JUDGMENT OF THE COURT (First Chamber)

20 January 2005 *

In Case C-412/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Regeringsrätten (Sweden), made by decision of 29 September 2003, received at the Court on 3 October 2003, in the proceedings

Hotel Scandic Gåsabäck AB

v

Riksskatteverket,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts (Rapporteur), J.N. Cunha Rodrigues, E. Juhász and M. Ilešič, Judges,

* Language of the case: Swedish.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 21 October 2004,

after considering the observations submitted on behalf of:

— the Swedish Government, by A. Kruse and K. Wistrand, acting as Agents,

— the Danish Government, by J. Molde, acting as Agent,

— the Greek Government, by M. Apessos, V. Pelekou and I. Pouli, acting as Agents,

— the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

— the Commission of the European Communities, by D. Triantafyllou and L. Ström, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 November 2004,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 2, 5(6) and 6(2)(b) 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 The question arose in proceedings between Hotel Scandic Gåsabäck AB ('Scandic') and the Riksskatteverket (National Tax Board) concerning the determination of the taxable amount for the provision of meals by that company to its members of staff.

Legal framework

Community legislation

3 Under Article 2(1) of the Sixth Directive, 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is subject to value added tax ('VAT').

4 Article 11A(1)(a) of the Sixth Directive states that, as a general rule, the taxable amount for supplies of goods and services 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 for such supplies including subsidies directly linked to the price of such supplies'.

5 Article 5(6) of the Sixth Directive provides:

'The application by a taxable person of goods forming part of his business assets for his private use or that of his staff, or the disposal thereof free of charge or more generally their application for purposes other than those of his business, where the value added tax on the goods in question or the component parts thereof was wholly or partly deductible, shall be treated as supplies made for consideration. However, applications for the giving of samples or the making of gifts of small value for the purposes of the taxable person's business shall not be so treated.'

6 With respect to the application of goods in the manner defined in Article 5(6), Article 11A(1) of the Sixth Directive lays down a special rule for the determination of the taxable amount, which is worded as follows:

'The taxable amount shall be:

...

(b) in respect of supplies referred to in Article 5(6) ..., the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined [at] the time of supply;

...'

7 With regard to the provision of services, Article 6(2) of the Sixth Directive provides:

'The following shall be treated as supplies of services for consideration:

(a) the use of goods forming part of the assets of a business for the private use of the taxable person or of his staff or more generally for purposes other than those of his business where the value added tax on such goods is wholly or partly deductible;

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.

...'

8 According to Article 11A(1)(c) of the Sixth Directive, the taxable amount is, 'in respect of supplies referred to in Article 6(2), the full cost to the taxable person of providing the services'.

National legislation

9 Under Paragraph 2(2) in Chapter 2 of the mervärdesskattelagen (Swedish law on VAT) (SFS 1994, No 200; 'the Swedish law'), the application of goods is to be understood to mean, inter alia, a transfer by a taxable person to a third party either free of charge or for a consideration which is less than the value calculated pursuant to Paragraph 3(2)(a) in Chapter 7 of that law, where such a reduction is not dictated by market conditions. The value referred to in that provision is the purchase value of the goods or similar goods or, in the absence of such a value, the cost price at the time of the application.

10 Under the first subparagraph of Paragraph 5 in Chapter 2 of the Swedish law, 'the application of services for private use' is to be understood to mean, inter alia, the performance, the arrangement of performance or the offering in some other way by a taxable person of a service meeting his own private needs, those of his staff or for other purposes unrelated to his business activities, where the service is offered either free of charge or for a consideration which is less than the value calculated pursuant to Paragraph 3(2)(b) in Chapter 7 of the law and where that reduction is not dictated by market conditions. It follows from the latter provision that that value is the cost of the service at the time of the 'application'.

11 The first subparagraph of Paragraph 2 in Chapter 7 of the Swedish law provides that the taxable amount for the supply of goods or services applied in this way is the value calculated pursuant to Paragraph 3(2)(a) or (b) in Chapter 7 of that law.

The main proceedings and the questions referred for a preliminary ruling

12 Scandic carries on its business in the hotel and restaurant sectors in Sweden. It offers its staff of approximately 25 persons lunch at a fixed price in a canteen specially set up by the company.

13 For that meal, the members of staff pay a price which exceeds the cost incurred by Scandic. However, it is possible that, in future, the price will be lower than the cost. Wishing to ascertain the tax implications of providing meals to its staff, Scandic asked the Skatterättsnämnden (a special commission responsible for issuing preliminary decisions in tax matters) whether the provision of meals to its staff was a supply of food (taxed at 12%) or a provision of services (taxed at 25%) and whether the fact that the company provides the meal at a price which is lower than the cost incurred in supplying the goods or providing the services means that the provision is taxable under the rules of the Swedish law on applications for private purposes or whether the taxable amount is the price paid by the employee.

14 In a preliminary decision of 10 June 2002, the Skatterättsnämnden found that the provision by Scandic of meals to its staff must be regarded as a provision of services and that it is subject to VAT by virtue of the provisions of the first subparagraph of Paragraph 5 in Chapter 2 and Paragraph 3(2)(b) in Chapter 7 of the Swedish law, where the price of the meal is lower than the cost incurred by Scandic.

15 Scandic brought an appeal against that decision before the Regeringsrätten (Supreme Administrative Court). It argues that the provision of a meal to its members of staff must be regarded as a supply of goods and not as a provision of services and that the rules on applications for private use cannot be applied because the staff pay a consideration for the provision of that meal.

16 The Regeringsrätten found that, under the Swedish law, the provisions on the taxation of the supply of goods or services for private use apply both where the goods or services are made available free of charge and where they are made available for a consideration which is lower than the purchase price or cost price of the goods or, as the case may be, the cost of providing the service. In the main proceedings, the question arose as to whether Articles 2, 5(6) and 6(2)(b) of the Sixth Directive preclude those national provisions.

17 Accordingly, the Regeringsrätten decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. In the event that the Regeringsrätten finds, when the case is decided, that the company's supplies are supplies of goods, are Article 2 and Article 5(6) of the Sixth Directive to be interpreted as precluding provisions in the legislation of a Member State under which the application of goods for private use means that a taxable person transfers goods to a third party for a consideration less than the purchase value of the goods or of similar goods or, if no such value is available, the cost price?

2. In the event that the Regeringsrätten finds, when the case is decided, that the company's supplies are food dispensing services, are Article 2 and Article 6(2)(b) of the Sixth Directive to be interpreted as precluding provisions in the legislation of a Member State under which the application of services for private use means that a taxable person performs, arranges performance or in some other way provides a service for himself or his staff for private purposes or for other non-commercial purposes, where the service is provided for a consideration less than the cost of performing the service?'

The questions referred for a preliminary ruling

18 The questions referred to the Court concern the determination of the taxable amount in the case of a supply of goods or a provision of services by a taxable person to the members of his staff for a price which is lower than the cost price. They have been referred, in particular, to enable the national court to assess the compatibility with the Sixth Directive of the Swedish law, which applies the rules laid down in Articles 5(6) and 6(2)(b) of that directive, in cases in which consideration has actually been paid for the supply of goods or the provision of services but in which that consideration is less than the cost price of those goods or services.

19 The Greek and Swedish Governments take the view that Articles 5(6) and 6(2)(b) of the Sixth Directive extend the scope of taxable transactions in that even transfers of goods or services which are not effected 'for consideration' within the meaning of Article 2 of that directive are rendered subject to VAT. It follows from those

provisions, read in conjunction with Article 11A, that the purpose of the directive is to prevent a taxable person or members of his staff from enjoying unjustified advantages over ordinary consumers (see Case C-415/98 *Bakcsi* [2001] ECR I-1831, paragraph 42, and Joined Cases C-322/99 and C-323/99 *Fischer and Brandenstein* [2001] ECR I-4049, paragraph 56). To that end, the Sixth Directive imposes tax not only on transfers free of charge but also on transfers for a price which is lower than the cost price.

20 By contrast, the Commission of the European Communities and the Danish Government submit that, in keeping with their wording, Articles 5(6) and 6(2)(b) of the Sixth Directive apply exclusively to transactions effected free of charge. Under Article 11A(1)(a) of that directive, the taxable amount is the consideration actually paid by the employee to the employer, even if that consideration is less than the cost price of the meals provided.

21 According to the general rule stated in Article 11A(1)(a) of the Sixth Directive, the taxable amount for the supply of goods or services for consideration is the consideration actually received for them by the taxable person. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria (see Case 154/80 *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraph 13; Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraph 16; Case C-126/88 *Boots Company* [1990] ECR I-1235, paragraph 19; Case C-258/95 *Fillibeck* [1997] ECR I-5577, paragraph 13; and Case C-404/99 *Commission* v *France* [2001] ECR I-2667, paragraph 38). Moreover, that consideration must be capable of being expressed in money (*Coöperatieve Aardappelenbewaarplaats*, paragraph 13; *Naturally Yours Cosmetics*, paragraph 16; and *Fillibeck*, paragraph 14).

22 As the Advocate General rightly stated in point 35 of his Opinion, the fact that the price paid for an economic transaction is higher or lower than the cost price is irrelevant to the question whether a transaction is to be regarded as a 'transaction effected for consideration'. The latter concept requires only that there be a direct link between the supply of goods or the provision of services and the consideration actually received by the taxable person (see, to that effect, Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraph 12).

23 Articles 5(6) and 6(2) of the Sixth Directive treat certain transactions for which no consideration is actually received by the taxable person as supplies of goods and provisions of services effected for consideration. The purpose of those provisions is to ensure equal treatment as between a taxable person who applies goods or services for his own private use or for that of his staff and a final consumer who acquires goods or services of the same type (see Case C-230/94 *Enkler* [1996] ECR I-4517, paragraph 35; *Fillibeck*, cited above, paragraph 25; and *Fischer and Brandenstein*, cited above, paragraph 56). In pursuit of that objective, Articles 5(6) and 6(2)(a) prevent a taxable person who has been able to deduct VAT on the purchase of goods used for his business from escaping payment of that tax when he applies those goods from his business for his own private use or that of his staff and from thereby enjoying advantages to which he is not entitled by comparison with an ordinary consumer who buys goods and pays VAT on them (see Case C-20/91 *De Jong* [1992] ECR I-2847, paragraph 15; *Enkler*, cited above, paragraph 33; *Bakcsi*, cited above, paragraph 42; and *Fischer and Brandenstein*, paragraph 56). Similarly, Article 6(2)(b) of the Sixth Directive prevents a taxable person or members of his staff from obtaining, free of tax, services provided by the taxable person for which a private individual would have to have paid VAT.

24 It is apparent from the order for reference that, in future, the members of Scandic's staff will continue to pay an actual consideration for the meals supplied by the

company. Since the transaction in question is effected for consideration within the meaning of Article 2 of the Sixth Directive, there is no reason to apply Articles 5(6) and 6(2)(b). Those provisions relate only to transactions effected free of charge which are treated as supplies effected for consideration for VAT purposes.

25 According to the Swedish Government, the aim and effectiveness of Articles 5(6) and 6(2)(b) of the Sixth Directive would be compromised if a transaction effected for a symbolic consideration did not fall within their scope. The payment of VAT could to a large extent be avoided if taxable persons or their employees were able to acquire goods or services for a symbolic sum and be taxed on the basis of that consideration.

26 The order for reference nowhere indicates that the amount to be paid in future by the members of Scandic's staff for the provision of a meal in the company's canteen will be symbolic. In any event, the risk referred to by the Swedish Government may be dealt with only by a request by the Member State concerned for authorisation under Article 27 of the Sixth Directive to introduce measures derogating from that directive in order to prevent certain types of tax evasion or avoidance.

27 The Swedish Government also points out that, under Article 11A(1)(a) of the Sixth Directive, subsidies directly linked to the price of taxable supplies form part of the taxable amount. Were an undertaking to subsidise the meals provided to its members of staff through an external catering company, it would pay to that company directly the subsidy amount which supplements the price paid by the staff to the catering company. The subsidy would then be regarded as an amount directly

linked to the price and would form part of the taxable amount pursuant to that provision. An undertaking which subsidises meals offered by its own catering services must be taxed in the same way.

28 It should be observed that, under the general rule laid down in Article 11A(1)(a) of the Sixth Directive, the taxable amount for the supply of goods or the provision of a service is formed by the consideration actually received by the taxable person 'from the purchaser, the customer or a third party ... including subsidies directly linked to the price of such supplies'.

29 The part of that phrase on which the Swedish Government relies relates to situations involving three parties, namely the party which grants the subsidy, the supplier of the goods or the provider of the services which benefits from it and the purchaser of the goods or services (see Case C-184/00 *Office des produits wallons* [2001] ECR I-9115, paragraph 10). In the present case, only two parties are involved, namely Scandic as the supplier of goods or provider of services and the members of its staff. Moreover, as is clear from Article 11A(1)(a) of the Sixth Directive, the consideration is always paid by 'the purchaser, the customer or a third party' and never by the supplier or provider itself. The cost incurred by the taxpayer itself in providing meals to its staff therefore cannot form part of the taxable amount for the transaction in question.

30 It follows from the above that Articles 2, 5(6) and 6(2)(b) of the Sixth Directive must be interpreted as precluding a national rule whereby transactions in respect of which an actual consideration is paid are regarded as an application of goods or services for private use, even where that consideration is less than the cost price of the goods or services supplied.

Costs

31 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) rules as follows:

Articles 2, 5(6) and 6(2)(b) 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 precluding a national rule whereby transactions in respect of which an actual consideration is paid are regarded as an application of goods or services for private use, even where that consideration is less than the cost price of the goods or services supplied.

[Signatures]