

**Downloaded via the EU tax law app / web**

JUDGMENT OF THE COURT (Third Chamber)

20 June 2013 (\*)

(Reference for a preliminary ruling – Sixth VAT Directive – Article 2(1) and Article 6(1) – Meaning of ‘supply of services’ – Supply of advertising and loan broking services – Exemptions – Economic and commercial reality of the transactions – Abusive practices – Transactions with the sole aim of obtaining a tax advantage)

In Case C-653/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom), made by decision of 13 December 2011, received at the Court on 19 December 2011, in the proceedings

**Her Majesty’s Commissioners of Revenue and Customs**

v

**Paul Newey**, trading under the business name Ocean Finance,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, E. Jarašiusas, A. Ó Caoimh, C. Toader (Rapporteur) and C. G. Fernlund, Judges,

Advocate General: P. Mengozzi,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 March 2013,

after considering the observations submitted on behalf of:

- Mr Newey, trading under the business name Ocean Finance, by J. Ghosh QC, E. Wilson and J. Bremner, Barristers,
- the United Kingdom Government, by S. Ossowski and L. Christie, acting as Agents, and by O. Thomas, Barrister,
- Ireland, by E. Creedon, acting as Agent, and by A. Collins SC,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by A. De Stefano, avvocato dello Stato,
- the European Commission, by R. Lyal and C. Soulay, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## Judgment

1 This request for a preliminary ruling concerns 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), as amended by Council Directive 2000/65/EC of 17 October 2000 (OJ 2000 L 269, p. 44) ('the Sixth Directive').

2 The request has been made in proceedings between Her Majesty's Commissioners of Revenue and Customs ('the Commissioners') and Mr Newey, trading under the business name Ocean Finance, concerning the value added tax ('VAT') applicable to the supply of advertising services.

### Legal context

#### *European Union law*

3 Under Article 299(6) EC, the EC Treaty is to apply to the Channel Islands, of which the island of Jersey is part, only to the extent necessary to ensure the implementation of the arrangements for those islands set out inter alia in Protocol No 3 on the Channel Islands and the Isle of Man (OJ 1972 L 73, p. 164), which is annexed to the Act concerning the conditions of accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, and the adjustments to the Treaties (OJ 1972 L 73, p. 14). As that protocol does not contain any provisions concerning VAT, European Union VAT law does not apply on the island of Jersey.

4 The fourth recital in the preamble to the Sixth Directive states that account should be taken of the objective of abolishing the imposition of tax on the importation and the remission of tax on exportation in trade between Member State and it should be ensured that the common system of turnover taxes is non-discriminatory as regards the origin of goods and services, so that a common market permitting fair competition and resembling a real internal market may ultimately be achieved.

5 Article 2(1) of the Sixth Directive makes subject to VAT 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such'.

6 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 and under Article 6(1) of that directive, 'supply of services' is to mean any transaction which does not constitute a supply of goods within the meaning of Article 5 thereof.

7 Article 9 of the Sixth Directive 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 customers

established outside the Community or 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:

...

– advertising services,

...

– banking, financial and insurance transactions including reinsurance, with the exception of the hire of safes,

...

– the services of agents who act in the name and for the account of another, when they procure for their principal the services referred to in this point (e).

3. In order to avoid double taxation, non-taxation or the distortion of competition the Member States may, with regard to the supply of services referred to in 2(e) and the hiring out of forms of transport consider:

...

(b) the place of supply of services, which under this Article would be situated outside the Community, as being within the territory of the country where the effective use and enjoyment of the services take place within the territory of the country.'

8 Article 13 of the Sixth Directive, headed 'Exemptions within the territory of the country', provides under the heading 'B. *Other exemptions*':

'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:

1. the granting and the negotiation of credit and the management of credit by the person granting it;

2. the negotiation of or any dealings in credit guarantees or any other security for money and the management of credit guarantees by the person who is granting the credit;

...'

9 Article 17(2) of the Sixth Directive 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) [VAT] due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

...'

10 Under Article 21 of the Sixth Directive:

'...

1. Under the internal system, the following shall be liable to pay [VAT]:

...

(b) taxable persons to whom services covered by Article 9(2)(e) are supplied or persons who are identified for [VAT] purposes within the territory of the country to whom services covered by Article 28b(C), (D), (E) and (F) are supplied, if the services are carried out by a taxable person not established within the territory of the country;

...'

*United Kingdom law*

11 At the time of the facts at issue in the main proceedings, section 4(1) of the Value Added Tax Act 1994 was worded as follows:

'VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.'

12 Section 5(2)(a) and (b) of that Act provided:

(a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;

(b) anything which is not a supply of goods but is done for a consideration ... is a supply of services.'

13 Section 7(10) of the Value Added Tax Act 1994 provided:

'A supply of services shall be treated as made—

(a) in the United Kingdom if the supplier belongs in the United Kingdom; and

(b) in another country (and not in the United Kingdom) if the supplier belongs in that other country.'

14 Section 8(1) and (2) of that Act imposed a reverse charge of VAT for services provided from outside the UK and provided:

'(1) Subject to subsection (3) below, where relevant services are—

(a) supplied by a person who belongs in a country other than the United Kingdom, and

(b) received by a person ("the recipient") who belongs in the United Kingdom for the purposes

of any business carried on by him,

then all the same consequences shall follow under this Act (and particularly so much as charges VAT on a supply and entitles a taxable person to credit for input tax) as if the recipient himself supplied the services in the United Kingdom in the course or furtherance of his business, and that supply were a taxable supply.

(2) In this section "relevant services" means services of any of the descriptions specified in Schedule 5 not being services within any of the descriptions specified in Schedule 9.

(3) Supplies which are treated as made by the recipient under subsection (1) above are not to be taken into account as supplies made by him when determining any allowance of input tax in his case under section 26(1).'

15 Section 9 of the Value Added Tax Act 1994 set out the definition of the 'place of belonging' for a recipient of services in the following manner:

'(1) Subsection (2) below shall apply for determining, in relation to any supply of services, whether the supplier belongs in one country or another and subsections (3) and (4) below shall apply (subject to any provision made under section 8(6)) for determining, in relation to any supply of services, whether the recipient belongs in one country or another.

(2) The supplier of services shall be treated as belonging in a country if—

(a) he has there a business establishment or some other fixed establishment and no such establishment elsewhere; or

(b) he has no such establishment (there or elsewhere) but his usual place of residence is there; or

(c) he has such establishments both in that country and elsewhere and the establishment of his which is most directly concerned with the supply is there.

(3) If the supply of services is made to an individual and received by him otherwise than for the purposes of any business carried on by him, he shall be treated as belonging in whatever country he has his usual place of residence.

(4) Where subsection (3) above does not apply, the person to whom the supply is made shall be treated as belonging in a country if—

(a) either of the conditions mentioned in paragraphs (a) and (b) of subsection (2) above is satisfied; or

(b) he has such establishments as are mentioned in subsection (2) above both in that country and elsewhere and the establishment of his at which, or for the purposes of which, the services are most directly used or to be used is in that country.

5) For the purposes of this section (but not for any other purposes)—

(a) a person carrying on a business through a branch or agency in any country shall be treated as having a business establishment there; and

(b) “usual place of residence”, in relation to a body corporate, means the place where it is legally constituted.’

16 Section 31 of the Value Added Tax Act 1994 and Group 5 of Schedule 9 to that Act give effect to Article 13B(d) of the Sixth Directive and provide exemption from VAT for, inter alia, the services of ‘the making of any advance or the granting of any credit’ and the supply of related intermediary services.

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

17 It is apparent from the order for reference that, during the period at issue in the main proceedings, Mr Newey was a loan broker, established in Tamworth (United Kingdom). The broking services supplied in the United Kingdom by Mr Newey were, in accordance with Article 13B(d) of the Sixth Directive, exempt from VAT. By contrast, the advertising services supplied to Mr Newey in the United Kingdom, which were intended to attract potential borrowers, were subject to VAT, with the result that the tax borne by Mr Newey on the advertising costs was not recoverable.

18 In order to avoid that non-recoverable tax burden, Mr Newey incorporated the company Alabaster (CI) Ltd (‘Alabaster’), which was established in Jersey, a territory in which the Sixth Directive does not apply, and granted that company the right to use the business name Ocean Finance. Mr Newey was the sole shareholder of that company.

19 Alabaster employed at least one person on a full-time basis and had its own management, natural persons resident in Jersey with no direct experience of broking who were suggested or recruited by Mr Newey’s accountants and paid on the basis of the time devoted to Alabaster’s business activities.

20 Under Alabaster’s constitution and the law in force in Jersey, those directors were responsible for managing and exercising the powers of that company and Mr Newey played no part in its management.

21 The broking contracts were concluded directly between the lenders and Alabaster, with the result that the broking commissions were paid not to Mr Newey, but to that company.

22 However, Alabaster did not itself process the loan applications, but used Mr Newey’s services for that purpose, which were provided, under a sub-contract (‘the services agreement’), by his employees carrying on their business activities in Tamworth. That agreement contained a list of services Mr Newey was to provide which essentially covered all the processing tasks for the loan broking business. Under that agreement, Mr Newey also had the power to negotiate the terms of the contracts concluded between Alabaster and the lenders.

23 In return for those services, Mr Newey received fees fixed at 50% at the outset, and then at 60%, of the amount of the gross commissions immediately receivable in respect of each loan by Alabaster, plus certain expenses or disbursements.

24 In practice, potential borrowers contacted directly Mr Newey’s employees in the United Kingdom who processed each file and sent the applications which satisfied the credit eligibility criteria to Jersey to Alabaster’s directors for authorisation. The approval process generally took around one hour to complete and, in fact, no request for authorisation was refused.

25 As advertising aimed at potential borrowers was critical to the loan broking business, it represented a considerable part of the costs borne by Alabaster.

26 According to the referring court, the advertising services were provided by Wallace Barnaby & Associates Ltd ('Wallace Barnaby'), a company which was not connected with Alabaster and was also established in Jersey, under a contract concluded with the latter. Wallace Barnaby itself obtained those advertising services from advertising agencies established in the United Kingdom, in particular from the advertising agency Ekay Advertising. Under the law in force in Jersey, the payments made by Alabaster to Wallace Barnaby for those services were not subject to VAT.

27 Mr Newey was not entitled to use the advertising services on behalf of Alabaster and assumed no liability for the payment of the services provided by Wallace Barnaby to that company. However, he had the power to approve the content of the advertisements, regarding which he met with one of Ekay Advertising's employees working in the United Kingdom. Following those meetings, that employee made recommendations to Wallace Barnaby.

28 Wallace Barnaby, in turn, made recommendations to Alabaster's directors, who met each week after receiving those recommendations to determine the proposed advertising expenditure. In practice, none of those recommendations was rejected.

29 The Commissioners submit that, for VAT purposes, first, the advertising services concerned were supplied to Mr Newey in the United Kingdom and are therefore taxable in the United Kingdom and, secondly, the loan broking services were supplied in the United Kingdom by Mr Newey.

30 In the alternative, they submit that, if Alabaster has to be regarded as being, in Jersey, the recipient of the advertising services as well as the supplier of the loan broking services, the arrangements entered into for the purpose of bringing about this result are contrary to the principle of prohibition of the abuse of rights as stated by the Court in Case C-255/02 *Halifax and Others* [2006] ECR I-1609 and must be recharacterised.

31 Accordingly, on 27 September 2005, the Commissioners issued a VAT assessment to Mr Newey for the period 1 July 2002 to 31 December 2004 in the sum of 10 707 075 pounds sterling (GBP) in order to recover from him the VAT on the advertising services supplied to him during that period.

32 Mr Newey maintains that the loan broking services at issue in the main proceedings were supplied from Jersey by Alabaster and that Alabaster was the recipient of the advertising services. He adds that the principle of prohibition of the abuse of rights is not applicable if the services are supplied by a person established outside of the European Union to another person established outside of the European Union.

33 Consequently, Mr Newey appealed against that assessment before the First Tier Tribunal (Tax Chamber) which allowed that appeal by a judgment of 23 April 2010.

34 That court held that the loan broking business was carried on by Alabaster, by means of services provided by Mr Newey under the services agreement. Alabaster could not therefore be categorised as a 'brass plate' company.

35 The First Tier Tribunal (Tax Chamber) also held that Alabaster had supplied the loan broking services concerned to the lenders and that it was the recipient of the advertising services. There was no direct transaction for consideration between Mr Newey and the lenders or between

Mr Newey and Wallace Barnaby. Although the essential aim of Alabaster was to obtain a tax advantage, there was, according to that court, no abuse since the arrangement involving Alabaster was not contrary to the purpose of the Sixth Directive.

36 The Commissioners appealed to the Upper Tribunal (Tax and Chancery Chamber) against that decision.

37 In those circumstances the Upper Tribunal (Tax and Chancery Chamber) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) In circumstances such as those in the present case, what weight should a national court give to contracts in determining the question of which person made a supply of services for the purposes of VAT? In particular, is the contractual position decisive in determining the VAT supply position?’

(2) In circumstances such as those in the present case, if the contractual position is not decisive, in what circumstances should a national court depart from the contractual position?

(3) In circumstances such as those in the present case, in particular, to what extent is it relevant:

(a) Whether the person who makes the supply as a matter of contract is under the overall control of another person?

(b) Whether the business knowledge, commercial relationship and experience rests with a person other than that which enters into the contract?

(c) Whether all or most of the decisive elements in the supply are performed by a person other than that which enters into the contract?

(d) Whether the commercial risk of financial and reputational loss arising from the supply rests with someone other than that which enters into the contracts?

(e) Whether the person making the supply, as a matter of contract, sub-contracts decisive elements necessary for such supply to a person controlling that first person and such sub-contracting arrangements lack certain commercial features?

(4) In circumstances such as those in the present case, should the national court depart from the contractual analysis?

(5) If the answer to question 4 is “no”, is the tax result of arrangements such as those in this case a tax advantage the grant of which would be contrary to the purpose of the Sixth Directive within the meaning of paragraphs 74 to 86 of [*Halifax and Others*]?

(6) If the answer to question 5 is yes, how should arrangements such as those in the present case be recharacterised?’

### **Consideration of the questions referred**

#### *The first to fourth questions*

38 By its first to fourth questions, which it is appropriate to examine together, the referring court seeks, in essence, to know whether contractual terms are decisive for the purposes of identifying the supplier and the recipient in a ‘supply of services’ transaction within the meaning of Articles

2(1) and 6(1) of the Sixth Directive, and, if the answer is in the negative, under what circumstances those terms may be recharacterised.

39 It must be remembered first of all that the Sixth Directive establishes a common system of VAT based, inter alia, on a uniform definition of taxable transactions (*Halifax and Others*, paragraph 48).

40 Under Article 2(1) 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. As regards, more specifically, the meaning of supply of services, the Court has repeatedly held that a supply of services is effected 'for consideration', within the meaning of Article 2(1) of that directive, and hence is 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-270/09 *MacDonald Resorts* [2010] ECR I-13179, paragraph 16 and the case-law cited).

41 It is also apparent from the case-law of the Court that the term supply of services is therefore objective in nature and applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person (see, to that effect, *Halifax and Others*, paragraphs 56 and 57 and the case-law cited).

42 As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law of the Court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, Joined Cases C-53/09 and C-55/09 *Loyalty Management UK and Baxi Group* [2010] ECR I-9187, paragraphs 39 and 40 and the case-law cited).

43 Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of Articles 2(1) and 6(1) of the Sixth Directive have to be identified.

44 It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.

45 That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions.

46 The Court has held on various occasions that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see *Halifax and Others*, paragraph 71 and the case-law cited) and that the effect of the principle that the abuse of rights is prohibited is to bar wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage (see Case C-162/07 *Amplis Scientifica and Amplifin* [2008] ECR I-4019, paragraph 28; Case C-504/10 *Tanoarch* [2011] ECR I-10853, paragraph 51; and Case C-326/11 *J.J. Komen en Zonen Beheer Heerhugowaard* [2012] ECR, paragraph 35).

47 In the main proceedings, it is not disputed that, formally, in accordance with the contractual

terms, Alabaster provided the lenders with the supplies of loan broking services and that it was the recipient of the supplies of advertising services provided by Wallace Barnaby.

48 However, taking into account the economic reality of the business relationships between, on the one hand, Mr Newey, Alabaster and the lenders and, on the other hand, Mr Newey, Alabaster and Wallace Barnaby, as apparent from the order for reference and, in particular, the matters of fact mentioned by the Upper Tribunal (Tax and Chancery Chamber) in the third question, it is conceivable that the effective use and enjoyment of the services at issue in the main proceedings took place in the United Kingdom and that Mr Newey profited therefrom.

49 It is for the referring court, by means of an analysis of all the circumstances of the dispute in the main proceedings, to ascertain whether the contractual terms do not genuinely reflect economic reality and whether it is Mr Newey, and not Alabaster, who was actually the supplier of the loan broking services at issue and the recipient of the supplies of advertising services provided by Wallace Barnaby.

50 If that were the case, those contractual terms would have to be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice (see, to that effect, *Halifax and Others*, paragraph 98).

51 In the present case, the re-establishment of the situation that would have prevailed in the absence of the transactions at issue, if the referring court were to consider them to constitute an abusive practice, would, in particular, mean that the services agreement and the advertising arrangements concluded between Alabaster and Wallace Barnaby could not be relied upon against the Commissioners, who could legitimately regard Mr Newey as actually being the supplier of the loan broking services and the recipient of the supplies of advertising services at issue in the main proceedings.

52 In the light of the foregoing considerations, the answer to the first to fourth questions is that contractual terms, even though they constitute a factor to be taken into consideration, are not decisive for the purposes of identifying the supplier and the recipient of a 'supply of services' within the meaning of Articles 2(1) and 6(1) of the Sixth Directive. They may in particular be disregarded if it becomes apparent that they do not reflect economic and commercial reality, but constitute a wholly artificial arrangement which does not reflect economic reality and was set up with the sole aim of obtaining a tax advantage, which it is for the national court to determine.

#### *The fifth and sixth questions*

53 In view of the answer given to the first to fourth questions, there is no need to reply to the fifth and sixth questions referred by the referring court.

#### **Costs**

54 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:

**Contractual terms, even though they constitute a factor to be taken into consideration, are not decisive for the purposes of identifying the supplier and the recipient of a 'supply of services' within the meaning of Articles 2(1) and 6(1) 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 2000/65/EC of 17 October 2000. They may in particular be disregarded if it**

**becomes apparent that they do not reflect economic and commercial reality, but constitute a wholly artificial arrangement which does not reflect economic reality and was set up with the sole aim of obtaining a tax advantage, which it is for the national court to determine.**

[Signatures]

\* Language of the case: English.