OPINION OF ADVOCATE GENERAL

JÄÄSKINEN

delivered on 8 December 2011 (1)

**Case C?520/10**

**Lebara Ltd**

**v**

**The Commissioners for Her Majesty's Revenue & Customs**

(Reference for a preliminary ruling from the First?tier Tribunal, Tax Chamber (United Kingdom))

(Taxation — Sixth VAT Directive — Article 2 — Article 6(4) — Supply of services –Persons to whom services are supplied — Telecommunications services — Prepaid phonecards containing information facilitating access to international telephone calls — Marketing phonecards through distributors — Rules governing the imposition of VAT — Commission agent — Distribution service — Single supply)

## I – **Introduction**

1. It is common place for the Court to be asked to identify the correct value added tax (VAT) treatment of complex transactions; a task that can be particularly challenging in the realm of modern technologies. The present dispute at the First?tier Tribunal, Tax Chamber, between Lebara Ltd ('Lebara') and the United Kingdom's Commissioners for Her Majesty's Revenue and Customs ('HMRC') concerns the difficult issue of determining VAT liability in the supply chain of telecommunications services.

2. The differences in the observations presented in this case illustrate the challenge entailed in coming to a single correct answer to the questions referred by the national court. There are four possible ways of solving the problem, all of which are, to some degree, sound in law but none of which is without its difficulties. Therefore, it is for the Court to find a solution that is compatible with the fundamental principles of the EU VAT law, and which is workable in practice, both for taxable persons and government administrators who are responsible for its day?to?day application.

## II – **Legal context**

3. Under the first and second paragraphs of Article 2 of the First VAT Directive: (2)

‘The principle of the common system of value added tax 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 tax is charged.

On each transaction, value added tax, 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 value added tax borne directly by the various cost components.’

4. Article 2(1) of the Sixth VAT Directive makes ‘the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such’ subject to VAT. (3)

5. Under Article 5(1) of the Sixth VAT Directive, (4) a supply of goods is to mean ‘the transfer of the right to dispose of tangible property as owner’.

6. Article 6 of the Sixth VAT Directive states:

‘1. “Supply of services” shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5. (5)

...

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 …’ (6)

7. Article 9 of the Sixth VAT Directive, found in Title VI thereof headed ‘Place of Taxable Transactions’ provides that:

‘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. (7)

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)

...'

8. Article 10(1) and 10(2) of the Sixth VAT Directive, (9) found in Title VII thereof headed 'Chargeable Event and Chargeability of Tax', states:

'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.

...'

9. Article 21(1) of the Sixth VAT Directive, headed 'Persons liable for payment for tax', provides: (10)

'1. Under the internal system, the following shall be liable to pay value added tax:

(a) the taxable person carrying out the taxable supply of goods or of services, except for the cases referred to in (b) and (c).

Where the taxable supply of goods or of services is effected by a taxable person who is not established within the territory of the country, Member States may, under conditions determined by them, lay down that the person liable to pay tax is the person for whom the taxable supply of goods or of services is carried out;

(b) taxable persons to whom services covered by Article 9(2)(e) are supplied or persons who are identified for value added tax 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; (11)

...'

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

10. Lebara, a company established in the United Kingdom, operates a telephone switch, under lease, in the territory of the United Kingdom in order to provide telecommunications services. The

switch, in turn, is linked to the international telephone network. Lebara's business model entails routing telephone calls made by end users, who are located all over the EU, to its United Kingdom switch, and then through to the international telephone network. The calls then progress to the customers' desired destinations, all of which are outside of the EU.

11. Lebara is able to conduct this business by virtue of three sets of contractual arrangements. The first is Lebara's agreement with a provider or providers of international telephony. The second are Lebara's agreements with local operators in various Member States which oblige the local operators to route local calls from end users to Lebara's United Kingdom telephone switches.

12. The third is a set of agreements between Lebara and distributors (12) who are established in various Member States other than the United Kingdom. These transactions form the subject of the order for reference.

13. Under the agreements, Lebara sells phonecards to distributors at less than their 'face value'. The heart of the agreement between Lebara and its distributors is that the latter is to promote and sell the phonecards in their Member State of establishment, and thus facilitate consumption of Lebara's low?cost international phone calls by end users.

14. The agreements also contain provisions on the duration of calls, the destination countries to which calls can be made, the tariffs to be charged, the branding of the phonecards (which is usually in the name of the distributor, with assistance provided by Lebara in terms of card design and marketing material) and customer care. Pursuant to the latter, the cards bear a customer care telephone number that gives end users access to the distributor, although in some Member States end users are put in touch directly with Lebara. Hence, the distributor performs the role of the end users' contact point in the event of difficulties, even if it is only Lebara who can remedy the problem.

15. The phonecards provided by Lebara are about the same shape as a credit card. The cards also bear a face value, expressed in the currency of the Member State of the distributor, usually in euros, which is higher than the price paid for them by the distributor to Lebara, along with a unique serial number and a concealed PIN code.

16. The cards remain inactive until the distributor contacts Lebara, asks for the activation of the card, and provides Lebara with the relevant serial number. Lebara then activates the cards corresponding to the relevant serial numbers, provided that the price of the phonecard has been paid, or the distributor's account with Lebara is otherwise in credit. (13)

17. The only use to which the phonecards can be put is the making of international telephone calls. They enable the holder to make telephone calls up to the face value stated on the card.

18. Low?cost international phone calls are accessed by end users by performing three physical acts. First, they scratch away a panel on the card they have purchased from the distributor to reveal a PIN code. Second, they dial the designated local number, which automatically puts them in contact with Lebara's UK telephone switch. The telephone number is printed on the card. Third, they enter the PIN code. To make a telephone call, it is sufficient to have this information. It is not necessary to have the card to hand, and nor is there a requirement to present it to redeem the telephone calls. The end user is then able to dial the number to the desired destination outside of the EU. The call is routed from Lebara's exchange to one of the providers of international telephony with whom Lebara has contracted.

19. Lebara brought proceedings in the United Kingdom First?tier Tribunal, Tax Chamber, challenging a decision of HMRC that required Lebara to account for 'redemption' services supplied

by Lebara, for consideration, to end users for the month of March of 2005. While HMRC took the view that a first taxable supply was made by Lebara when it sold the phonecards to the distributors, it argued that a second supply of telecommunications services, for consideration, was made by Lebara when end users made international telephone calls that were routed via Lebara's switches.

20. For HMRC, the place of supply of this second supply was the United Kingdom, on the basis that end users would be using the phonecards in their personal capacity, and not in a business capacity, so that Lebara remained bound to levy VAT on the supply of the phonecards to end users. However, HMRC were willing to accept that the sale of phonecards to the distributors, as VAT taxable entities, entailed a separate supply taking place in the Member State in which the distributors were established.

21. Lebara contended that, if it were obliged to levy VAT on the supply of phonecards to end users, then double taxation would necessarily result, in breach of EU law. This was so because VAT had already been paid on the sale of the phonecards by the distributors, and to the VAT authorities in the distributors' Member State of establishment, under the 'reverse charge mechanism'. (14)

22. HMRC disputed that the payment of VAT on the supply of phonecards by Lebara to end users would breach EU law. They argued that it was a consequence of lack of harmonisation at EU level on the treatment of vouchers, which left HMRC at liberty to tax the supply of the phonecards. HMRC also argued that risk of non-taxation would result if Lebara's position were accepted, and not double taxation.

23. The United Kingdom First?tier Tribunal, Tax Chamber, referred two questions to the Court for a preliminary ruling.

'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 VAT 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?'

24. Lebara, the Greek Government, the Netherlands Government, the United Kingdom Government, and the European Commission have submitted written observations. They all participated in the hearing that was held on 13 October 2011.

## IV – **Analysis**

### A – *Preliminary remarks*

#### 1. Lebara's phonecard in the context of EU VAT law

25. First, it is important to emphasise that the only use to which the phonecards can be put is the making of telephone calls through Lebara's system. They cannot be used, for example, for paying for other goods and services provided by Lebara or third parties. In this respect the phonecards differ from the scenario in which the credit on a prepaid SIM-card can be used for

multipurpose payments. On the contrary, Lebara's phonecards resemble what are often termed 'single purpose vouchers'. (15)

26. However, Lebara's phonecards differ from all types of vouchers in that their presentation is not necessary to access the service in question. It is sufficient to remember the PIN code and the local phone number that routes the calls to Lebara's switches. In other words, the phonecards are not bearer certificates which represent a specific counter-value that can be used for paying for something and which need to be physically presented before they can be used.

27. It also is questionable whether the phonecards could be understood as a means of payment or digital money. The face value of the phonecard is expressed as a sum of money, but its does not represent any abstract buying power. Rather, it reflects a precise number of minutes of international phone calls to each destination as pre-defined in Lebara's pricing policy. The phonecard is valid for only a limited period of time. After the expiration of that time it cannot be used.

28. Indeed, a precise description of the arrangement would be that the activation of the phonecard creates a temporary customer account in Lebara's system with credit up to a certain amount of phone time units corresponding to the face value of the phonecard. That account can be used by anyone identifying themselves with the PIN code corresponding to the account.

29. Therefore, in my opinion the phonecards are not a means of payment, but a device that facilitates the use of the right of access to telecommunications services, which the customer receives upon the payment of the price to the distributor or his retailer, as the case may be.

2. What service does Lebara supply?

30. At the outset it is sufficient to observe that the phonecards do not function as goods, but relate to the supply of services. Further, identification of the service provided is the starting point for resolving any VAT dispute that is concerned with the supply of a service along a chain of transactions. This is so because, under Article 2 of the Sixth VAT Directive, it is the supply of services which 'shall be subject to values added tax'. In other words, no tax can be levied until the supply of a service has been identified.

31. The facts at hand warrant the analysis propounded by Advocate General Trstenjak, and accepted by the Court, in *MacDonald Resorts*. (16) The case?law of the Court states that, when determining the relevant supply (of a service) in which a taxable person engages in a combination of transactions, regard must be had to all the circumstances in which the transaction takes place, and indeed all the transactions. (17) As the Court has recently affirmed 'consideration of economic realities is a fundamental criterion for the application of the common system of VAT'. (18) It is necessary, therefore, to take account of factors going beyond the mere selling of phonecards in order to identify the relevant supply.

32. According to the settled case?law, while every supply of a service must normally be regarded as distinct and independent, supplies of a service which constitute a single service from an economic point of view should not be artificially split. To avoid the latter, regard must be had to the essential features of the transaction. The ‘ultimate intention’ of end users when they pay for the phonecard is decisive. (19) Moreover, the Court has recently applied these principles to the context of the supply of telecommunications services. In *Everything Everywhere* (20) it was held that, for the purposes of collecting value added tax, certain additional charges invoiced by a provider of telecommunications services to its customers did not constitute consideration for a supply of services distinct and independent from the principal supply of telecommunications services.

33. As the Greek Government emphasises, there is a single supply where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied. (21)

34. The approach, described here, to deciding on the Article 2 relevant supply (22) in the case of multiple transactions in the provision of a service, was established some time ago in *Faaborg-Gelting Linien*. (23) There it was held that transactions consisting of the supply of meals on board ferries between ports amounted not to the supply of goods but the supply of services under the Sixth VAT Directive, because restaurant transactions are characterised by a cluster of features and acts, of which the provision of food is only one component and in which services largely predominate. (24)

35. Account taken of all the relevant facts and transactions, and, moreover, the ‘ultimate intention’ of the end user when purchasing a phonecard, the relevant service is the right to access to international telephone calls that are cheaper than those available through the local telephone exchange in the Member State where the card is purchased, or indeed elsewhere. As was pointed out by the Netherlands Government, for end users gaining the possession of a phonecard is not an aim in itself. (25) What is of interest for the consumer is the low-cost international phone calls which the card facilitates.

36. This facilitation occurs through the provision, in the text written on the card, of the local telephone number that automatically puts the end user’s local call through to Lebara’s UK exchange, and by the supply of the hidden PIN code. Aside from providing, limited, customer care services, through the eyes of the consumer the card serves no other purpose. As I have stated, end users do not need to have possession of the telephone card to make the phone call if they remember the information contained therein.

37. Therefore, on the basis of the established approach to the interpretation of Article 2 of the Sixth VAT Directive, Lebara supplies a right of access to telecommunications services to end users. There is a direct link between end users and Lebara through the payment of consideration by end users to distributors or their retailers, and its onward transmission to Lebara. A direct connection is also evident in the requirement of end users to dial a PIN code which is received by Lebara’s switches and proves purchase of the card.

B – *Construing the legal relationships from the perspective of EU VAT Law*

1. The questions referred and the approach to answering them

38. The referring court has asked two questions. The first of them is rather precise, while the

second is more general. However, in my opinion the first question is based on certain implicit assumptions that extend to issues of both fact and law. Moreover, it is not feasible to attempt to answer the first question without making a comprehensive analysis of the relationships between Lebara, its distributors (and their possible retailers) and the end users, from the perspective of EU VAT law. This analysis must necessarily address the core questions of the nature of the supply, the taxable event, the taxable amount, and the place of supply. These will be considered in the ensuing paragraphs which discuss the four alternative solutions proposed in the written observations of the parties and the interveners.

2. Option 1: Two successive supplies of service

a) Summary of the position of the United Kingdom Government

39. According to the United Kingdom Government, Article 2(1) of the Sixth VAT Directive is to be interpreted so as to mean that a trader makes two supplies by issuing phonecards; one at the time of the initial sale of the phonecard and one at the time of redemption of the phone calls. According to the United Kingdom Government, under the current state of harmonisation of EU law, the Member States have a policy choice as to which of those two supplies attracts VAT. Insofar as this might result in non-taxation or double taxation, this is the result of lack of harmonisation in this area which can only be remedied by legislation on the treatment of face value vouchers across the European Union.

40. The United Kingdom Government further argues that, on this analysis, the place of supply would be the United Kingdom. This is so because the end users are presumed not to be taxable persons. The place of supply is therefore determined by Article 9(1) of the Sixth VAT Directive, and not by Article 9(2)(e). Further, the taxable event then arises at the time of the redemption of the phone calls by end users.

41. Finally, under the proposal of the United Kingdom Government, the consideration for access to low-cost telephone calls would consist of the price paid by the distributors to Lebara for the phonecards. However, the taxable amount would have to be adjusted if fewer calls are redeemed than the card provides. The non?used part of the face value of the phonecard would not be taken into consideration in determining the taxable amount. So, for example, if a phonecard has a face value of EUR 15, which is purchased by a distributor for EUR 10, the taxable amount will be EUR 5, and not EUR 10, if only half of the phonecard is used.

b) Assessment

42. As a starting point, my conclusion that the relevant supply is access to the right to make cheap telephone calls, and furnished by Lebara to end users, does not mean that I have accepted the model proposed by the United Kingdom Government. More particularly, it does not mean that I accept the argument that Lebara makes two supplies, one to the distributors of the phonecards, and another to the end users, for the same consideration.

43. In the first place, the notion of a ‘double supply’ for the same service is alien to the EU VAT legal regime. If it were adopted, it would indeed rupture fundamental principles of EU VAT law, and create problems in terms of legal certainty and double or zero taxation. (26)

44. Moreover, even though the relevant supply is not of a phonecard, but a right of access to Lebara’s telecommunications services, this conclusion would not entitle the United Kingdom to rely on Article 9(1) of the Sixth VAT Directive and levy VAT on all transactions between Lebara and its distributors. It cannot be assumed that all end users are non-taxable persons for the purposes of Article 9(2)(e) of the Sixth VAT Directive because it is reasonable to presume that taxable persons

with links with specific third countries may want to make use of Lebara's services. In these circumstances, the place of supply would shift, under Article 9(2)(e), to the Member State of the customer. But other redeemers will be individual consumers, so that the VAT treatment of Lebara's supply to such end users will still be governed by Article 9(1).

45. Lebara is not able to identify all, or perhaps any, of its end users because they are clients of the distributors or the distributors' retailers. In my opinion, a Member State should not be allowed to base its tax jurisdiction on assumptions that cannot be rebutted or verified. Moreover, acceptance of the argument of the United Kingdom Government that all end users of Lebara's services are non?taxable persons would take this assumption out of the reach of judicial control. (27)

3. Option 2: Two parallel supplies of service

a) Summary of the position of the Netherlands Government

46. The Netherlands Government also proposes an analysis according to which the business model in question entails two supplies of service, but only one of which is made by Lebara. On their case, there is a single supply of telecommunications services by Lebara to end users, combined with an ancillary supply of distribution services from distributors to Lebara.

47. In the view of the Netherlands Government, in circumstances such as those of the main proceedings, Article 2(1) of the Sixth VAT Directive should be interpreted so as to mean that the provider of telecommunications services (Trader A) makes one supply, namely, the supply of telecommunications services to the end user. The supply of the phonecard by the provider (Trader A) to the distributor (Trader B) does not, independently and separately from the telecommunications services, constitute a supply within the meaning of Article 2(1) of the Sixth VAT Directive. However, the distributor (Trader B) supplies distribution services for the benefit of the provider (Trader A).

48. They conclude that the provider (Trader A) is liable to pay VAT in the Member State where he is established, in respect of the supply of the telecommunications services to end users who are assumed to be non?taxable persons. VAT is chargeable at the moment the distributor pays the amount of the face value of the phonecard to the provider by means of a payment on account.

49. Their view, therefore, of the taxable amount is different from, and higher than, that of the United Kingdom Government. Under the model proposed by the Netherlands Government, the taxable amount attaching to the service provided by Lebara would be the face value of the phonecard, irrespective of whether the distributor or a retailer sells the phonecards for a higher or lower price than the face value. Further, the taxable event, for the Netherlands Government, is not the redemption of the phone calls (as proposed by the United Kingdom Government) but the sale of phonecards by Lebara to its distributors. Meanwhile the taxable amount on the ancillary service provided by distributors to Lebara is the difference between the face value of the phonecards and the price that the distributor pays to Lebara upon purchase. In other words, the distributor is considered to have charged that difference as consideration for the service it provides to Lebara.

b) Assessment

50. There are several problems with this solution, aside from the difficulty that I have already flagged concerning the (unfounded) assumption that all end users of Lebara's cards are non-taxable persons. Although I share the view that the delivery of the phonecards by Lebara to the distributor does not amount to an independent supply of services, and that the supply of the cards, as such, is an irrelevant act for VAT purposes, contrary to arguments made by the Netherlands

Government at the hearing, I am unable to agree that the participation of the distributor or his retailer in the final transaction with end users does not amount to some sort of supply of services by the former to the latter.

51. More importantly, the model proposed by the Netherlands Government does not take account of the fact that, in EU VAT law, different rules apply depending on whether an intermediary makes a supply in their own name or in the name of the principal. (28) These rules cannot be ignored in determining the VAT liability of Lebara in the present dispute.

52. So, for example, if A sells something to C, with B acting in his own name as an intermediary completing the transaction with C, B is not providing a separate distribution service to A. Rather, B simply forms a step in the chain of supply.

53. But if there is a transaction between A and C and A uses B as a distribution service provider acting in the name and on behalf of A in the transaction, B provides a separate supply of service to A. The transaction between A and B amounts in VAT law to an input to the supply by A to C.

54. However, for A to be able to deduct the VAT levied on the distribution service by B, the latter would need to present a separate invoice to A to cover its commission. But a logical consequence of the scheme proposed by the Netherlands Government would be the elimination of any separate invoicing of the distributors' commission, which is necessary if VAT is to be levied correctly, because the commission would be comprised of the difference between the consideration the distributor receives and pays for the phonecards. (29)

55. An even more serious problem with the Netherlands Government's model relates to the fact that it would result in excessive taxation if the phonecards were sold to the end user for a price lower than the face value. Also, some consideration would be left untaxed if it were sold at a price higher than the face value. The same problem would necessarily extend to the VAT levied on the distribution service.

4. Option 3: A single chain of supply

a) Summary of the positions of Lebara and the Commission

56. The model proposed by the Commission and which is, in essence, shared by Lebara is robust, but not without its flaws. Their position can be summarised as follows.

57. Where a taxable person ('Trader A') sells to another taxable person ('Trader B'), whose place of business is in another Member State, phonecards representing the right to receive telecommunications services, and Trader B subsequently sells the phonecard for consumption by end users, Trader A makes a single taxable supply of services at the time of the sale to Trader B. The subsequent purchase and use of the card by an end user does not represent a taxable supply by Trader A to the end user but by Trader B to the end user.

58. Under this scenario Trader B is liable under the reverse charge mechanism for VAT for the consideration he pays to Trader A. Trader B is also liable for the VAT levied on the consideration received from the end user. VAT is levied on both supplies in the Member State where Trader B's business is located. Trader B is entitled, however, to deduct the VAT paid by him with respect to the dealings with Trader A when accounting to the VAT authorities in Trader B's Member State upon the sale of the telecommunications services to end users. In other words, Trader B deducts input tax.

b) Assessment

59. This model reflects the idea of a supply chain from the producer through different market stages to the final consumer. The value added at all the market stages is taxed, and the model would lead to correct application of VAT with regard to the place of taxation and the tax rate applied to consumption.

60. However, the problem remains that the phonecard itself has no independent function as a good or service. Further, it is impossible to conclude that the end users are purchasing a right to telecommunications services from the distributors, because the service was never transferred *in toto* from Lebara to its distributors.

61. The marketing arrangements concluded between Lebara and the distributors show that the function of the distributor is to promote the sale of the phonecards to end users, either directly or via retailers. Further, a fundamental element of EU VAT law is that it is a tax on consumption. (30) As I have already explained, the whole purpose of the transactions between Lebara and its distributors was to facilitate consumption, not by the distributors, but by end users. On no analysis can it be said that, in the ordinary course of events, low?cost telephone calls are consumed by the distributors.

62. It is true that the distributor can take the role of an end user and use the phonecard provided that it is paid for and activated, but this is not the real economic purpose of the arrangement between the distributors and Lebara. If a distributor were to use a phonecard to make international phone calls, that would be a taxable self supply, provided the phonecard were used for purposes other than business purposes. This is dealt with under Article 6(2)(b) of the Sixth VAT Directive. (31)

63. Nor do the facts support the idea that the distributors design and market their own telecommunications services, and then implement them by subcontracting the necessary network access services to Lebara.

64. It is clearly Lebara who creates, by its contractual network, a pathway of telecommunications between the end user and Lebara’s switch, and from there, via international phones service providers, to the recipients of the phone calls outside of the EU. In this respect, comparing Lebara’s distributors with providers of virtual mobile telecommunications networks, as suggested by the Commission at the hearing before the Court, cannot be sustained.

65. Finally, in its written observations Lebara placed emphasis on the fact that end users do not know, and have no way of knowing, that the access to low?cost international telephone calls that they have purchased from distributors or retailers are supplied by Lebara. Lebara also emphasised the absence of a direct contractual obligation between the end user and Lebara.

66. With regard to the former, re-branding so that the identity of the supplier is concealed in no way alters the ‘ultimate intention’ of the end user when they purchase the cards, which is to make low-cost international phone calls. With regard to the latter, Article 2 of the Sixth VAT Directive is not predicated on the existence of contractual relations between the end user and the supplier, but rather on the flow of consideration between the end user and the supplier. As the Court stated in *Town & County Factors*, (32) adopting the approach of making the existence of a legal relationship depend on the obligations of the provider of the service being enforceable would compromise the effectiveness of the Sixth VAT Directive. (33) Consideration passes from end users to Lebara via retailers and distributors. Moreover, there is a direct link between end users and Lebara because the PIN code gives the end user direct access to Lebara’s switches.

67. In summary, if the Court were to accept the model proposed by the Commission and Lebara, it would require, at minimum, an elastic interpretation of the legal relationship between Lebara and its distributors which, moreover, is not supported by the Court’s case-law. On no analysis does Lebara provide the same service to its distributors as the latter provide to end users.

5. Option 4: Supply of services by a taxable person acting in his own name but on behalf of another

a) Summary of the Commission’s alternative position

68. The Commission further submits, in the alternative, that under Article 6(4) of the Sixth VAT Directive, where taxable persons acting in their own name but on behalf of another take part in a supply of services, they must be considered to have received and supplied those services themselves. Thus, Lebara’s distributors (who clearly act in their own name) should be considered as having received the supplies from Lebara in a first taxable transaction, and then having supplied them to the end users in a second transaction.

b) Assessment

69. The Court has recently held that Article 6(4) of the Sixth VAT Directive creates the legal fiction of two identical supplies of services provided consecutively. Under that fiction, the operator, who takes part in the supply of services and who constitutes the commission agent, is considered to have, firstly, received the services in question from the operator on behalf of whom it acts, who constitutes the principal, before providing, secondly, those services to the client. It follows that, as regards the legal relationship between the principal and the commission agent, their respective roles of service provider and payer are notionally inversed for the purposes of VAT. (34)

70. In my opinion that fiction is the key to resolving this case. For VAT purposes, the distributors should be considered as commission agents acting in their own name, but on behalf of Lebara, who is the principal. The Commission correctly states that Article 6(4) of the Sixth VAT Directive leads to levying VAT in the same way as the model of two supplies in a single chain. I would add that Article 6(4) of the Sixth VAT Directive achieves this without distorting the reality of the service supplied by Lebara, and to whom the service is supplied.

71. The distributors are not, in fact, recipients of a right of access to telecommunications services, but Article 6(4) of the Sixth VAT Directive amounts to a mandate from the EU legislature for a fiction of this kind to be applied when a distributor acts in his own name but on behalf of another. It also results in the tax being levied in the correct Member State at the correct rate — in the case to hand, in the Member State where the distributor is located, with the taxable amount being the sum paid by the distributors to Lebara, while the taxable event arises when the phonecards are activated. Moreover, Article 6(4) enables the invoices to be issued correctly to,

and by, the taxable person participating in the supply. (35)

72. However, Lebara has emphasised that the distributors do not act as their agents and that the national judge had already found that the distributors act in their own name. In other words, this suggests that the agreement between Lebara and its distributors does not reflect a relationship in which the distributors act as Lebara's 'undisclosed' or commission agent under Article 6(4) of the Sixth VAT Directive.

73. What is required in the present preliminary ruling case, however, is interpretation of the meaning of Article 6(4) of the Sixth VAT Directive by reference to EU law, and not national laws on agency, or any other element of national civil law, or indeed domestic tax law. Moreover, Article 6(4), as a tax law provision, may be vested with a meaning, which may not necessarily be the same as parallel concepts arising under any element of national civil law. In my opinion Article 6(4) of the Sixth VAT Directive is not restricted to relations where there is an agency relationship, disclosed or otherwise, under the law of the Member State in question, and in this case the United Kingdom. The requirements of Article 6(4) are met when the three criteria (participation in the supply of service, in the trader's own name, on behalf of another) are fulfilled.

74. The absence of a specific question in the order for reference on the meaning of Article 6(4) of the Sixth VAT Directive does not preclude the Court from addressing that provision. It is well established that, even when a national court has formally limited its questions for interpretation to a confined range of provisions, such a situation does not prevent the Court from providing the national court with all of the elements of interpretation of EU law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in questions. (36) Indeed, this sentiment is reflected in the breadth of the second question referred. Further, the ruling of the Court in *Henfling and Others*, (37) on the approach to interpreting Article 6(4) of the Sixth VAT Directive, post-dated any findings that the First?tier Tribunal, Tax Chamber, may have made concerning the meaning of Article 6(4). (38)

75. As to the EU law interpretation of Article 6(4) of the Sixth VAT Directive, it seems to me that the distributors in the present case are to be considered as acting on behalf of Lebara for the following reasons. First, I have the impression that the delivery of the phonecards to the distributors does not mean that any economic risk is transferred from Lebara. This is so because the distributors do not seem to have to pay for phonecards which have not been activated. I conclude on the basis of the submissions of Lebara that the distributors pay no consideration to Lebara if they do not manage, when they market the cards, to sell them to end users. When this happens, they do not ask for their activation. In other words, economically, they act on behalf of Lebara.

76. Further, the distributors take part in the supply of a right of access to telecommunications services from Lebara to the end user. They take responsibility, in their own name, but on behalf of Lebara, for the distribution of access to low-cost telephone calls, along with the transfer of consideration from the end user to Lebara. Moreover, it is the distributors who take the necessary steps (namely payment and communication to Lebara of the serial number) to activate the temporary customer account that the phonecard represents.

77. Therefore, in my opinion the most tenable way of classifying the set of facts of the present case is to find that Lebara supplies to end users services consisting of right of access to telecommunications services against prepayment that can be considered as a temporary customer account up to certain amount of phone time units. The distributors take part in these supplies in their own name but on behalf of Lebara. Therefore, under Article 6(4) of the Sixth VAT Directive the distributors are considered as both having received the service from Lebara and as having provided it to the end users. This leads to VAT treatment as explained above in points 70 and 71.

78. I note, however, that the Court, in its ruling in *Henfling and Others*, left the question of the satisfaction of Article 6(4), on the facts at hand, to the national court. The Court confined its approach to issuing guidelines of the kind I have here elaborated on the factors to be taken into account when applying Article 6(4). (39) That being so, whether the facts in this case meet the requirements of Article 6(4) may be left for conclusion by the national court, with due account taken of the findings of the Court on the various points raised in these proceedings, the need to preserve the integrity of the established principles of EU VAT law, and the autonomous EU meaning to be given to Article 6(4), as distinct from concepts arising under national law.

## V – **Summary**

79. Of the four alternatives presented above I advise the Court to reject the model put forward by the United Kingdom Government because it may lead either to double taxation or zero taxation. In addition it leads to the conclusion that the place of supply, and consequently the VAT jurisdiction, has to be determined on the basis of the assumption that all end users are non-taxable persons, the truth of which cannot be controlled judicially.

80. The latter point also applies to the model proposed by the Netherlands Government. Moreover, that model may lead, as the case may be, to excessive or too little VAT since the taxable base for both the supply of the right to telecommunications services and the separate distribution service is derived from the face value of the phonecards. This may be higher or lower than the price paid by the end users for them.

81. The supply chain model proposed by Lebara and the Commission leads to the correct end result, but at the expense of distorting the relationship between Lebara and its distributors, given that it would require the Court to conclude that Lebara sells right of access to its low-cost telephone calls to its distributors. Instead of this, reliance on the legal fiction created by Article 6(4) of the Sixth VAT Directive would more correctly fit in with the realities of the business model that has been presented to the Court in the present case. However, should the Court disagree with my conclusions concerning Article 6(4), in the alternative I would counsel in favour of accepting the proposal of the Commission and Lebara, pursuant to which sale of the phonecard by Lebara to its distributors constitutes a single supply, and the onward sale by distributors a separate supply.

## VI – **Conclusion**

82. On the basis of these considerations I propose the following answer to the preliminary questions referred by the First?tier Tribunal, Tax Chamber:

Where a taxable person (‘Trader A’) sells to another taxable person (‘Trader B’) phonecards containing information enabling their buyer (‘End User C’) to access and receive telecommunications services from A to the amount specified on the card (provided that A has received from B the consideration agreed between them) Trader A supplies to end user C a service consisting of a right of access to telecommunications service against prepayment. However, pursuant Article 6(4) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the

harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, if Trader B takes part in his own name but on behalf of Trader A in the supply of that service to end user C, which is for the national court to ascertain, Trader B shall for VAT purposes be considered as having received that supply of service from Trader A and as having supplied it to End User C.

83. If the Court chooses not to follow this proposal, or if the national court is unable to find that the distributors act on behalf of Lebara, I suggest in the alternative the following answer to the preliminary questions of the First?tier Tribunal, Tax Chamber:

Where a taxable person ('Trader A') sells to another taxable person ('Trader B') phonecards representing the right to receive telecommunications services from Trader A, and Trader B subsequently sells the phonecard to End User C who makes the international telephone calls represented in the phonecard, Trader A makes a single taxable supply of telecommunications services at the time of the sale to Trader B. The subsequent purchase and use of the card by an End User does not represent a further taxable supply by Trader A.

1 – Original language: English.

2 – Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes ('First VAT Directive') (OJ, English Special Edition 1967, p. 14). Article 2 is now reflected in Article 1(2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive') (OJ 2006 L 347, p. 1). The Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment ('Sixth VAT Directive') (OJ 1977 L 145, p. 1) is applicable *ratione temporis,* in the present case. It has now been replaced by the VAT Directive. For the sake of clarity reference will be made throughout this Opinion to both the Sixth VAT Directive and the equivalent provisions in the VAT Directive.

3 – See now Article 2(1) of the VAT Directive.

4 – Article 5(1) of the Sixth VAT Directive is now Article 14(1) of the VAT Directive.

5– Now Article 24 of the VAT Directive.

6– Now Article 28 of the VAT Directive.

7– The substance of this provision now appears in Articles 44 and 45 of the VAT Directive.

8– The provision in the 10th indent of Article 9(2)(e) of the Sixth VAT Directive was inserted by Council Directive 1999/59/EC of 17 June 1999 amending Directive 77/388/EEC as regards the value added tax arrangements applicable to telecommunications services (OJ 1999 L 162, p. 63). See now Articles 369a to Article 369k of the VAT Directive.

9– See now Articles 62, 63 and 65 of the VAT Directive.

10 – See now Title XI, Chapter 1, Section 1, entitled 'Persons liable for payment of VAT to the tax authorities', which encompasses Articles 193 to 205.

11– Article 21(1) [28 g] of the Sixth VAT Directive was amended by Article 1(4) of Council Directive 2000/65/EC of 17 October 2000 amending Directive 77/388/EEC as regards the determination of the person liable for payment of value added tax (OJ 2000 L 269, p. 44).

12– Lebara's counsel explained at the hearing that the distributors do not normally provide telecommunications services themselves. They are dealers of telecommunications services who can buy these services for distribution from other service providers aside from Lebara.

13– Submissions made by counsel for Lebara at the hearing stated that distributors pay for the phonecards before they are activated, and sell them after they have been activated. The sequence was said to be payment in full, followed by activation, followed by sale. However, Lebara's written observations state that, to counter the risk of theft, the phonecards could not be used to make a phone call at the time they were sent from Lebara to a distributor. After receiving them, the distributor would ask Lebara to activate the phonecards. The distributor became liable to pay Lebara for the phonecards only once they were activated. If the phonecards were subsequently stolen, or the distributor failed to pay for them, they could be deactivated by Lebara. These positions are not entirely consistent with regard to the point in time that payment takes place between distributors and Lebara. It seems to be resolved, however, by the order for reference. It states that 'Lebara would activate the phonecards if the distributor's account with Lebara was in credit or would otherwise request a payment from the distributor before activating them'.

14– Under 'the reverse charge mechanism', provided for in Article 21(1) of the Sixth VAT Directive, if supplier A, and buyer B, are not established in the territory of the same Member State, the tax accountability is reversed so that the receiver of the supply is bound to pay VAT and not the supplier. This means that B is bound to collect the VAT due on the transaction, and account for it to the VAT authorities in the Member State of B. As already noted, Article 21(1) is now encapsulated in Title XI, Chapter 1, Section 1, of the VAT Directive, entitled 'Persons liable for payment of VAT to the tax authorities', which encompasses Articles 193 to 205.

15– In this sense, a small modification of the facts might render the legal solution in this case inapplicable to a similar situation. Thus, the case to hand is not necessarily relevant to more complex VAT problems concerning multi-purpose vouchers or situations where consideration for supplies of goods or services is paid by using pre-paid or account credit on mobile or fixed telephone connections.

16– Case C–270/09 [2010] ECR I?13179, paragraph 18.

17– Joined Cases C?308/96 and C?94/97 *Madgett and Baldwin* [1988] ECR I?6229, paragraphs 23 and 24; Case C?349/96 *CPP* [1999] ECR I?973, paragraphs 26 to 32; Case C?37/08 *RCI Europe* [2009] ECR I?7533, paragraphs 23 to 25; Case C?41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I?9433, paragraphs 17 to 26; *MacDonald Resorts*, cited in footnote 16, paragraph 18.

18– Joined Cases C?53/09 and C?55/09 *Loyalty Management UK and Baxi Group* [2010] ECR I?9187, paragraph 39.

19– In this sense see *MacDonald Resorts*, cited in footnote 16, paragraph 22.

20– Case C?276/09 *Everything Everywhere* [2010] ECR I?12359.

21– *Madgett and Baldwin*, cited in footnote 17, paragraph 24; *CPP*, cited in footnote 17, paragraph 30.

22 – See for example, *MacDonald Resorts*, cited in footnote 16, paragraphs 24 and 32, where it was held that transactions for the acquisition of points rights in time share options schemes for holiday resorts were 'preliminary transactions' so that the 'real service', which entailed the right to

temporarily stay in a property or use a hotel, or to use another service could be exercised; in *Madgett and Baldwin*, cited in footnote 17, paragraphs 24 and 25, it was held that services that were brought in by third parties, and which did not constitute an aim in themselves, but a means of better enjoying the principal service supplied by the trader, were purely ancillary; see also *Levob Verzekeringen and OV Bank,* cited in footnote 17, paragraphs 17 to 26, where it was held that there was one supply of a service, and not two, when functional software was tailored, after its initial sale, to the buyer's requirements.

23– Case C?231/94 [1996] ECR I?2395.

24– *Faaborg-Gelting Linien*, cited in footnote 23, paragraph 14.

25– *MacDonald Resorts*, cited in footnote 16, paragraph 24.

26– If the Member State of the distributor took the view that the redemption of the phone calls was the taxable event, and the Member State of the service provider took the view that the supply of the phonecards to end users was the taxable event, neither of them would levy VAT in the factual situation at hand. It would also be contrary to the fundamental principle of VAT law in Article 2 of the First VAT Directive that VAT is a tax on consumption exactly proportional to the price of goods and services.

27– Similarly, in *MacDonald Resorts*, cited in footnote 16, the Court rejected a solution that would have entitled the taxable person in that case to make their own assessment of the portfolio of accommodation available for the purposes of calculating VAT. More generally, the Court has held that Member State courts must be in a position 'effectively to apply the relevant principles and rules of Community law' when exercising judicial control. See Case C?120/97 *Upjohn* [1999] ECR I?223, paragraph 36. See more recently Opinion 1/09 [2011] ECR I?1137, where the Court observed at point 85 that 'the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties'.

28 – See Article 6(4) and 9(2)(e), seventh indent, of the Sixth VAT Directive.

29 – See Article 18(1)(a) of the Sixth Directive, according to which the taxable person, in order to exercise his right to deduct must, 'in respect of deductions under Article 17(2)(a), hold an invoice, drawn up in accordance with Article 22(3)'. See now Article 178(a) of the VAT Directive.

30– See recently *RCI Europe*, cited in footnote 17, paragraph 39.

31 – Article 6(2)(b) of the Sixth VAT Directive provides that supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business shall be treated as supplies of services for consideration. See now Article 26(1)(b) of the VAT Directive.

32– Case C?498/99 [2002] ECR I?7173.

33 – *Town & County Factors*, cited in footnote 32, paragraph 21.

34– Case C?464/10 *Henfling and Others* [2011] ECR I?6219, paragraph 35.

35 – See Ben Terra and Julie Kajus, *European VAT Directives* (2011), section 10.2.1.4.

36– Case C?434/09 *McCarthy* [2011] ECR I?3375, paragraph 24.

37 – Cited in footnote 34.

38– The order for reference to the Court in this case is dated 22 October 2010 and *Henfling and Others* was decided in the following year on 14 July 2011.

39– Cited in note 34. See in particular paragraphs 42 and 43.