JUDGMENT OF THE COURT (Sixth Chamber)

29 May 2001 *

In Case C-86/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the VAT and Duties Tribunal, London (United Kingdom) for a preliminary ruling in the proceedings pending before that court between

Freemans plc

and

Commissioners of Customs and Excise,

on the interpretation of Article 11A(3)b and C(1) 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: English.

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, R. Schintgen, F. Macken and N. Colneric (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

— Freemans plc, by P. Trevett QC, and F. Fitzpatrick, Barrister, instructed by Herbert Smith, Solicitors,

— the United Kingdom Government, by R. Magrill, acting as Agent, assisted by K. Parker QC,

— the Greek Government, by M. Apessos and E. Mamouna, acting as Agents,

— the Commission of the European Communities, by E. Traversa and F. Riddy, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Freemans plc, represented by P. Trevett and F. Fitzpatrick, of the United Kingdom Government, represented by K. Parker, of the Greek Government, represented by M. Apessos, and the Commission, represented by R. Lyal, acting as Agent, at the hearing on 9 November 2000,

after hearing the Opinion of the Advocate General at the sitting on 11 January 2001,

gives the following

Judgment

1 By order of 14 January 1999, which was received at the Court on 12 March 1999, the VAT and Duties Tribunal, London, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 11A(3)b and C(1) 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 That question has been raised in proceedings between Freemans plc ('Freemans') and the Commissioners of Customs and Excise ('the Commissioners'), the competent authority in the United Kingdom for collecting value added tax ('VAT'), relating to the determination of the taxable amount, for VAT purposes, in the case of goods supplied in the course of a sales promotion scheme established by Freemans.

The Community rules

3 In Title V ('Taxable transactions'), Article 5(1) of the Sixth Directive provides as follows:

'"Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.'

4 Article 11A(1)(a) and (3)(b) of the Sixth Directive provide:

'A. *Within the territory of the country*

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;

...

3. The taxable amount shall not include:

...

(b) price discounts and rebates allowed to the customer and accounted for at the time of the supply.'

5 Article 11C(1), first subparagraph, of the Sixth Directive provides:

'C. *Miscellaneous provisions*

1. 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 27 of the Sixth Directive, which constitutes Title XV, 'Simplification procedures', provides as follows in its first paragraph:

'1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from

the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.'

The national rules

7 Pursuant to Article 27 of the Sixth Directive the United Kingdom has introduced special schemes for retailers allowing them to calculate their output VAT by reference to the overall value of taxable supplies made during an accounting period, using the concept of 'daily gross takings' rather than by reference to the value of each individual supply.

8 Until 28 February 1997, the United Kingdom allowed retailers to calculate their daily gross takings by means of the standard method of gross takings ('the SMGT'), which was based on payments received by a retailer in an accounting period. From 1 March 1997, the United Kingdom withdrew the SMGT and required retailers to calculate their gross takings under a new system using the optional method of calculating gross takings ('the OMGT'). The OMGT is based on the total amount invoiced by the retailer.

The main proceedings and the question referred for a preliminary ruling

9 Freemans sells its goods to customers by means of mail order, using catalogues which it sends to individuals in order that they may act as its agents. It has approximately 900 000 active agents, who order goods either for themselves

('agents' own purchases') or for other customers. Purchases are paid for under a self-financed credit scheme established by Freemans, the agents paying for the goods at the price set out in the catalogue ('the catalogue price') in instalments, generally spread over a period of 50 weeks. Freemans has created in its books a separate credit account for the agents to which a sum equal to 10% of each payment made by an agent to Freemans is credited to her automatically, that sum comprising more precisely a 10% discount in respect of the agent's own purchases (hereinafter referred to as 'AOP discount') and a 10% commission in respect of purchases made for other customers (hereinafter 'commission').

10 The agent may withdraw the amount credited to her account at any time by cheque, by post office giro or by national lottery vouchers; she may also set off that amount against outstanding balances owed by herself or a customer, or use it against new purchases, which will entitle her to a further 10% discount. However, agents are not entitled to pay, from the outset, the catalogue price less the AOP discount.

11 If an agent does not pay an instalment due, the total balance owing on her account becomes immediately due and payable. In such a case, in principle, the AOP discount or commission cannot be paid out until the account is put in order.

12 Where the amount credited to the agent's account is not claimed over a certain period, it is written off in Freemans books. However, in practice, even where agents delay in claiming their right to AOP discount and where that right is technically time-barred, they do not lose their entitlement to that right. In fact, a substantial amount of AOP discount remains unclaimed and is retained by Freemans.

13 Under the SMGT, Freemans was entitled to make an immediate deduction of AOP discount from its daily gross takings. Since 1 March 1997, the date of application of the OMGT, Freemans is required to calculate its daily gross takings without deducting AOP discount, unless and until the discount is withdrawn by the agent in cash or set against the purchase price of goods.

14 Despite the withdrawal of the SMGT, Freemans continued to calculate its VAT returns for the periods April and July 1997 on that basis, namely deducting the AOP discount from the catalogue price. The Commissioners nevertheless assessed Freemans' transactions according to the new method, the OMGT. Freemans appealed against those assessments to the VAT and Duties Tribunal, London.

15 In the proceedings before that tribunal, Freemans submits that the taxable amount in respect of goods supplied to an agent for her own use is the catalogue price of those goods less the agent's own purchase discount, since Freemans is never in a contractual position in which it is entitled to receive the full catalogue price from the agent.

16 The Commissioners contend, on the other hand, that upon a proper construction of the agreement between Freemans and its agent the consideration, within the meaning of Article 11A(1)(a) of the Sixth Directive, is the full purchase price of the catalogue goods which the agent is contractually required to pay to Freemans.

17 The VAT and Duties Tribunal points out that the Commissioners are not claiming from Freemans VAT on an amount greater than that actually paid by the final

consumer. It adds that the time of supply of the goods leading to the AOP discount is before payment for the goods which gives rise to that discount. In its view, that tends to suggest that Freemans' appeal should be dismissed.

18 However, the VAT and Duties Tribunal concluded that the outcome of the dispute before it requires an interpretation of Article 11 of the Sixth Directive and decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'What, on a proper construction of Article 11A and 11C of the Sixth Directive, is the taxable amount in respect of goods supplied by mail order from a catalogue to a customer for the customer's own use where the supplier in operating self-financed credit terms allows a discount from the catalogue price to the customer ("AOP discount") with the AOP discount being credited to the customer as and when instalment payments are made to the supplier (or use made of AOP discount in reducing or discharging an instalment payment) but where the AOP discount which has accrued on payments made is available for immediate withdrawal or use by the customer even though future instalment payments will be due from that customer?

Is the taxable amount:

(1) the full catalogue price of the goods sold to the customer less the AOP discount on that price; or

(2) the full catalogue price of the goods sold to the customer with a reduction as and when the AOP discount is credited to a customer; or

(3) the full catalogue price of the goods sold to the customer with a reduction as and when the AOP discount is withdrawn or used by a customer; or

(4) some other, and if so what, amount?'

The question referred for a preliminary ruling

19 First of all, it should be remembered that each time that it is necessary, as in the main proceedings, to decide whether an element of the price may be included in the taxable amount or, conversely, may be expressly excluded from that amount, it is first necessary to examine whether the element in question falls within one of the categories referred to in Article 11A(2) and (3) of the Sixth Directive and it is only when the answer to that question is in the negative that reference must be made to the general concept of taxable amount referred to in Article 11A(1)(a) of that directive (see Case C-126/88 *Boots Company* [1990] ECR I-1235, paragraph 16).

20 The Commission submits that the wording of Article 11A(3)(b) of the Sixth Directive, particularly in the French version, suggests that price discounts and rebates are 'accounted for' within the meaning of that provision as soon as the purchaser acquires a legal entitlement to them. Since, in the present case, the agent is entitled to an AOP discount at the time when she buys the goods, that provision is applicable so that the taxable amount is from the outset the catalogue price less the discount.

21 The United Kingdom and Greek Governments do not accept that the existence of such a right to a discount suffices to render Article 11A(3)(b) of the Sixth Directive applicable. They contend that at the time of the supply of the goods purchased the consideration is the full catalogue price, because that is what the agent must pay to Freemans.

22 It should be pointed out that, according to the wording of Article 11A(3)(b) of the Sixth Directive, price discounts allowed to the customer and accounted for at the time of supply are not to be included in the taxable amount. As regards the supply of goods, the time of the supply within the meaning of that provision is, according to Article 5(1) of the Sixth Directive, the time when the right to dispose of the goods purchased is transferred, that is to say, in the case in point, the time when the products are adopted by the agent.

23 If, at the time of that transfer, the customers paid a reduced price, they would receive a discount; if the seller refunded to them part of the price already paid, the customers would receive a rebate within the meaning of Article 11A(3)(b) of the Sixth Directive (see, to that effect, the judgment in *Boots Company*, cited above, paragraph 18).

24 However, that is not the case here. At the time of that transfer, agents must pay the full catalogue price in instalments, and Freemans is required to credit a separate account with a sum equal to 10% in respect of each payment which agents make. The sums which will thus have to be credited as and when those payments are made do not yet constitute discounts within the meaning of Article 11A(3)(b) of the Sixth Directive.

25 Contrary to the Commission's submissions, for Article 11A(3)(b) to be applicable, it is not sufficient that the customer acquires at the time of the purchase, as in the main proceedings, a discount which she has a legal entitlement to receive.

26 It is true that the French version of that provision might suggest that the term 'acquis' should be interpreted as meaning 'juridiquement acquis' ('legally acquired'). However the German version of the same provision ('erhält') suggests that the discount must actually be paid at the time of the supply. In any event, none of the language versions of Article 11A(3)(b) contains the expressions 'legally acquired' or 'actually acquired', which would have been clear and unambiguous. The wording must therefore be interpreted in the light of the objectives of Article 11 of the Sixth Directive.

27 It must be pointed out here that Article 11A(3)(b) of the Sixth Directive is merely an application of the rule laid down in Article 11A(1)(a) of that directive as interpreted by the Court in its decisions (see the judgment in *Boots Company*, cited above, paragraph 19). According to the latter provision, the taxable amount is, with regard to the supply of goods, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser. According to the Court's settled case-law, the definitive taxable amount for the supply of goods is the consideration actually received for them (see Case C-38/93 *Glawe* [1994] ECR I-1679, paragraph 8, and Case C-288/94 *Argos Distributors* [1996] ECR I-5311, paragraph 16). Article 11A(1)(a) thus ensures the neutrality of the tax, a principle inherent in the common system of VAT which must be observed when the provisions of the Sixth Directive are to be interpreted (see, to that effect, Case C-317/94 *Elida Gibbs* [1996] ECR I-5339, paragraphs 26 to 31).

28 In the present case, Freemans, by calculating VAT from the outset on the catalogue price less the amounts to be credited by it, would obtain, if its customers subsequently did not use the amounts credited, a sum corresponding to

a part of the sales price that is the consideration for the goods delivered, but that sum would not be part of the taxable amount. Such a method of calculating VAT would therefore infringe Article 11A(1)(a) of the Sixth Directive, interpreted in accordance with the principle of the neutrality of the tax.

29 Consequently, a taxable person who uses a sales promotion scheme such as that at issue in the main proceedings is not entitled to claim that from the outset the consideration within the meaning of Article 11A(1)(a) of the Sixth Directive is represented by the full price less the AOP discount.

30 Admittedly, as Freemans rightly points out, the Court has held, with regard to gaming machines offering a chance of winning (slot machines), that the consideration is the total stakes inserted less the proportion corresponding to the winnings paid out to players (judgment in *Glawe*, cited above, paragraph 13). However, it must be pointed out, first, that gambling transactions do not lend themselves easily to the application of VAT, as the Commission stated in its proposal for a Sixth Directive (see *Bulletin of the European Communities*, Supplement 11/73, p. 16). It thus hardly appears to be appropriate to draw general conclusions from the taxation of those transactions in order to apply them to the taxation of ordinary supplies of goods. Next, it is necessary to take account of the fact that, in the case which gave rise to the judgment in *Glawe*, cited above, the proportion of stakes not included in the taxable amount was in fact repaid to players who won. The facts of *Glawe* were thus materially different from those in the present case, in which an element of the price paid by the final consumer is retained by the taxable person, if the consumer does not use it.

31 Finally, it must be stated that Article 11C(1) of the Sixth Directive must be interpreted as meaning that, in a sales promotion scheme such as that at issue in the main proceedings, the taxable amount constituted by the full catalogue price

must be reduced as soon as the agent withdraws or uses in another way the amount with which her separate account has been credited.

32 Freemans and the Commission submit that Article 11C(1) of the Sixth Directive covers the cases in which the reduction in consideration arises from an amendment to the contract after the time of the supply. That provision is therefore not applicable where, as in the present case, the contractual relations giving rise to the supply provide from the very beginning for the grant of a discount, even though that discount is not actually accounted for until later. In that context, they rely upon paragraph 31 of the judgment in *Elida Gibbs*, cited above, in which the Court held that that provision refers to the normal case of contractual relations entered into directly between two contracting parties, which are modified subsequently.

33 In that regard, it suffices to state that the wording of Article 11C(1) of the Sixth Directive does not presuppose such a subsequent modification of the contractual relations in order for it to be applicable. In principle, it requires the Member States to reduce the taxable amount whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person (see Case C-330/95 *Goldsmiths* [1997] ECR I-3801, paragraphs 16, 17 and 18). Moreover, there is no indication that in its judgment in *Elida Gibbs*, cited above, the Court wished to restrict the scope of application of that provision. On the contrary, it is apparent from the facts of the *Elida Gibbs* case that there had been no modification of the contractual relations. Nevertheless, the Court held that Article 11C(1) of the Sixth Directive was applicable.

34 In the alternative, Freemans contends that Article 11C(1) must be interpreted as meaning that, under the promotion scheme at issue in the main proceedings, the taxable amount must be reduced at the time when the amount paid as AOP discount is credited to an agent's account.

35 However, at the time when it credits the amount in question to the agent's account established in its books, Freemans has not yet actually paid the AOP discount to the agent. Where the agent does not use that amount, Freemans disposes of it by adding it to its profit and loss account. It is only when the customer uses the AOP discount that the discount is actually paid, so that, as Article 11C(1) of the Sixth Directive provides, the taxable amount for the corresponding purchase must be reduced accordingly under conditions to be determined by the Member States.

36 The answer to be given to the national court's question is therefore that, upon a proper construction of Article 11A(3)(b) and C(1) of the Sixth Directive, the taxable amount in respect of goods supplied by mail order from a catalogue to a customer for the customer's own use where the supplier allows the customer a discount from the catalogue price, a separate account being credited in the customer's favour with the amount of that discount as and when instalment payments are paid to the supplier — a discount which may then be immediately withdrawn or used in another way by the customer — is the full catalogue price of the goods sold to the customer, reduced accordingly by the amount of that discount at the time when it is withdrawn or used in another way by the customer.

Costs

37 The costs incurred by the United Kingdom and Greek 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 VAT and Duties Tribunal, London, by order of 14 January 1999, hereby rules:

Upon a proper construction of Article 11A(3)(b) and C(1) 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, the taxable amount in respect of goods supplied by mail order from a catalogue to a customer for the customer's own use where the supplier allows the customer a discount from the catalogue price, a separate account being credited in the customer's favour with the amount of that discount as and when instalment payments are paid to the supplier — a discount which may then be immediately withdrawn or used in another way by the customer — is the full catalogue price of the goods sold to the customer, reduced accordingly by the amount of that discount at the time when it is withdrawn or used in another way by the customer.

Gulmann Skouris Schintgen

Macken Colneric

Delivered in open court in Luxembourg on 29 May 2001.

R. Grass C. Gulmann

Registrar President of the Sixth Chamber