JUDGMENT OF THE COURT (Sixth Chamber)

17 September 2002 *

In Case C-498/99,

REFERENCE to the Court under Article 234 EC by the VAT and Duties Tribunal, Manchester (United Kingdom), for a preliminary ruling in the proceedings pending before that tribunal between

Town & County Factors Ltd

and

Commissioners of Customs and Excise,

on the interpretation of Articles 2(1), 6(1) and 11A(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1),

* Language of the case: English.

THE COURT (Sixth Chamber),

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

Advocate General: C. Stix-Hackl,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Town & County Factors Ltd, by R. Cordara QC and P. Cargill-Thompson, Barrister, instructed by Ernst & Young, tax advisers,

— the United Kingdom Government, by J.E. Collins, acting as Agent, and K.P.E. Lasok QC,

— the Commission of the European Communities, by R. Lyal, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Town & County Factors Ltd, represented by R. Cordara and P. Cargill-Thompson; the United Kingdom Government,

represented by J.E. Collins and K.P.E. Lasok; the German Government, represented by B. Muttelsee-Schön, acting as Agent; and the Commission, represented by R. Lyal, at the hearing on 27 June 2001,

after hearing the Opinion of the Advocate General at the sitting on 27 September 2001,

gives the following

Judgment

1 By order of 16 December 1999, received at the Court on 22 December 1999, the VAT and Duties Tribunal, Manchester, referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 2(1), 6(1) and 11A(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, 'the Sixth Directive').

2 Those questions were raised in proceedings between Town and County Factors Ltd ('Town & County') and the Commissioners of Customs and Excise ('the Commissioners'), who are responsible for the collection of value added tax (VAT) in the United Kingdom, concerning the payment of VAT on the organisation of competitions.

The Community legislation

3 Article 2 of the Sixth Directive, which forms Title II, 'Scope', provides:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. ...'

4 Under Article 6(1) of the Sixth Directive:

'"Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

Such transactions may include *inter alia*:

— assignments of intangible property whether or not it is the subject of a document establishing title,

— obligations to refrain from an act or to tolerate an act or situation,

— the performances of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law.'

5 In Title VIII, 'Taxable amount', Article 11A(1)(a) of the Sixth Directive provides:

'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'.

The main proceedings and the questions referred for a preliminary ruling

6 Town & County is registered for VAT purposes as the representative member of a group of companies, one of which organised a weekly 'Spot the Ball' competition, in particular from June 1994 to November 1995.

7 The entry forms for those competitions contain a photograph taken during a football match from which the ball has been blanked out. The object of the competition is to indicate by a cross where, in the contestant's opinion, the centre of the ball is. Competitors may put up to 900 crosses on the photograph, and the entry fee payable depends on the number of crosses marked. The competitor whose cross is nearest to the place where, in the panel's opinion, the centre of the ball is wins the first prize. The second prize is awarded to the competitor whose cross is next best placed, and so on.

8 The rules of the competition, which are printed on the entry forms, state *inter alia* that competitors agree that the obligations created for the organiser of the competition are 'binding in honour only'.

9 It is common ground that during the period at issue in the main proceedings, June 1994 to November 1995, the organiser never refused to pay or transfer to the winners the prizes indicated on the entry forms. Those prizes, which consisted of money, goods or services, were always paid out to the winners and financed by

the entry fees received. It is also common ground that neither the rules of the competition nor national legislation obliged the organiser of the competition to pay the cash prizes or pay for the non-cash prizes out of the entry fees.

10 Following the judgment of 5 May 1994 in Case C-38/93 *Glawe* [1994] ECR I-1679, Town & County, which had until then always calculated the VAT it was liable for on the total amount of the entry fees received, considered that it was liable for VAT only on that amount less the value of the prizes awarded to the winners.

11 On 28 March 1995 the Commissioners decided that Town & County was liable for VAT on the full amount of the entry fees received.

12 Town & County appealed against that decision to the VAT and Duties Tribunal.

13 The tribunal considered that the outcome of the proceedings before it depended on the interpretation of Community law, and in particular on whether the fact that the organiser of the competition was bound in honour only, which cast doubt on the existence of any legal relationship between the organiser and the competitors, meant that the organisation of the competition could not be regarded as a supply of services within the meaning of Article 2(1) of the Sixth Directive. It therefore decided on 3 June 1997 to stay the proceedings and refer a question on this point to the Court for a preliminary ruling.

14 The High Court of Justice of England and Wales held, on appeal, that the tribunal should also refer to the Court the question whether the taxable amount within the meaning of Article 11A(1)(a) of the Sixth Directive consisted of the full amount of the entry fees received rather than the net amount after deduction of amounts corresponding to the prizes distributed.

15 In those circumstances, the VAT and Duties Tribunal, Manchester, referred the following questions to the Court for a preliminary ruling:

'(1) On a proper interpretation of Council Directives 67/227/EEC of 11 April 1967 and 77/388/EEC of 17 May 1977, in particular Articles 2(1) and 6(1) of the latter, and having regard to the case-law of the Court, in particular Case C-16/93 *Tolsma* [1994] ECR I-743, is a transaction which is agreed by the parties thereto to be "binding in honour only" (and therefore unenforceable under domestic law by legal proceedings) capable of being a taxable transaction for the purposes of value added tax?

(2) If the answer to Question 1 is in the affirmative, then, on a proper interpretation of the said directives, in particular Article 11A(1) of the latter, and having regard to the case-law of the Court, in particular Case C-38/93 *Glawe*..., is the taxable amount for the purposes of value added tax in respect of the services of organising a competition supplied by the organiser to entrants to the competition in return for the entry fees paid by the entrants —

(a) the amount of the entry fees, or

(b) the amount of the entry fees less the amount or value of the prizes given to the successful entrants, or

(c) some other and if so what amount?

Alternatively, if those services are correctly to be regarded as supplied by the organiser to each entrant in return for the entry fee paid by that entrant, is the taxable amount in respect of each such supply —

(a) the amount of that entry fee, or

(b) the amount of that entry fee less a proportionate part of the amount or value of the prizes given to the successful entrants, or

(c) some other and if so what amount?'

Question 1

16 By its first question, the VAT and Duties Tribunal essentially asks whether Article 2(1) of the Sixth Directive is to be interpreted as meaning that a supply of services which is effected for consideration but is not based on enforceable

obligations, because it has been agreed that the provider is bound in honour only to provide the services, constitutes a transaction subject to VAT.

17 To answer that question, it should be remembered that, under Article 2(1) of the Sixth Directive, supplies of goods or services effected for consideration within the territory of the country by a taxable person acting as such are subject to VAT.

18 It should also be noted that in paragraph 14 of *Tolsma* the Court held that a supply of services is effected 'for consideration' within the meaning of Article 2(1) of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.

19 According to Town & County, where a competition such as that at issue in the main proceedings is organised, no such legal relationship exists between the recipient of the service and the provider, since by reason of the provision that the organiser binds himself in honour only his obligations are not enforceable.

20 It must be observed, first, that it is common ground that where a competition such as that at issue in the main proceedings is organised there is reciprocal performance within the meaning of the *Tolsma* judgment between the organiser of the competition and the competitors, the remuneration received by the organiser in the form of entry fees constituting the value actually given in return for the service he supplies to the competitors.

21 It is clear, next, that adopting the approach of making the existence of a legal relationship in the *Tolsma* sense depend on the obligations of the provider of the service being enforceable would compromise the effectiveness of the Sixth Directive, in that it would have the consequence that the transactions falling within that directive could vary from one Member State to another because of differences which might exist between the various legal systems in this respect.

22 Moreover, this approach would enable a taxable person to avoid paying VAT by including in his contracts for sales or services a term such as that at issue in the main proceedings.

23 Finally, it cannot be validly maintained that no legal relationship in the *Tolsma* sense exists, because the obligation on a provider of services is not enforceable, where the impossibility of seeking enforcement of that obligation derives from an agreement between the provider of services and the recipient, such an agreement constituting the very expression of a legal relationship in that sense.

24 In those circumstances, the answer to the first question must be that Article 2(1) of the Sixth Directive is to be interpreted as meaning that a supply of services which is effected for consideration but is not based on enforceable obligations, because it has been agreed that the provider is bound in honour only to provide the services, constitutes a transaction subject to VAT.

Question 2

25 By its second question, the tribunal essentially asks whether Article 11A(1)(a) of the Sixth Directive is to be interpreted as meaning that, for the organisation of a competition such as that at issue in the main proceedings, the taxable amount consists of the full amount of the entry fees received by the organiser of the competition, or that amount less the value of the prizes distributed to the competitors, or some other amount.

26 In order to answer the question thus reformulated, it should be noted, first, that Article 11A(1)(a) of the Sixth Directive states that '[t]he taxable amount shall be... 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'.

27 It should be noted, second, that it is settled case-law that that rule must be interpreted as meaning that the taxable amount for a supply of services is represented by the consideration actually received for that supply (see, *inter alia*, Case C-126/88 *Boots Company* [1990] ECR I-1235, paragraph 19, and Case C-258/95 *Fillibeck* [1997] ECR I-5577, paragraph 13).

28 In the case of the organisation of a competition such as that at issue in the main proceedings, the consideration actually received by the organiser for the service

he supplies to the competitors is represented by the entry fees paid by them. He receives those fees in full and they enable him to cover the costs of his activity. It follows that it is the amount represented by those entry fees that constitutes the taxable amount, within the meaning of Article 11A(1)(a) of the Sixth Directive, of the transaction in question.

29 It should be observed, finally, that that interpretation of Article 11A(1)(a) of the Sixth Directive does not call into question the Court's interpretation in *Glawe*, inasmuch as the operation of the gaming machines concerned by that judgment and the organisation of the competition at issue in the main proceedings differ in essential points.

30 While those gaming machines were characterised by the fact that, in accordance with mandatory statutory provisions, they were set in such a way that at least a certain percentage, in fact 60%, of the players' stakes was paid out to them as winnings and those stakes were kept technically and physically separate from the stakes which the operator could actually take for himself, the competition at issue in the main proceedings does not display any of those features, so that the organiser of the competition has freely at his disposal the full amount of the entry fees received.

31 In those circumstances, the answer to the second question must be that Article 11A(1)(a) of the Sixth Directive is to be interpreted as meaning that the full amount of the entry fees received by the organiser of a competition constitutes the taxable amount for that competition where the organiser has that amount freely at his disposal.

Costs

32 The costs incurred by the United Kingdom Government 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 tribunal, the decision on costs is a matter for that tribunal.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the VAT and Duties Tribunal, Manchester, by order of 16 December 1999, hereby rules:

1. **Article 2(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 must be interpreted as meaning that a supply of services which is effected for consideration but is not based on enforceable obligations, because it has been agreed that the provider is bound in honour only to provide the services, constitutes a transaction subject to value added tax.**

2. **Article 11A(1)(a) of the Sixth Directive 77/388 must be interpreted as meaning that the full amount of the entry fees received by the organiser of a competition constitutes the taxable amount for that competition where the organiser has that amount freely at his disposal.**

Colneric Gulmann Puissochet

Schintgen Skouris

Delivered in open court in Luxembourg on 17 September 2002.

R. Grass F. Macken

Registrar President of the Sixth Chamber