Jurisdiction
JUDGMENT OF THE COURT (First Chamber)

16 January 2014 (1)

„Value-added tax — Operations of travel agents — Granting of price discounts to customers — Determination of the taxable amount for services provided as part of an intermediary activity“

In Case C?300/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decision of 26 April 2012, received at the Court on 20 June 2012, in the proceedings

Finanzamt Düsseldorf-Mitte

v

Ibero Tours GmbH,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the First Chamber, A. Borg Barthet (Rapporteur), E. Levits and M. Berger, Judges,

Advocate General: M. Wathelet,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 5 June 2013,

after considering the observations submitted on behalf of:

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Ibero Tours GmbH, by P. Englert, Rechtsanwalt, and P. Moser, barrister,

—

the German Government, by T. Henze and K. Petersen, acting as Agents,

—

the United Kingdom Government, by L. Christie, acting as Agent, and R. Hill, Barrister,

—

the European Commission, by C. Soulay and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 July 2013,

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, ‘the Sixth Directive’).

2

The request has been made in the context of proceedings between the Finanzamt Düsseldorf-Mitte (‘the Finanzamt’) and Ibero Tours GmbH (‘Ibero Tours’) concerning the determination of the amount of value added tax (‘VAT’) payable by Ibero Tours for the tax years 2002 to 2005.

Legal context

European Union law

3

Under Article 11A(1)(a) of the Sixth Directive:

‘...

1. 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’.

4

Article 11A(3) of the Sixth Directive stipulates:

‘The taxable amount shall not include:

(a)

price reductions by way of discount for early payment;

(b)

price discounts and rebates allowed to the customer and accounted for at the time of the supply;

...’

5

The first subparagraph of Article 11C(1) of the Sixth Directive, entitled ‘Miscellaneous provisions’,

provides:

‘In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.’

6

Article 26 of the Sixth Directive, entitled ‘Special scheme for travel agents’, provides:

‘1. Member States shall apply [VAT] to the operations of travel agents in accordance with the provisions of this Article, where the travel agents deal with customers in their own name and use the supplies and services of other taxable persons in the provision of travel facilities. This Article shall not apply to travel agents who are acting only as intermediaries and accounting for tax in accordance with Article 11A(3)(c). In this Article travel agents include tour operators.

2. All transactions performed by the travel agent in respect of a journey shall be treated as a single service supplied by the travel agent to the traveller. It shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has provided the services. The taxable amount and the price exclusive of tax, within the meaning of Article 22(3)(b), in respect of this service shall be the travel agent’s margin, that is to say, the difference between the total amount to be paid by the traveller, exclusive of [VAT], and the actual cost to the travel agent of supplies and services provided by other taxable persons where these transactions are for the direct benefit of the traveller.

3. If transactions entrusted by the travel agent to other taxable persons are performed by such persons outside the Community, the travel agent’s service shall be treated as an exempted intermediary activity under Article 15(14). Where these transactions are performed both inside and outside the Community, only that part of the travel agent’s service relating to transactions outside the Community may be exempted.

4. [VAT] charged to the travel agent by other taxable persons on the transactions described in paragraph 2 which are for the direct benefit of the traveller shall not be eligible for deduction or refund in any Member State.’

German law

7

Paragraph 17(1) of the German Law on turnover tax (Umsatzsteuergesetz, ‘UStG’) in the version in force from 1 January 2002 to 16 December 2004 provided:

‘When the basis of assessment of a taxable transaction for the purposes of Paragraph 1(1)(1) has changed,

1. the trader who made the supply shall adjust correspondingly the amount of tax payable and

2. the trader who received the supply shall adjust correspondingly the amount of input tax deductible in that regard;

that shall apply by analogy in the case of Paragraph 1(1)(5) and of Paragraph 13b. Adjustment of the deduction of input tax may be waived where a third-party trader pays to the tax authority the amount of the tax corresponding to the reduction in remuneration; in that case the third-party trader is liable to pay the tax. ...'

8

Paragraph 17(1) of the UStG, in the version in force from 16 December 2004, provides:

'When the basis of assessment of a taxable transaction for the purposes of Paragraph 1(1)(1) has changed, the trader who made the supply shall adjust correspondingly the amount of tax payable. The trader who received the supply shall also adjust the amount of input tax deductible in that regard. This shall not apply if the trader is not placed at an economic advantage by the change in the taxable amount. If in such cases another trader is placed at an economic advantage by the change in the taxable amount, that trader must adjust the amount of deductible input tax. The first to fourth sentences shall apply by analogy in the case of Paragraph 1(1)(5) and of Paragraph 13b. Adjustment of the amount of deductible input tax may be waived where a third?party trader pays to the tax authority the amount of tax corresponding to the reduction in remuneration; in that case the third?party trader is liable to pay the tax. ...'

9

Paragraph 25(1) to (4) of the UStG, in the version in force from 1 April 1999, provides:

'1. The following provisions shall apply to travel services provided by a trader that are not provided for the purposes of the customer's business, where the trader deals with customers in his own name and makes use of travel-related inputs. The service provided by the trader is deemed to fall within the category of other services. If the trader provides several services of this nature to a customer in the context of one journey, those services will be deemed to be the provision of a single service falling within the other services category. The place at which the other service is provided shall be determined in accordance with Paragraph 3a(1). Travel-related inputs are supplies and other services provided by third parties which are for the direct benefit of the traveller.

2. Other services are exempt where the travel-related inputs relating to them are provided abroad. ...

3. The taxable value of other services shall be the difference between the amount paid by the customer for the service and the amount paid by the undertaking for travel-related inputs. …

4. By way of exception to Paragraph 15(1), the trader may not deduct the amount of VAT charged on invoices for travel-related inputs. The remaining provisions of Paragraph 15 shall apply in full.'

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Paragraph 25(4) of the UStG, in the version in force from 1 January 2005, provides:

'By way of exception to Paragraph 15(1), the trader may not deduct the amount of input tax charged on invoices for travel-related inputs, or the amounts of tax payable under Paragraph 13b. The remaining provisions of Paragraph 15 shall apply in full.'

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

11

As part of its economic activity, Ibero Tours provides services as an intermediary on German territory falling within the scope of the Sixth Directive. Those services are partly exempt and partly taxable.

12

In the course of taxable transactions, Ibero Tours arranges, as an intermediary, travel services which are provided by tour operators to clients and which fall within the special scheme pursuant to Article 26 of the Sixth Directive. Although Ibero Tours is a travel agent, that special scheme does not apply to the services which are at issue in the main proceedings, since that agent only acts as an intermediary and, according to the second sentence of Article 26(1) of the Sixth Directive, the special scheme provided for in that article should not be applied to such an agent.

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Ibero Tours provides intermediary services to tour operators and receives the agreed commission from them. However, Ibero Tours gave travel clients price reductions which it financed from part of its commission. Having first paid the VAT on all of the commission, it applied to the Finanzamt for an adjustment of the assessment of that tax for the tax years 2002 to 2005, so that the price reductions granted to its clients would be deducted from the taxable amount.

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The Finanzamt agreed only to the extent that the services provided by the tour operators were liable to tax under the special scheme pursuant to Article 26 of the Sixth Directive. To the extent that those services were exempt under Article 26(3) of the Sixth Directive, the Finanzamt refused to make the adjustment requested by Ibero Tours.

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Following an unsuccessful objection, Ibero Tours brought an action which the Finanzgericht (Finance Court) upheld. The Finanzamt appealed against the judgment of the Finanzgericht before the Bundesfinanzhof.

16

The national court asks, first, whether it is possible to apply the principles defined by the Court in Case C-317/94 Elida Gibbs [1996] ECR I-5339, where an intermediary, in the framework of the provision of services, provides a price reduction on the principal service in which it is involved.

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Although the principle of neutrality supports the application, in the present case, of the solutions adopted in that judgment, doubts nevertheless arise given that the Court envisages, in that judgment, a ‘distribution chain’ in which ‘similar goods’ are supplied repeatedly and under the same taxation conditions. Consequently, the referring court asks whether those concepts are relevant in the case in the main proceedings, since the transactions of the principal trader and of the intermediary are different in nature and are subject to discrete tax law conditions in each case.

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Secondly, if the view is taken that the services performed in the context of an intermediate activity may be part of a distribution chain that would be subject to the principles established by the Court of Justice in Elida Gibbs, the question remains, according to the Bundesfinanzhof, whether this also applies where the principal services are covered by Article 26 of the Sixth Directive. Indeed, the referring court considers that, in such a case, it is doubtful that an application of the principles laid down by the Court in that judgment leads to correct taxation.

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Furthermore, the referring court notes that in Case C-427/98 Commission v Germany [2002] ECR I-8315, the Court held that Member States are entitled not to apply the principles of the judgment in Elida Gibbs if the principal service is exempt. In that regard, the referring court considers that the judgment in Commission v Germany must be understood as meaning that the principles laid down by the Court in Elida Gibbs should not be applied if the last services in the distribution chain are exempt. If the principal services fall within the special scheme under Article 26 of the Sixth Directive, Article 26(3) treats those services as exempted intermediary services where the transactions entrusted by the service provider to other taxable persons are performed by such persons outside the European Union. If those transactions are performed both inside and outside the European Union, the services are only partially exempt.

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It follows that there may be doubts as to how the travel agent and the relevant tax authority are to establish the extent to which the principal travel services are exempt and consequently do not entitle them to apply the principles laid down by the Court in Elida Gibbs.

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Thirdly, the referring court considers the situation in which a Member State has duly transposed Article 11C(1) of the Sixth Directive, but nevertheless wishes to exclude reduction of the VAT payable by the intermediary in the case of exempted principal services. The referring court doubts that such exclusion is covered by the correct transposition of that provision and questions the need for legislation of the Member State concerned in which that reduction is specifically provided for. It takes the view that paragraphs 65 and 66 of the judgment in Commission v Germany support that assessment in so far as reference is made to ‘possibilities’ afforded to Member States. The referring court considers that that conclusion, however, is not necessarily appropriate when limiting the consequences of an interpretation given by the Court.

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In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1.

According to the principles of the judgment of the Court … in [Elida Gibbs] does it also result in a reduction of the taxable amount within the context of a distribution chain if an intermediary ([in the case in the main proceedings]: a travel agent) refunds to the customer (here: a travel client) in the transaction arranged by him (here: services of the tour operator provided to the travel client) part of the price for the transaction arranged?

2.

In the event that Question 1 is answered in the affirmative: must the principles of [that judgment] also be applied if the tour operator's transaction which has been arranged by the intermediary falls within the special scheme under Article 26 of the Sixth [Directive] but the intermediary services of the travel agent do not fall within that provision?

3.

In the event that Question 2 is also answered in the affirmative: in the event of the exemption of the services arranged by the intermediary, is a Member State which has correctly transposed Article 11(C)(1) of the Sixth [Directive] authorised to refuse a reduction of the taxable amount only if, in exercising the authority included in that provision, it has provided for additional conditions on the refusal of the reduction?'

Consideration of the questions referred

The first question

23

By its first question, the referring court asks, in essence, whether the principles laid down by the Court in Elida Gibbs, concerning the determination of the taxable amount for the purposes of VAT, are applicable where a travel agent, acting as an intermediary, grants the final consumer, on the travel agent's own initiative and at his own expense, a reduction of the price of the principal service provided by the tour operator.

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In order to reply to that question, it must be pointed out that Article 11A(1)(a) of the Sixth Directive states that the taxable amount, in respect of supplies of goods and services, is everything which constitutes the value of 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.

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Of course, the aim of Article 26 of the Sixth Directive is to avoid the practical difficulties arising from the fact that the activities of travel agents and tour operators consist of multiple services and are performed in several locations. However, the attainment of that objective in no way requires any derogation from the rule laid down in Article 11A(1)(a) of the Sixth Directive which, for the purposes of determining the taxable amount, refers to 'the consideration which has been or is to be obtained by the supplier from the ... customer or a third party' (see the judgment in Case C-149/01 First Choice Holidays [2003] ECR I-6289, paragraph 26).

26

First, in the main proceedings the consideration obtained by the tour operator for its services is the total price of the travel without reductions. That fact is not called into question by the fact that Ibero Tours pays the tour operator a reduced amount only, consisting of the travel price minus the commission owed to Ibero Tours, that reduction being determined simply by offsetting sums due under various headings.

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Secondly, given that Ibero Tours does not give a discount, for services provided in connection with its activity as an intermediary, to the tour operator, and given that the tour operator is not affected by the existence or amount of the discount granted by Ibero Tours to final consumers, the fact that Ibero Tours finances that discount from a part of its commission or from other funds has no impact on the price of the services provided by the tour operator or on the price of those services provided by Ibero Tours, as part of its activity as an intermediary, to that tour operator.

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The principles established in Elida Gibbs do not affect the determination of the taxable amount in a situation such as that at issue in the main proceedings.

29

It should be recalled in that regard that the Court held in that judgment that when a manufacturer of a product who, having no contractual relationship with the final consumer but being the first link in a chain of transactions which ends with that final consumer, grants the final consumer a price reduction using discount coupons received by retailers and reimbursed by the manufacturer to those retailers, the taxable amount for VAT purposes must be reduced by that reduction (Elida Gibbs, paragraphs 31, 34 and 35). In the case which gave rise to the judgment in Elida Gibbs, the consideration received by the taxpayer, who was at the head of a chain of operations, was, in fact, actually reduced by the reduction granted by that taxpayer directly to the final consumer.

30

However, in the circumstances at issue in the main proceedings, the tour operator is not at the head of a chain of operations, as it provides its services directly to the final consumer, with Ibero Tours intervening as an intermediary in that single transaction only. Ibero Tours, however, provides a service, namely as an intermediary, which is totally separate from that provided by the tour operator.

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Furthermore, the tour operator, in the case in the main proceedings, gives no discount since Ibero Tours is, in any event, bound to pay the tour operator the agreed price, regardless of any discount that Ibero Tours gives to the traveller.

32

In those circumstances, the financing by a travel agent, in the situation of Ibero Tours, of a part of the travel price which, with regard to the final consumer of the travel, takes the form of a price reduction for that travel, affects neither the consideration received by the tour operator for the sale of that travel nor the consideration received by Ibero Tours for its intermediation service. Accordingly, pursuant to Article 11A(1)(a) of the Sixth Directive, such a price reduction does not lead to a reduction of the taxable amount either for the principal transaction or for the supply of services by the travel agent.

33

It follows from the foregoing that the answer to the first question is that the provisions of the Sixth Directive must be interpreted as meaning that the principles laid down by the Court of Justice in Elida Gibbs concerning the determination of the taxable amount of the VAT do not apply when a travel agent, acting as an intermediary, grants to the final consumer, on the travel agent’s own

initiative and at his own expense, a price reduction on the principal service provided by the tour operator.

The second and third questions

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Since the reply to the first question is in the negative, there is no need to reply to the second and third questions.

Costs

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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 (First Chamber) hereby rules:

The provisions 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, must be interpreted as meaning that the principles established by the Court of Justice of the European Union in Case C-317/94 Elida Gibbs concerning the determination of the taxable amount for VAT purposes do not apply when a travel agent, acting as an intermediary, grants to the final consumer, on the travel agent’s own initiative and at his own expense, a price reduction on the principal service provided by the tour operator.

[Signatures]

(1) Language of the case: German.