OPINION OF ADVOCATE GENERAL GULMANN

delivered on 3 March 1993 *

Mr President,
Members of the Court,

1. The Tribunal de Première Instance, Brussels, has referred to the Court for a preliminary ruling two questions concerning the interpretation of Article 11A of the Sixth Directive on VAT. [1] These questions arise in proceedings brought by the Belgian company SA Chaussures Bally against the Belgian revenue authorities for a declaration that a decision taken by them is void.

2. The court of reference has explained in its order for reference that the plaintiff markets 'Bally' shoes through a network of shops in Belgium and has further stated as follows:

'The customers of shops run by the plaintiff pay for their purchases either in cash, by cheque of by credit card for example "American Express", "Diners' Club" or the like;

In order to meet the wishes of potential customers to use credit cards as a means of payment, the plaintiff signed "shop" type agreements with organizations issuing credit cards;

Such organizations withhold from the traders affiliated to them a commission which is generally some 5% of the payments which they make to them following their use of the credit cards ...;

That commission represents payment for the services which the Diners' Club performs for establishments affiliated to it;

Certain organizations issuing credit cards prefer to submit one invoice for all their services (American Express), whereas others regard the service as relating to the individual purchase (Diners), but the commission or discount is always calculated on the whole turnover in the transactions between the affiliated establishment and the issuing organization.'

3. It further appears from the order for reference that:

— at one stage Bally had asked the Belgian revenue authorities to clarify the question whether it was required to pay VAT on the full selling price or whether it was responsible only for tax on the amount it

* Original language: Danish.

1 — Directive 77/388/EEC of 17 May 1977 on the harmonization 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).

received from the organizations issuing credit cards after they had deducted their commission; and

— the Belgian revenue authorities claim in the main proceedings that the taxable amount is the first-mentioned sum, whilst Bally claims that the taxable amount is the second such sum.

4. *The first question referred to the Court* is as follows:

'*1. Article 11(1)(a) of the directive:*

In the context of a sale in which the payment is made by credit card, must not the view be taken that the consideration obtained from the credit organization by the affiliated trader for the delivery of a product is restricted solely to the amount received from that organization by the affiliated trader?'

5. Article 11 of the directive contains rules as to the taxable amount. Article 11A lays down rules as to the taxable amount for transactions within the territory of the country. Paragraph 1 provides:

'1. The taxable amount shall be:

(a) in respect of supplies of goods ... 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 ...'

Article 11A(2) and (3) lay down, respectively, as regards certain specific cases, what is to be included in the taxable amount (for example taxes, other than VAT, and packing, transport and insurance costs) and what is not to be included therein (for example price reductions by way of discount for early payment).

6. It may perhaps be helpful to show by certain figures the practical significance of the differing points of view.

If it is assumed for example that:

— the rate of VAT is 20%;

— the selling price less VAT is ECU 100; and

— the commission deducted by the card-issuing organization on payment to the vendor is 5%,

the Belgian authorities' view would mean that the company's taxable amount would be

ECU 100, that is, that the VAT due is ECU 20, whereas Bally's view would imply that the taxable amount is only ECU 95, that is, that the VAT due is ECU 19.

It may also be appropriate to stress that:

— the vendor has claimed from the purchaser, that is, the final consumer, VAT on the full amount and that the purchaser has signed a 'credit card slip' for ECU 120;

— Bally receives from the issuer of the credit card ECU 114, since the commission of 5%, according to the information received, is calculated, in pursuance of the existing agreements between Bally and the issuers of the credit cards, as the selling price including VAT; and

— in accordance with a possible exception in the directive, it seems that in Belgium VAT is not levied on the card-issuing organizations' commission.

7. Bally states in its observations submitted to the Court substantially *that* in fact it receives from the card-issuers, to take the figures in the example, only ECU 95 in payment for the goods sold, together with ECU 19 representing VAT on the payment actually received for the goods, *that* the ECU 95 must therefore be regarded as the consideration it has received from a third party for the sale of the goods and *that* it is therefore that amount which, according to Article 11A, represents the taxable amount. Bally states in addition that it is particularly the card holders, that is, the purchasers, who benefit from the services provided by the card-issuers, and that it is unreasonable for the company to have to pay VAT on sums paid to the card-issuers, simply because they are exempt.

The Belgian Finance Minister, the United Kingdom and the Commission agree that Article 11A must be interpreted as meaning that the taxable amount is the full amount of the consideration, namely ECU 100. There are certain differences in the reasons they give. These differences arise *inter alia* in a different view as to whether the consideration for the goods supplied is received from the purchaser or from a third party, namely the card-issuers.

8. In my view there can be no reasonable doubt that Article 11A must be interpreted as meaning that the taxable amount is the sum on which Bally demands VAT from the purchasers, even if they pay by credit card.

I think it is important to remember that the purpose of Article 11A is primarily to establish the taxable amount — the taxable value — of the goods delivered by a supplier to a purchaser with a view to the latter's paying VAT at the rate applicable in the Member State on the taxable amount thus laid down. The VAT is 'paid' in the last resort by the final consumer as a given percentage of the taxable amount, as to which see Article 12(3)

of the directive. The detailed provisions of Article 11A(1) to (3) aim in the first place at solving the problems which not infrequently arise in practice, when the taxable person, the supplier, has to determine the taxable amount in relation to the person who has to pay the VAT for the article supplied. [2]

9. Accepting Bally's view would mean that there may be a difference between the taxable amount used when demanding VAT from final consumers and that which determines the amount of VAT payable by the taxable person to the authorities. It seems to me hard to reconcile with the system of the directive to accept that such a difference can exist and in any case Bally did not succeed in showing that there should be such a difference in this situation.

10. In my view there are no compelling reasons for following the company's point of view. In this connection it seems to me that there is no problem in regarding the commission which the card-issuer deducts from the amount on the credit-card payment slip as Bally's payment for the services rendered to it by the card-issuer. It is a fact that the commission payable is laid down in an agreement between Bally and the card-issuer on which the card-holder, that is, the purchaser of the goods, has no influence. Bally has thus also assumed the obligation to pay commission on the full value shown on the credit-card payment slip, namely the selling price *plus* VAT.

Moreover, in my opinion, Bally is misunderstanding the position when it expresses the view that the fact that the services of the card-issuer are not subject to VAT is of essential importance for assessing this case. If such services were subject to VAT the consequences at first sight would be only that the commission of 5% would have to be subject to VAT and that Bally would therefore have to pay a larger sum to the card-issuers.

11. The United Kingdom stressed during the oral procedure, correctly in my view, that the Court should ensure that the reasons it gives for its answers to the question referred to it should not as such have a content as to be able to influence the legal description of the legal relationships, which in other respects are quite complicated, between card-holders, card-issuers and the suppliers affiliated to the latter. The reasons I have given for my suggested answer do not seem to me, and in any event are not intended, to be capable of being taken as support for any particular view as to how the legal relationships between the parties involved are to be described outside the sphere of VAT.

12. The Commission called attention in its written observations to the fact that in certain circumstances — namely where a supplier generally gives cash customers a discount equal to the card issuer's commission — there might be grounds for modifying the solution supported by the Commission itself in this case. The United Kingdom Government stated during the oral procedure that it did not agree with the Commission on this

2 — The case-law of the Court on the interpretation of Article 11A relates moreover to such situations, for example the judgments in Joined Cases 138 and 139/86 *Direct Cosmetics* [1988] ECR 3937 and in Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365.

point. I do not think there is any reason for the Court to express an opinion on that question in this case, in which it is clear according to the order for reference that the circumstances referred to by the Commission do not apply.

13. *The second question from the court of reference* is worded as follows:

'*Article 11(3)(c) of the Sixth Directive:*

Must the amount of the commission or discount retained by the issuing organization from the price displayed be regarded as payment for the expense incurred on behalf of the affiliated trader so as to ensure him a guaranteed payment and accordingly not form part of the taxable amount under Article 11(3)(c) of the Sixth Directive?'

14. Article 11A(3)(c) provides that the taxable amount is not to include:

'the amounts received by a taxable person from his purchaser or customer as repayment for expenses paid out in the name and for the account of the latter and which are entered in his books in a suspense account ...'.

15. That provision cannot be quoted as support for thinking that Bally may use as the taxable amount in relation to the revenue authorities the sum which it receives from the card-issuing organization.

As previously mentioned, the purpose of Article 11A(3) is to make it clear that the supplier of goods is not to include certain sums in the taxable amount used as against the purchaser. The purpose of subparagraph (c) is thus to make it clear that there are sums which the supplier does as a matter of pure fact receive from purchasers but which nevertheless are not to be included in the taxable amount because they are only a repayment of expenses which the supplier has incurred in the purchasers' interest and which cannot therefore be regarded as a part of the consideration for the goods delivered.

This case relates to a quite different situation since the purchaser has in fact paid VAT on a taxable amount from which no deduction of the kind referred to in Article 11A(3)(c) has been made.

It may be added that, as has already been mentioned, it cannot be regarded as natural to consider the commission paid as an amount paid out 'in the name and for the account' of the purchaser.

16. I therefore suggest that the Court should reply as follows to the questions referred to it by the Tribunal de Première Instance, Brussels:

Article 11A of the Council's Sixth Directive should be interpreted as meaning that when a purchaser pays for an article with a credit card the taxable amount is the selling price — excluding the value added tax itself — which appears on the credit card payment slip signed by the purchaser at the time of the purchase and not the amount which the supplier receives from the organization issuing the credit card after the latter has deducted an amount as commission.