JUDGMENT OF THE COURT (Third Chamber)

3 May 2012 (*)

(Taxation — Sixth VAT Directive — Article 2 — Supply of services for consideration — Telecommunications services — Prepaid phonecards displaying information for making international calls — Marketing through a network of distributors)

In Case C?520/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the First?Tier Tribunal (Tax Chamber) (United Kingdom), made by decision of 22 October 2010, received at the Court on 8 November 2010, in the proceedings

Lebara Ltd

v

Commissioners for Her Majesty’s Revenue and Customs,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, R. Silva de Lapuerta, G. Arestis and T. von Danwitz (Rapporteur), Judges,

Advocate General: N. Jääskinen,

Registrar: K. Sztranc-S?awiczek, Administrator,

having regard to the written procedure and further to the hearing on 13 October 2011,

after considering the observations submitted on behalf of:

– Lebara Ltd, by P. Lasok QC, and M. Angiolini, Barrister, instructed by S. Macherla, Solicitor,

– the United Kingdom Government, by S. Hathaway and L. Seeboruth, acting as Agents, and by R. Hill, Barrister,

– the Greek Government, by K. Paraskevopoulou, M. Germani and I. Pouli, acting as Agents,

– the Netherlands Government, by C. Wissels, M. de Ree, M. Bulterman and J. Langer, acting as Agents,

– the European Commission, by R. Lyal and C. Soulay, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 December 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of point (1) of Article 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 (OJ 1977 L 145, p. 1), as amended by Council Directive 2003/92/EC of 7 October 2003 (OJ 2003 L 260, p. 8; 'the Sixth Directive').

2 The reference has been made in proceedings between Lebara Ltd ('Lebara') and the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners') regarding a Notice of Assessment issued by the latter concerning the value added tax ('VAT') allegedly payable by Lebara in respect of telecommunications services supplied by that company in March 2005.

Legal context

3 Under the first and second paragraphs of Article 2 of First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14; 'the First Directive'):

'The principle of the common system of [VAT] involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which the tax is charged.

On each transaction, [VAT], calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of [VAT] borne directly by the various cost components.'

4 Under point (1) of Article 2 of the Sixth Directive, 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is to be subject to VAT.

5 Under Article 5(1) of that directive, 'supply of goods' is to mean the transfer of the right to dispose of tangible property as owner.

6 Article 6 of the Sixth Directive provides:

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

Such transactions may include *inter alia*:

– assignments of intangible property whether or not it is the subject of a document establishing title,

…

4. Where a taxable person acting in his own name but on behalf of another takes part in a supply of services, he shall be considered to have received and supplied those services himself.

…'

7 In Title VI of the Sixth Directive, which is entitled 'Place of taxable transactions', Article 9 provides:

'1. The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in

the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.

2. However:

…

(e) the place where the following services are supplied … when performed for … taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides:

…

– Telecommunications. Telecommunications services shall be deemed to be services relating to the transmission, emission or reception of signals, writing, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception. Telecommunications services within the meaning of this provision shall also include provision of access to global information networks.

…'

8 In Title VII of the Sixth Directive, which is entitled 'Chargeable Event and Chargeability of Tax', paragraphs 1 and 2 of Article 10 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. …

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.

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 Lebara is a company established in the United Kingdom which provides telecommunications services. At the material time, it marketed phonecards through taxable persons established in a number of other Member States ('the distributors'), targeting people established in those Member States who wished to make calls to third countries at inexpensive rates.

10 The phonecards sold by Lebara displayed, in particular: a brand name; the face value expressed in the currency of the Member State in which the distributor was established; one or more local access numbers to use in order to make a telephone call; and a concealed PIN code. To make a telephone call, it was sufficient to have that information, the PIN included.

11 The only use to which the phonecards could be put was the making of telephone calls. Their validity was limited, first, to the face value shown on the card and, secondly, to a fixed period beginning on the date of first use. At the end of that period, any unused call credit was lost.

12 To make a phone call to a third country, the user dialled the local access code displayed on the card. The call was picked up on the telecommunications network by a local telecommunications services operator, with whom Lebara had previously entered into an agreement on the provision of one or more dedicated local numbers, and routed to the switch held and operated by Lebara in the United Kingdom. Next, Lebara's automated system invited the user to enter the PIN number indicated on the card. When the PIN code had been recognised by the automated system, the user dialled the international number which he wished to call. The call was thus routed to its final destination by the international telecommunications service providers with whom Lebara had also previously entered into agreements giving it access to their international telecommunications network.

13 Lebara did not sell phonecards directly to consumers, but exclusively through a network of distributors.

14 As described in the order for reference, the distributors bought the phonecards from Lebara for an agreed price, lower than the face value of the cards, and then resold the cards under their own name or under a name chosen by them, or even under the Lebara brand. In any event, the distributors were acting in their own name and on their own behalf and not as Lebara's agents. The phonecards were sold almost exclusively to end users in the Member State of the distributor, either directly by the distributor or by other taxable persons such as wholesalers or retailers established in that Member State acting as intermediaries. Lebara neither knew nor controlled the resale price charged by the distributors or by the other intermediaries.

15 The phonecards were activated by Lebara following a request by the distributor, provided that the distributor had paid for them. Even if Lebara did not know the identity of the end user, it had systems in place which enabled it to track the use of each card sold and to ascertain, in particular, whether the card was still valid, the amount of unused credit, the numbers from which calls had been made using the card and the numbers called. No distributor or other person had access to those systems.

16 Lebara did not account to the Commissioners for VAT on the sale of phonecards to distributors, on the ground that that transaction was a supply of telecommunications services which took place in the Member State in which the distributor was established and that, in consequence, it was the distributor which had to pay VAT in that Member State in accordance with the reverse charge mechanism. According to Lebara, actual use of the card did not entail the supply by Lebara, for consideration, of services to the end user.

17 By contrast, the Commissioners took the view that Lebara had to pay VAT in the United Kingdom because it did in fact supply two services: (i) the 'issue', which took place at the time when the card was sold to the distributor and (ii) the 'redemption', when the card was actually used by the end user. The Member States are free to tax either the first of those supplies of services, or the second. In the United Kingdom, it is the second which is taxed. The taxable amount is the part of the amount paid by the distributor to Lebara which represents the use actually made of the card

by the end user as a proportion of the face value of the card.

18 On that basis, the Commissioners issued a Notice of Assessment of VAT in respect of the supplies of telecommunications services carried out by Lebara in March 2005. Lebara appealed to the referring tribunal against that notice.

19 The referring tribunal considers inter alia that, since some Member States adopt different practices in relation to the tax treatment of such phonecards, there is a risk of the double taxation, or the non-taxation, of revenue from the marketing of phonecards. On the view that the proper approach to be taken in the dispute before it depends on the interpretation of European Union ('EU') law, the First?Tier Tribunal decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'In circumstances such as those of the present case:

1. Where a taxable person ("Trader A") sells phonecards representing the right to receive telecommunications services from that person, is Article 2(1) of the Sixth … Directive to be interpreted so as to mean that Trader A makes two supplies for VAT purposes: one at the time of the initial sale of the phonecard by Trader A to another taxable person ("Trader B") and one at the time of its redemption (i.e. its use by a person — the "End User" — to make telephone calls)?

2. If so, how (consistently with EU VAT legislation) is VAT to be applied through the chain of supply where Trader A sells the phonecard to Trader B, Trader B resells the phonecard in Member State B and it is eventually purchased by the End User in Member State B, and the End User then uses the phonecard to make telephone calls?'

Consideration of the questions referred

20 The first question referred by the national tribunal concerns a telecommunications services operator which offers telecommunications services consisting in selling to a distributor phonecards which display all the information necessary for making international telephone calls by means of the infrastructure provided by that operator and which are resold by the distributor, in its own name and on its own behalf, to end users, either directly or through other taxable persons such as wholesalers or retailers. The national tribunal asks in substance whether point (1) of Article 2 of the Sixth Directive should be interpreted as meaning that such a telecommunications services operator carries out two supplies for consideration, one to the distributor, at the time of the sale of the card to the latter, and the other to the end user, when that user makes telephone calls using the information on the card.

21 In that respect, the observations submitted to the Court essentially reflect three different positions. According to the first two, the telecommunications services operator supplies a single taxable telecommunications service, either to the distributor when the operator sells it the phonecard or to the end user when the operator allows the user actually to use the card to make calls. According to the third position, the operator supplies two separate services, the Member State being free to choose which of those supplies to make subject to VAT.

22 In order to answer the first question referred, it is necessary to recall the objectives and the principal rules of the common system of VAT and the special features of the marketing system at issue in the main proceedings.

23 Under Article 2 of the First Directive, the principle of the common system of VAT is the application to goods and services of a general tax on consumption which is exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the

production and distribution process before the stage at which tax is charged (see, inter alia, Case C?475/03 *Banca popolare di Cremona* [2006] ECR I?9373, paragraph 21, and Case C?49/09 *Commission* v *Poland* [2010] ECR I?10619, paragraph 44).

24 However, VAT is chargeable on each transaction only after deduction of the amount of VAT borne directly by the costs of the various price components. The procedure for deduction is so arranged that taxable persons are authorised to deduct from the VAT for which they are liable the input VAT already charged on the goods or services and that the tax is charged, at each stage, only on the added value and is ultimately borne by the final consumer (see *Banca popolare di Cremona*, paragraph 22, and *Commission* v *Poland*, paragraph 44).

25 It follows that VAT is intended to tax only the final consumer and to be completely neutral as regards the taxable persons involved in the production and distribution process prior to the stage of final taxation, regardless of the number of transactions involved (see, to that effect, Case C?427/98 *Commission* v *Germany* [2002] ECR I?8315, paragraph 29).

26 Moreover, it follows from point (1) of Article 2 of the Sixth Directive that it is supplies of goods or services which are subject to VAT, rather than payments made by way of consideration for such supplies (see, to that effect, Case C?108/99 *Cantor Fitzgerald International* [2001] ECR I?7257, paragraph 17, and Case C?419/02 *BUPA Hospitals and Goldsborough Developments* [2006] ECR I?1685, paragraph 50). However, under the second subparagraph of Article 10(2) of the Sixth Directive, where a payment is to be made on account, the VAT may become chargeable without the supply having yet taken place, provided that all the relevant information concerning the chargeable event — namely, the future delivery or future performance — are already known (see *BUPA Hospitals and Goldsborough Developments*, paragraph 48).

27 Lastly, it is settled case?law that a supply of services is effected ‘for consideration’ for the purposes of point (1) of Article 2 of the Sixth Directive, hence taxable, only if there is a legal relationship between the service provider and the recipient, pursuant to which there is reciprocal performance, the remuneration received by the service provider constituting the value actually given in return for the service supplied to the recipient. There must therefore be a direct link between the service supplied and the consideration received (see, inter alia, Case C?37/08 *RCI Europe* [2009] ECR I?7533, paragraphs 24 and 30; Case C?246/08 *Commission* v *Finland* [2009] ECR I?10605, paragraphs 44 and 45, and Case C?93/10 *GFKL Financial Services* [2011] ECR I?10791, paragraphs 18 and 19).

28 As regards the special features of the marketing system at issue in the main proceedings, phonecards are for a single purpose in so far as they may be used only to make international telephone calls to destinations, and at rates, determined in advance. Accordingly, they allow access only to services of one type, the nature and quantity of which are determined in advance and which are subject to a single rate of tax.

29 The phonecards are marketed through a distribution chain which includes at least one intermediary operator — the distributor — between the telecommunications services operator, which provides the infrastructure necessary for making international calls, and the end user. According to the facts given in the order for reference, the distributor resells the phonecards in its own name and on its own behalf.

30 Moreover, the price paid by the end user for purchasing a phonecard, either directly from a distributor, or from a retailer, is not necessarily the same as the face value of that card. Lastly, the telecommunications services operator, which does not control the resale price charged by the distributors or the other intermediaries, is not in a position to know that price.

31 Given that a supply of services is taxable only if it is made for consideration, which presupposes reciprocity between the service provided and the remuneration constituting the value given in return for that service, as observed in paragraph 27 above, it must be borne in mind that the telecommunications services operator receives only one actual payment in the course of supplying its telecommunications services.

32 In those circumstances, the telecommunications services operator cannot be treated as carrying out two supplies of services for consideration for the purposes of Article 6(1) of the Sixth Directive, one to the distributor and one to the end user.

33 In order to identify the recipient of the sole supply of services made for consideration by that operator and, accordingly, the sole taxable supply, it is necessary to determine whether it is the distributor or the end user which is linked to the telecommunications services operator by a legal relationship in the course of which there is reciprocal performance.

34 In that connection, it should be noted first that, by the sale of the phonecards, the telecommunications services operator supplies the distributor with all the information necessary for making international phone calls of a fixed duration by means of the infrastructure provided by that operator, which means that it transfers to the distributor the right to use that infrastructure in order to make such calls. The telecommunications services operator thus supplies a service to the distributor.

35 That service is covered by the term ‘telecommunications services’ as used in the tenth indent of Article 9(2)(e) of the Sixth Directive. That provision defines that term broadly, so as to cover not only the transmission of signals and sounds as such, but also all services ‘relating to’ the transmission, and the related transfer of the right to use capacity for such transmission.

36 Secondly, it should be noted that, in return for that telecommunications service, the distributor pays the telecommunications services operator the price agreed on with that operator.

37 That payment cannot be treated as a payment made to the telecommunications services operator by the end user, even if the resale of the phonecard by the distributor — and, as the case may be, the other intermediary operators — ultimately leads the burden of making that payment to be passed on to the end user.

38 The distributor resells the phonecards in its own name and on its own behalf and, as regards at least part of that resale, also uses other intermediary operators such as wholesalers or retailers. In addition, the amount which the end user actually pays at the time of purchasing the phonecard from the distributor or from an intermediary retailer is not necessarily the same as the price paid by the distributor to the telecommunications services operator or the face value of the card, and the telecommunications services operator is not in a position to know that amount. Moreover, the identity of the end user of a phonecard is not necessarily known at the time of the payment made by the distributor to the telecommunications services operator, in particular where the card is to be resold by another intermediary operator.

39 In the light of those circumstances, it cannot be held that, by its payment to the telecommunications services operator, the distributor transfers to the telecommunications services operator only the remuneration paid by the end user, and thereby creates a direct link between operator and end user.

40 Furthermore, given that the end user has no right to receive a refund from the telecommunications services operator of any call credit unused during the period of validity of the

phonecard, it cannot validly be argued that there is a direct link, based on such a right, between the end user and the telecommunications services operator.

41 It follows that there is reciprocal performance, within the meaning of the case?law recalled in paragraph 27 above, between the telecommunications services operator and the distributor at the time of the initial sale of the phonecards to the distributor.

42 Thus, a telecommunications services distribution chain, such as that at issue in the main proceedings, is consistent with the first paragraph of Article 2 of the First Directive and with the principle of fiscal neutrality where, in particular, the distributor does not resell the phonecards directly to the end user: both the initial sale of a phonecard and its subsequent resale are taxable transactions. At each stage of the chain, the VAT is exactly proportional to the price paid and allows deduction of the input tax paid. Specifically, on the final sale of a phonecard to the end user, the VAT is exactly proportional to the price paid by that user in order to purchase the card, even if that price is not the same as the face value of the card.

43 Consequently, the answer to the first question is that point (1) of Article 2 of the Sixth Directive must be interpreted as meaning that a telecommunications services operator which offers telecommunications services consisting in selling to a distributor phonecards which display all the information necessary for making international telephone calls by means of the infrastructure provided by that operator and which are resold by the distributor, in its own name and on its own behalf, to end users, either directly or through other taxable persons such as wholesalers or retailers, carries out a supply of telecommunications services for consideration to the distributor. On the other hand, that operator does not carry out a second supply of services for consideration, this time to the end user, where that user, having purchased the phonecard, exercises the right to make telephone calls using the information on the card.

44 In the light of that answer to the first question, there is no need to address the second question.

Costs

45 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 (Third Chamber) hereby rules:

Point (1) of Article 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 2003/92/EC of 7 October 2003, must be interpreted as meaning that a telecommunications services operator which offers telecommunications services consisting in selling to a distributor phonecards which display all the information necessary for making international telephone calls by means of the infrastructure provided by that operator and which are resold by the distributor, in its name and on its own behalf, to end users, either directly or through other taxable persons such as wholesalers or retailers, carries out a supply of telecommunications services for consideration to the distributor. On the other hand, that operator does not carry out a second supply of services for consideration, this time to the end user, where that user, having purchased the phonecard, exercises the right to make telephone calls using the information on the card.

[Signatures]

* Language of the case: English.