide that the tax shall

become chargeable, for certain transactions or for certain categories of taxable person, either:

– no later than the issue of the invoice or of the document serving as invoice, or

– no later than receipt of the price, or

– where an invoice or document serving as invoice is not issued, or is issued late, within a specified period from the date of the chargeable event.'

8 Article 13A(1)(b) to (e) of the Sixth Directive provide that Member States are to exempt certain activities in the medical services sector.

9 Article 17(1) of the Sixth Directive states that '[t]he right to deduct shall arise at the time when the deductible tax becomes chargeable'.

10 Article 17(2)(a) provides:

'In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person'.

11 Under the first sub-subparagraph of Article 28(2)(a) of the Sixth Directive, during the transitional period referred to in Article 28l, '[e]xemptions with refund of the tax paid at the preceding stage and reduced rates lower than the minimum rate laid down in Article 12(3) in respect of the reduced rates, which were in force on 1 January 1991 and which are in accordance with Community law, and satisfy the conditions stated in the last indent of Article 17 of the Second Council Directive of 11 April 1967, may be maintained'.

National legislation

12 Section 6(4) of the Value Added Tax Act 1994 (hereinafter 'the VAT Act 1994') provides:

'If, before the time applicable under subsection (2) or (3) above, the person making the supply issues a VAT invoice in respect of it or if, before the time applicable under subsection (2)(a) or (b) or (3) above, he receives a payment in respect of it, the supply shall, to the extent covered by the invoice or payment, be treated as taking place at the time the invoice is issued or the payment is received.'

13 According to section 30(1) of that Act, as in force before 1 January 1998:

'Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section –

(a) no VAT shall be charged on the supply; but

(b) it shall in all other respects be treated as a taxable supply;

and accordingly the rate at which VAT is treated as charged on the supply shall be nil.'

The main proceedings and the questions referred to the Court of Justice

14 The order for reference shows that BUPA Hospitals and BUPA Gatwick Park Hospital Ltd (hereinafter 'BUPA Gatwick Park') are each part of the BUPA Group, and also, for the purposes of

the second subparagraph of Article 4(4) of the Sixth Directive, of the BUPA VAT group.

15 For some years, up to and including 1997, BUPA Hospitals carried on the business of, inter alia, running a large number of private hospitals. In accordance with a decision of the Court of Appeal in proceedings between BUPA Hospitals and the Commissioners which commenced in 1993, BUPA Hospitals's supplies of drugs and prostheses to patients in its hospitals were zero-rated for VAT purposes, which enabled BUPA Hospitals to deduct the input VAT on purchases of those goods from its suppliers.

16 Following the refusal on 24 July 1997 by the House of Lords to grant the Commissioners leave to appeal, the United Kingdom Government announced, on 13 August 1997, its intention to bring in early legislation to remedy the effect of the Court of Appeal's decision.

17 The national court observes that, following the announcement of that forthcoming legislation, the BUPA Group decided to use prepayment arrangements. The theory was that a trader whose supplies are zero-rated and who can therefore recover input VAT on purchases of drugs and prostheses to the extent to which they are used or to be used in making taxable supplies, contracts to buy in goods and services in anticipation of a change in the law. The trader then claims relief for input VAT for the period when payment was made or when an invoice was issued, notwithstanding that delivery might take place in a later accounting period.

18 For the purposes of those arrangements, it was decided to use a company in the BUPA group as the supplier, so as to keep the prepayment within the group. The company chosen was BUPA Medical Supplies Ltd (at that time still called Goldsborough Retirement Property Services Ltd, hereinafter referred to as 'BUPA Medical'), a company in the Goldsborough group acquired early in August 1997 by the BUPA Group, which had subsequently become a shell. That company, although in the BUPA group, was not in the same VAT group as BUPA Hospitals.

19 The order for reference states that, in order to avoid the risk that the Commissioners might find some reason for delaying repayment of VAT, it was decided that another company in the Goldsborough Group, namely Goldsborough Developments, a company which operated four private hospitals and was also in a different VAT group from that of BUPA Hospitals, should enter into a prepayment arrangement for the same amount and within a co-terminous accounting period with a supplier in the BUPA VAT group. BUPA Gatwick Park, which was another shell company at the time, was selected as the second supplier under the prepayment arrangements.

20 On 5 September 1997 board meetings were held of the four companies involved. The boards of BUPA Hospitals and BUPA Medical decided to enter into two contracts for the purchase and supply of drugs and prostheses, respectively.

21 At the board meeting of BUPA Hospitals, it was resolved to make a prepayment of GBP 60 million plus VAT for the purchase of drugs and GBP 40 million plus VAT for the purchase of prostheses from BUPA Medical.

22 On the same day, a special resolution was passed changing the name of Goldsborough Retirement Property Services Ltd to BUPA Medical and altering its objects to include dealing in pharmaceutical products and prostheses.

23 Also on 5 September 1997, BUPA Medical issued invoices to BUPA Hospitals for GBP 60 million, plus GBP 10.5 million VAT, for the supply of drugs, and for GBP 40 million, plus GBP 7 million VAT, for the supply of prostheses.

24 On the same date, the boards of Goldsborough Developments and BUPA Gatwick Park

decided to enter into two contracts for the purchase and supply of drugs and prostheses, respectively.

25 The board of Goldsborough Developments resolved to make payments forthwith to BUPA Gatwick Park of GBP 50 million plus VAT for the purchase of drugs and GBP 50 million plus VAT for the purchase of prostheses.

26 On the same day, BUPA Gatwick Park issued two invoices to Goldsborough Developments: for GBP 50 million, plus GBP 8.75 million VAT, for the supply of drugs, and also for GBP 50 million, plus GBP 8.75 million VAT, for the supply of prostheses.

27 According to the order for reference, the contracts on the basis of which the prepayments were made were similar. Those contracts stipulated that:

– the buyer was to pay the contractual price to the seller on the contract date;

– the products covered were those described in the schedule, and the schedule could be amended by agreement between the parties;

– the seller would deliver those products, or some of them, in accordance with further instructions from the buyer until the total delivered value was equal to the contract price;

– either party could terminate the contract by giving seven days' notice, and

– in that case, the buyer would recover the contract price less the value already delivered at the date of termination.

According to the national court, the schedule was the same for the various contracts and contained a composite list of several hundred drugs, prostheses and other goods. The national court observes that it was clear that none of the directors of any of the four companies had paid attention to the contents of that document.

28 According to the order for reference, those arrangements, if successful, would enable the BUPA Group to avoid a loss of cashflow and to avoid paying the Commissioners any VAT under them. The BUPA VAT group was able, in its VAT return for the period ending in November 1997, to account for input VAT of GBP 17.5 million in respect of purchases by BUPA Hospitals from BUPA Medical, matched by output VAT of GBP 17.5 million in respect of sales by BUPA Gatwick Park to Goldsborough Developments. The Goldsborough Group, which was separate from the BUPA VAT group, could do likewise: its VAT return included input VAT of GBP 17.5 million in respect of Goldsborough Developments, purchases from BUPA Gatwick Park and output VAT of GBP 17.5 million in respect of BUPA Medical sales to BUPA Hospitals.

29 On 8 September 1997, Midland Bank was instructed to transfer from the account of another company in the BUPA group, BUPA Investments Ltd ('BIL'), a total sum of GBP 235.5 million, and to credit GBP 118 million and GBP 117.5 million to the accounts of BUPA Hospitals and Goldsborough Developments respectively. Monthly interest was charged at the average overnight base rate for each month.

30 The same day, Midland Bank was instructed to transfer GBP 117.5 million, first from BUPA Hospitals to BUPA Medical, thereafter from Goldsborough Developments to BUPA Gatwick Park, and then back once more to BIL. BUPA Medical and BUPA Gatwick Park were credited with interest on the amounts of their deposits with BIL.

31 On 18 November 1997, the VAT (Drugs, Medicines and Aids for the Handicapped) Order (SI

1997/2744) was laid before Parliament. It took effect from 1 January 1998. It amended Group 12 of Schedule 8 to the VAT Act 1994 by removing supplies by private health providers in the United Kingdom from the zero-rating schedule. They became exempt supplies. As a result, in principle input VAT on such products can no longer be deducted.

32 Arrangements to implement the terms of the prepayment agreements between BUPA Hospitals and BUPA Medical were put into effect in September 1998. The order for reference states that the wholesale dealer's licence for medicinal products was granted to BUPA Medical on 19 August 1998 and that all hospitals managed by BUPA Hospitals were ordering from BUPA Medical towards the beginning of December 1998. According to the order for reference, BUPA Hospitals is using its prepayments at a rate which will result in zero-rating being preserved for six to seven years after September 1998.

33 In the case of the prepayment agreements between Goldsborough Developments and BUPA Gatwick Park, the arrangements relating to the supplies of prostheses took effect in mid-2001, and those relating to the supplies of drugs took effect in November 2001. The order for reference states that serious problems appear to have arisen after the purchase of the Goldsborough group, which needed to be resolved before the ordering process could be implemented. For that reason, BUPA Gatwick Park did not obtain a licence for the sale of medicinal products until 8 June 2001.

34 The order for reference also states that, to enable it to participate in the pre-purchasing arrangement, Goldsborough Developments was required to borrow from BIL GBP 117.5 million, some seven times its turnover in 1997, which had the effect of increasing its debt position by some 270%. The Commissioners estimate that it would have taken between 50 and 100 years for Goldsborough Developments to use its prepayment in full.

35 By decision of 14 September 2000, the Commissioners refused to allow the deduction by BUPA Hospitals or Goldsborough Developments of input VAT paid by each of them under the prepayment arrangements of September 1997 on the supplies made by BUPA Medical and BUPA Gatwick Park.

36 On 25 February 2002, the VAT and Duties Tribunal, London, dismissed the appeal against the decision of the Commissioners, on the ground that BUPA Medical and BUPA Gatwick Park did not carry on any economic activity and made no supplies for VAT purposes. It held that every step in the prepurchase arrangements of September 1997 was taken solely for the purposes of avoiding VAT. Neither BUPA Medical nor BUPA Gatwick Park had any role in those arrangements other than to facilitate that objective.

37 However, the VAT and Duties Tribunal dismissed the Commissioners' contention that a doctrine of abuse of rights denied BUPA Hospitals and Goldsborough Developments the right to deduct input VAT.

38 BUPA Hospitals and Goldsborough Developments appealed to the High Court of Justice of England and Wales, Chancery Division, and the Commissioners cross-appealed.

39 Considering that both the decision of the VAT and Duties Tribunal and the appeal to the High Court raised a number of questions of Community law, the High Court of Justice of England and Wales, Chancery Division, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Having regard to the relevant circumstances, the relevant transactions and the position of the vendor companies, how is the expression "economic activity" within the meaning of Article 4(1)

and (2) of [the Sixth Directive] to be interpreted?

2. Having regard to the relevant circumstances, relevant transactions, and the position of the vendor companies, how is the expression “supply of goods” in Article 5(1) of the [Sixth] Directive to be interpreted?

3. (a) Is there a principle of abuse of rights and/or abuse of the law which (independently of the interpretation given to the Directive) is capable of precluding the right to deduct input tax?

(b) If so, in what circumstances would it apply?

(c) Would it apply in circumstances such as those found by the [VAT and Duties] Tribunal?

4. Does it make any difference to the answers to Questions 1 to 3 above if payment is made in respect of the relevant transactions at a time when any onward supply of the goods would have been an exempt supply with refund of VAT at the preceding stage as permitted by Article 28(2)(a) of the Directive?

5. How is the Directive to be interpreted with particular reference to the following questions? In circumstances such as the relevant circumstances and with reference to transactions such as the relevant transactions:

(a) should supplies be treated as having been made by the outside suppliers to the purchasing companies with no supplies being made to or by the vendor companies?

or

(b) should supplies be treated as having been made by the outside suppliers to the vendor companies with no supplies being made by the vendor companies to the purchasing companies?

6. In circumstances where each vendor company, in the course of an economic activity, makes supplies to a purchasing company and:

(a) the purchasing companies have entered into agreements with the vendor companies to be supplied with goods;

(b) the goods are invoiced and paid for in advance of delivery;

(c) VAT is charged on the advance payment in accordance with the second subparagraph of Article 10(2) of the Directive;

(d) the goods are to be used by the purchasing companies in making supplies which, if made at the time of the payment, would have been exempt supplies with a right to refund at the preceding stage, but

(e) each purchasing company intends to take delivery of the goods under the agreements only if the law changes in such a way that the purchasing company’s use of the goods will be a use in making exempt supplies without a right of refund

how are Article 17 of the Directive and the rules on deduction to be interpreted? (With reference to paragraph (e), if the law does not change in the way described, the purchasing companies are entitled to terminate their contracts with the vendor companies and claim refunds of the prices paid. In the relevant transactions, the contracts between the purchasing companies and the vendor companies contain provisions permitting such terminations.)

7. The VAT and Duties Tribunal found (at paragraph 89 of the Decision) that “none of the individuals in a position to take decisions for [BUPA Medical and BUPA Gatwick Park] ... had any motive or purpose of substance other than to carry through the VAT avoidance scheme”. The Appellants have, in their Notice of Appeal to the High Court, challenged that finding of fact. If that finding of fact were to be set aside on appeal would it make any, and if so, what, difference to the answers to Questions 1 to 6 above inclusive?’

Preliminary observations

40 By its questions, the national court seeks in essence to ascertain, first, whether transactions of the kind at issue in the main proceedings, designed to obtain a tax advantage, constitute supplies of goods and an economic activity within the meaning of Article 2(1), Article 4(1) and (2), and Article 5(1) of the Sixth Directive and, second, whether that directive must be interpreted as meaning that a taxable person has no right to deduct input VAT when the transactions on which that right is based constitute an abusive practice.

41 However, it is clear from the order for reference and, in particular, from the factual circumstances described in the fourth and sixth questions, that the cornerstone of the arrangements set up by the BUPA group is the invoicing of VAT on prepayments in accordance with the second subparagraph of Article 10(2) of the Sixth Directive.

42 In order to provide a useful reply to the court which has referred to it a question for a preliminary ruling, the Court may be required to take into consideration rules of Community law to which the national court did not refer in its question (see, to that effect, in particular Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraph 24, and Case C-153/03 *Weide* [2005] ECR I-0000, paragraph 25).

43 Accordingly, for the purposes of the fourth and sixth questions, which it is appropriate to examine first and at the same time, it is necessary to consider whether prepayments of the kind at issue in the main proceedings fall within the scope of the second subparagraph of Article 10(2) of the Sixth Directive.

The fourth and sixth questions

44 It must be borne in mind at the outset that the first subparagraph of Article 10(2) of the Sixth Directive provides that the chargeable event occurs and VAT becomes chargeable when the goods are delivered or the services are performed.

45 The second subparagraph of Article 10(2) of the Sixth Directive, according to which, where payments are made on account before the goods are delivered or the services are performed, VAT becomes chargeable on receipt of payment and on the amount received, constitutes a derogation from the rule laid down in the first subparagraph of that provision and, as such, must be interpreted strictly.

46 Next, it must be borne in mind that Article 10(1)(a) of the Sixth Directive defines the ‘chargeable event’ for VAT as the occurrence by virtue of which the legal conditions necessary for

tax to become chargeable are fulfilled. It follows that the tax may become chargeable at the same time as or after the occurrence of the chargeable event but, subject to any provision to the contrary, not before it.

47 Thus, the third subparagraph of Article 10(2) of the Sixth Directive authorises the Member States to provide that the tax is to become chargeable on a later date than that of the chargeable event, specifying three possibilities: no later than the issue of the invoice, or no later than receipt of the price, or, where an invoice is not issued or is issued late, within a specified period from the date of the chargeable event.

48 The second subparagraph of Article 10(2) departs from that chronological order by providing that, where a payment is to be made on account, the VAT becomes chargeable without the supply having yet taken place. In order for the tax to become chargeable in such a situation, all the relevant information concerning the chargeable event, namely the future delivery or future performance, must already be known and therefore, in particular, as the Advocate General noted in point 100 of his Opinion, when the payment on account is made the goods or services must be precisely identified.

49 That conclusion is, moreover, endorsed by the explanatory memorandum to the proposal for the Sixth Directive (*Bulletin of the European Communities*, supplement 11/73, p. 13) in which the Commission observes that ‘when payments on account are received prior to the chargeable event, receipt of these amounts gives rise to a charge to tax, since the parties to the transaction in this way demonstrate their intention that all the financial consequences of the chargeable event should arise in advance’.

50 In that connection, it must also be borne in mind that it is the supplies of goods or services which are subject to VAT, rather than payments made by way of consideration for such supplies (see Case C-108/99 *Cantor Fitzgerald International* [2001] ECR I-7257, paragraph 17). A fortiori, payments on account of supplies of goods or services that have not yet been clearly identified cannot be subject to VAT.

51 Accordingly, the answer to be given to the fourth and sixth questions must be that prepayments of the kind at issue in the main proceedings whereby lump sums are paid for goods referred to in general terms in a list which may be altered at any time by agreement between the buyer and the seller and from which the buyer may possibly select articles, on the basis of an agreement which he may unilaterally resile from at any time, thereupon recovering the unused balance of the prepayments, do not fall within the scope of the second subparagraph of Article 10(2) of the Sixth Directive.

The first, second, third, fifth and seventh questions

52 In view of the answer given to the fourth and sixth questions, it is unnecessary to answer the first, second, third, fifth and seventh questions.

Costs

53 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Prepayments of the kind at issue in the main proceedings whereby lump sums are paid for goods referred to in general terms in a list which may be altered at any time by agreement between the buyer and the seller and from which the buyer may possibly select articles, on

the basis of an agreement which he may unilaterally resile from at any time, thereupon recovering the unused balance of the prepayments, do not fall within the scope of the second subparagraph of Article 10(2) 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, as amended by Council Directive 95/7/EC of 10 April 1995.

[Signatures]

* Language of the case: English.