JUDGMENT OF THE COURT (Sixth Chamber)

3 July 2001 *

In Case C-380/99,

REFERENCE to the Court under Article 234 EC by the Bundesfinanzhof (Germany) for a preliminary ruling in the proceedings pending before that court between

Bertelsmann AG

and

Finanzamt Wiedenbrück,

on the interpretation of Article 11A(1)(a) 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 (OJ 1977 L 145, p. 1),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris (Rapporteur), J.-P. Puissochet, R. Schintgen and N. Colneric, Judges,

Advocate General: C. Stix-Hackl,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Bertelsmann AG, by A. Raupach and D. Pohl, Rechtsanwälte,

— the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

— the United Kingdom Government, by J.E. Collins, acting as Agent, assisted by A. Robertson, barrister,

— the Commission of the European Communities, by E. Traversa and K. Gross, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Bertelsmann AG and the Commission at the hearing on 25 January 2001,

after hearing the Opinion of the Advocate General at the sitting on 6 March 2001,

gives the following

Judgment

1 By order dated 5 August 1999, which was received at the Court on 8 October 1999, the Bundesfinanzhof (Federal Finance Court, Germany) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 11A(1)(a) 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 (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive').

2 The question was raised in a case between Bertelsmann AG (hereinafter 'Bertelsmann') and the Finanzamt Wiedenbrück (Tax Office, Wiedenbrück, hereinafter 'the Finanzamt'), concerning notices of assessment to value added tax (hereinafter 'VAT') payable by Bertelsmann for the years from 1985 to 1990 on bonuses in kind which it had supplied to its existing customers in return for the introduction of new potential customers.

Legal context

Community legislation

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

'The taxable amount shall be:

(a) in respect of supplies of goods and services..., 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...'

4 Article 11A(2)(b) of the Sixth Directive provides:

'The taxable amount shall include:

...

(b) incidental expenses such as commission, packing, transport, and insurance costs charged by the supplier to the purchaser or customer...'

The national legislation

5 Paragraph 3 of the Umsatzsteuergesetz (Law on Turnover Tax) of 1980 (hereinafter 'the UStG') specifies the transactions subject to VAT. In particular Paragraph 3(12) of the UStG covers transactions of exchange and provides as follows:

'There is an exchange where the consideration for a supply consists in a supply. There is a transaction akin to an exchange where the consideration for another service consists in a supply or another service'.

6 The second sentence of Paragraph 10(2) of the UStG, which concerns the taxable amount of exchanges and transactions akin to exchanges, provides:

'In the case of exchanges, transactions akin to exchanges and surrenders in lieu of payment, the value of one transaction constitutes the consideration for the other transaction'.

The main proceedings and the question referred

7 Bertelsmann is the controlling company of a group of companies carrying on business as book and record clubs. During the years 1985 to 1990, group

companies gave bonuses in kind, such as books, records and bicycles, to existing club members in return for the introduction of new members. Those companies bought the bonuses in kind from third-party suppliers and bore the costs of delivering those bonuses to the introducing members.

8 In the notices of assessment for the years 1985 to 1990, the Finanzamt decided that the supplies of the bonuses in kind constituted transactions akin to an exchange and included in the taxable amount of those transactions the costs of delivering the bonuses borne by those companies besides their purchase price.

9 Since it considered that the inclusion of the costs of delivery in the taxable amount of supplies of bonuses in kind was not in accordance with the Sixth Directive, Bertelsmann brought, without prior administrative procedure, a 'leap-frog' action ('Sprungklage') before the Finanzgericht Münster (Finance Court, Munster).

10 Its action did not succeed and Bertelsmann appealed on points of law to the Bundesfinanzhof. That court states in its decision to make a reference to this Court that, in its view, the value of the goods supplied cannot be the only element to be taken into account in determining the taxable amount of the supplies in issue in the main proceedings. It considers that the taxable amount must also include the costs of delivery, since the delivery of the bonuses in kind was included in the supply of the bonuses, as an incidental service. However, since it considered that the case could not be definitely decided on the authority of the Court's judgments in Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365 and Case C-33/93 *Empire Stores* [1994] ECR I-2329, the Bundesfinanzhof

decided to stay the proceedings, and to refer the following question to the Court for a preliminary ruling:

'Is Article 11A(1)(a) of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (77/388/EEC) to be interpreted as meaning that the taxable amount in respect of the supply of a bonus payable in kind, which is sent to the recipient in exchange for recruiting a new client, includes not only the purchase price of the bonus but also the delivery costs?'

The question referred for a preliminary ruling

11 By its question, the referring court is asking, in essence, whether Article 11A(1)(a) of the Sixth Directive should be interpreted as meaning that the taxable amount for the supply of a bonus in kind, which constitutes consideration for introducing a new customer, also includes, besides the purchase price of that bonus, the costs of delivery when they are paid by the party who delivers the bonus.

The arguments put forward in the observations submitted to the Court

12 Bertelsmann submits that, since the value of the consideration constituting the taxable amount for the supply of the bonuses in kind is a subjective value which is

difficult to determine, only the purchase price of the bonuses should be taken into account. In its view, its argument is confirmed by the judgment in *Empire Stores* in which the Court did not include delivery costs in the taxable amount, although that judgment concerned a mail-order company. Furthermore, Bertelsmann maintains that delivery costs cannot be regarded as incidental expenses, within the meaning of Article 11A(2)(b) of the Sixth Directive, since it pays them itself and does not seek repayment from its purchasers, that is to say the customers who have acted as middlemen.

13 The German Government, the United Kingdom Government and the Commission, on the other hand, submit that the taxable amount for the supply of a bonus in kind includes, besides the cost of purchasing that bonus, the costs of delivering it. Whilst admitting that, by reason of the question referred to the Court, it did not explicitly rule, in its decision in *Empire Stores*, on the inclusion of the costs of delivery in the taxable amount, they submit that it is clear from that judgment that the costs of similar services incidental to the supply are to be included in the taxable amount.

14 The German and United Kingdom Governments also submit that the necessity of including the delivery costs in the taxable amount also follows from the principle by which VAT must be levied in a manner which is uniform and neutral in its effect on competition. The United Kingdom Government argues, in particular, that if it were accepted that the supply by the taxable person of a service consisting of delivery is not to be taken into account in calculating the taxable amount, this would permit the avoidance of tax through the making of supplies in kind which would undervalue the taxable amount. Therefore, the German and United Kingdom Governments submit that the tax on the service of delivery should be put into effect on the economic level as if the introducing customer had acquired the bonus in kind and its delivery in return for the payment of a sum of money also covering the costs of delivery.

Findings of the Court

15 It is evident from the judgment in Case C-126/88 *Boots Company* [1990] ECR I-1235, paragraphs 15 and 16, that before the application of Article 11A(1)(a) of the Sixth Directive can be accepted, the application of Article 11A(2)(b) thereof must be excluded.

16 It is agreed that the costs of delivery at issue in the main proceedings consist of transport costs. On the other hand, it is also agreed that Bertelsmann did not ask the recipients of the bonuses in kind to pay such costs. It follows that Article 11A(2)(b) of the Sixth Directive does not apply to the circumstances in the main proceedings. It is therefore with regard to Article 11A(1)(a) of the Directive that the taxable amount for the supply of the bonuses must be determined.

17 In order to interpret, for that purpose, the term 'consideration' in Article 11A(1)(a) of the Sixth Directive, it should be recalled that, according to settled case-law, the consideration for a supply of goods may consist of a supply of services, and so constitute the taxable amount within the meaning of that provision, if there is a direct link between the supply of goods and the supply of services and if the value of those services can be expressed in monetary terms (see, in particular, *Naturally Yours Cosmetics*, paragraphs 11, 12 and 16, and *Empire Stores*, paragraph 12).

18 In the present case, a supply of goods was made in consideration for a supply of services consisting in the introduction of new customers. In this regard, it is to be observed, first, that there is a direct link between the supply of the bonuses in kind and the introduction of new customers and, second, that since the services rendered to Bertelsmann were remunerated by supplies of goods, their value can

be expressed in monetary terms (see the judgment in *Empire Stores*, paragraphs 16 and 17).

19 The question is, then, whether a direct link exists not only between the supply of the bonuses in kind and the introduction of new customers but also between the delivery of the bonuses and that provision of a service.

20 It is clear from the case-law of the Court that, with regard to VAT, a supply must be regarded as incidental to a principal supply when it does not constitute for the customer an end in itself but a means of better enjoying the principal service of the supplier (see, in particular, Case C-349/96 *CPP* [1999] ECR I-973, paragraph 30, and Case C-76/99 *Commission* v *France* [2001] ECR I-249, paragraph 27).

21 In the present case, having regard to its circumstances, it must be concluded that the delivery of the bonuses in kind constitutes a service incidental to the principal supply, which is the supply of the bonuses. In effect, the customers who have introduced new customers are entitled to the supply of the bonus in kind and to its delivery. Therefore, the supply and the delivery of the bonus in kind together form a single transaction, remunerated by consideration which consists in the introduction of new customers.

22 As for determining the value of such transaction for the purposes of the taxable amount, it must be pointed out that, according to settled case-law, it is a subjective value, since the taxable amount is the consideration actually received and not a value estimated according to objective standards (see, in particular, *Naturally Yours Cosmetics*, paragraph 16, and *Empire Stores*, paragraph 18).

23 Furthermore, as the Court held at paragraph 19 of the judgment in *Empire Stores*, that value, in order to be subjective, must be the value which the recipient of the supply of services attributes to the services which he seeks to obtain and correspond to the amount which he is prepared to spend to that end.

24 It must be held that, on application of the principle thus stated in the judgment in *Empire Stores*, all the expenses borne by the recipient to obtain the supply in question, including the costs of incidental services which are connected to the supply of the goods, make up the value of the supply of services. It follows that, in the present case, because the recipient has not only paid the purchase price of the bonuses in kind but also paid the costs of their delivery, those costs must be included in the taxable amount of the said supply.

25 The answer to be given to the question referred by the national court must therefore be that, in application of Article 11A(1)(a) of the Sixth Directive, the taxable amount for the supply of a bonus in kind constituting consideration for the introduction of a new customer includes, besides the purchase price of that bonus, the costs of delivery, when they are paid by the supplier of the bonus.

Costs

26 The costs incurred by the German and United Kingdom Governments, and by the Commission, which have submitted observations to the Court are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Bundesfinanzhof, by order of 5 August 1999, hereby rules:

Article 11A(1)(a) 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, is to be interpreted as meaning that the taxable amount for the supply of a bonus in kind constituting consideration for the introduction of a new customer includes, besides the purchase price of that bonus, the costs of delivery, when they are paid by the supplier of the bonus.

Gulmann Skouris Puissochet

Schintgen Colneric

Delivered in open court in Luxembourg on 3 July 2001.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber