JUDGMENT OF THE COURT (Sixth Chamber)
3 July 1997 *

In Case C-330/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Value Added Tax Tribunal, Manchester Tribunal Centre (United Kingdom), for a preliminary ruling in the proceedings pending before that court between

Goldsmiths (Jewellers) Ltd

and

Commissioners of Customs and Excise

on the interpretation of Article 11C(1) of the Sixth Council 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),

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, C. N. Kakouris (Rapporteur), P. J. G. Kapteyn, G. Hirsch and R. Schintgen, Judges,

Advocate General: A. La Pergola,
Registrar: L. Hewlett, Administrator,

* Language of the case: English.

after considering the written observations submitted on behalf of:

— Goldsmiths (Jewellers) Ltd, by Dario Garcia, Tax partner of Ernst & Young, Chartered Accountants,

— the Government of the United Kingdom, by Stephen Braviner, of the Treasury Solicitor's Department, acting as Agent, and Eleanor Sharpston, Barrister,

— the Commission of the European Communities, by Enrico Traversa and Peter Oliver, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Goldsmiths (Jewellers) Ltd, represented by Dario Garcia, of the Government of the United Kingdom, represented by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Eleanor Sharpston, Barrister, of the German Government, represented by Ernst Röder, Ministerialrat in the Federal Ministry for the Economy, acting as Agent, and of the Commission, at the hearing on 8 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 27 February 1997,

gives the following

Judgment

1 By order of 19 December 1994, received at the Court on 19 October 1995, the Value Added Tax Tribunal, Manchester Tribunal Centre, referred to the Court for

a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 11C(1) of the Sixth Council 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, 'the Sixth Directive').

2 That question was raised in proceedings between Goldsmiths (Jewellers) Ltd ('Goldsmiths') 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 refund of sums paid by Goldsmiths by way of VAT.

3 It is apparent from the documents before the Court that Goldsmiths, a manufacturer and supplier of jewellery, concluded with RRI Ltd ('RRI'), a company whose business consisted of arranging exchanges of goods for services supplied by it, a contract under which Goldsmiths was to supply RRI with jewels in exchange for certain advertising services.

4 In pursuance of that agreement, on 23 October 1991 Goldsmiths supplied RRI with jewels to the value of £202 809.47, including VAT of £30 205.67. It accordingly became entitled to the advertising services to be provided by RRI to exactly the same value, including VAT.

5 On 28 February 1992 Goldsmiths sent RRI a VAT invoice recording the transaction; in addition, it declared that supply in its VAT return for the period from 1 September 1991 to 30 November 1991 and paid the corresponding VAT to the tax authorities.

6 Subsequently, in pursuance of that agreement, RRI supplied advertising services to Goldsmiths to the value of £68 678.03, including VAT of £9 335.

7 However, after providing further advertising services, RRI became insolvent and was wound up before it could perform all its obligations under the barter contract concluded with Goldsmiths. The value of the advertising services which could not be supplied to Goldsmiths amounted to £135 162.12, including VAT of £20 130.53.

8 Taking the view that the advertising services still outstanding would not now be provided, Goldsmiths adjusted its VAT declaration for the period ending on 28 February 1993, reducing the net amount of VAT due by £20 130, that is to say, the amount of VAT corresponding to the advertising services not provided by RRI.

9 By decision of 1 June 1993, the Commissioners refused to allow that adjustment and issued Goldsmiths with a VAT assessment of £20 130 plus interest. That decision was based on section 11 of the Finance Act 1990, applicable at the material time, which provided that the right to refund of VAT in the case of bad debts was subject to the condition *inter alia* that the goods or services were supplied for a consideration in money. According to the Commissioners, since the agreement concluded between Goldsmiths and RRI did not entail any pecuniary consideration, it was not possible to refund the VAT to Goldsmiths.

10 Goldsmiths continued to adhere to its point of view and appealed to the VAT Tribunal, Manchester Tribunal Centre, against the Commissioners' decision, relying on Article 11C(1) of the Sixth Directive, which is worded as follows:

'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.

However, in the case of total or partial non-payment, Member States may derogate from this rule.'

11 In its appeal, Goldsmiths claimed that section 11 of the Finance Act 1990, which implemented that provision in the United Kingdom, could not limit tax relief to the case of non-payment of consideration in money but should extend it to the case of consideration in kind. From that it deduced that section 11 of the Finance Act 1990 was contrary to Article 11C(1) of the Sixth Directive. Goldsmiths added that while that provision gave the Member States the power to exclude bad debt relief entirely, it did not entitle them to do so in part, namely for certain types of transactions, since the power to derogate constitutes an 'all or nothing' power.

12 By contrast, the Commissioners maintained essentially that the Sixth Directive had been correctly implemented by the United Kingdom since the power to derogate under Article 11C(1) was not subject to any condition. Non-application does not mean that the Member States have to take an 'all or nothing' approach but that they have power not to apply the rule as it stands. According to the Commissioners, that approach is more consistent with the objective of the Sixth Directive.

13 Uncertain as to the interpretation of the Sixth Directive, the VAT Tribunal, Manchester Tribunal Centre, decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is the derogation contained in Article 11C(1) of the EC Sixth Council Directive 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 (77/388/EEC) ("the Sixth Directive") to be interpreted as permitting a Member State which enacts provisions for the refund of tax in the case of bad debts to exclude relief where the consideration lost consists of something other than money?'

14 In order to answer that question, it should be borne in mind that Article 11A(1)(a) of the Sixth Directive provides, with a view to harmonizing the taxable amount, that within the territory of the country the amount chargeable in respect of supplies of goods is 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.

15 That provision embodies one of the fundamental principles of the Sixth Directive, according to which the basis of assessment is the consideration actually received (Case 230/87 *Naturally Yours Cosmetics* v *Commissioners of Customs and Excise* [1988] ECR 6365, paragraph 16) and the corollary of which is that the tax authorities may not in any circumstances charge an amount of VAT exceeding the tax paid by the taxable person (Case C-317/94 *Gibbs* v *Commissioners of Customs and Excise* [1996] ECR I-5339, paragraph 24).

16 In accordance with that principle, the first subparagraph of Article 11C(1) of the Sixth Directive defines the cases in which the Member States are required to ensure that the taxable amount is reduced accordingly, under conditions which are to be determined by the Member States themselves. That provision therefore requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person.

17 Nevertheless, the second subparagraph of Article 11C(1) of the Sixth Directive permits the Member States to derogate from the abovementioned rule in the case of total or partial non-payment.

18 The power to derogate, which is strictly limited to the latter situation, is based on the notion that in certain circumstances and because of the legal situation prevailing in the Member State concerned, non-payment of consideration may be difficult to establish or may only be temporary. It follows that the exercise of that power must be justified if the measures taken by the Member States for its implementation are not to undermine the objective of fiscal harmonization pursued by the Sixth Directive.

19 With regard to section 11 of the Finance Act 1990, the United Kingdom seeks to justify the refusal to refund the tax on the ground that there is a greater risk of evasion where the unpaid consideration is not expressed in money.

20 That justification is unacceptable for two reasons.

21 First, it is clear from Case 324/82 *Commission* v *Belgium* [1984] ECR 1861, paragraph 29, that measures intended to prevent tax evasion or avoidance may not in principle derogate from the basis for charging VAT laid down in Article 11 of the Sixth Directive, except within the limits strictly necessary for achieving that specific aim.

22 By excluding, generally and systematically, all transactions alike in which the consideration is not expressed in money from the refund of VAT, legislation of the kind at issue in the main proceedings alters the taxable amount for that class of transactions in a manner which goes beyond what is strictly necessary in order to avoid the risk of tax evasion. That is all the more obvious because in the circumstances of the case, as the United Kingdom Government acknowledges in its written observations, there was no risk of evasion.

23 Second, no distinction between consideration in money and consideration in kind is drawn in either Article 11A(1)(a) or Article 11C(1). As is apparent from the judgment in *Naturally Yours*, cited above, paragraph 16, for those provisions to apply it is sufficient if the consideration is capable of being expressed in money (see also Case C-33/93 *Empire Stores* v *Commissioners of Customs and Excise* [1994] ECR I-2329, paragraph 12). Since the two situations are, economically and commercially speaking, identical, the Sixth Directive treats the two kinds of consideration in the same way.

24 It follows that the refusal to refund VAT in the case of transactions in which the consideration is to be paid in kind, where such consideration is not paid in whole or in part, leads to discrimination against transactions of that type as compared with those in which the consideration is expressed in money.

25 A distinction of the kind made by the legislation at issue discourages traders from entering into barter contracts, although such contracts are not, in financial or commercial terms, in any way different from transactions in which the consideration is expressed in money, and consequently restricts traders' freedom to choose the contract which they consider to be most suited to satisfying their economic interests.

26 In light of the foregoing considerations, the answer to the question referred must be that, on a proper construction, the derogation provided for in the second subparagraph of Article 11C(1) of the Sixth Directive does not authorize a Member State which enacts provisions for the refund of VAT in the case of total or partial non-payment of the consideration to refuse that refund where the unpaid

consideration is in kind, when it permits a refund where the consideration is expressed in money.

27 During the hearing, the United Kingdom Government asked the Court, in the event of the latter construing the derogation in question as not authorizing a Member State to refuse the refund of VAT where the unpaid consideration is in kind, to limit the temporal effects of its judgment. In substance, it argued on this point that such a construction would raise very serious problems for the United Kingdom and other Member States which had interpreted the derogation in good faith.

28 In that regard, it should be noted that the United Kingdom Government has not put forward any tangible proof of the serious problems which it alleges would arise from that construction of the derogation in question. It follows that, in the circumstances, there is no evidence to support a departure from the principle that a ruling on interpretation takes effect as from the date on which the rule interpreted came into force.

Costs

29 The costs incurred by the German and United Kingdom Governments and the Commission of the European Communities, 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 proceedings 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 Value Added Tax Tribunal, Manchester Tribunal Centre, by order of 19 December 1994, hereby rules:

On a proper construction, the derogation provided for in the second subparagraph of Article 11C(1) of the Sixth Council 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 — does not authorize a Member State which enacts provisions for the refund of VAT in the case of total or partial non-payment of the consideration to refuse that refund where the unpaid consideration is in kind, when it permits a refund where the consideration is expressed in money.

Mancini Kakouris Kapteyn

Hirsch Schintgen

Delivered in open court in Luxembourg on 3 July 1997.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber