JUDGMENT OF THE COURT (Third Chamber)

30 September 2010 *

In Case C-581/08,

REFERENCE for a preliminary ruling under Article 234 EC from the VAT and Duties Tribunal, London Tribunal Centre (United Kingdom), made by decision of 17 December 2008, received at the Court on 29 December 2008, in the proceedings

EMI Group Ltd

v

The Commissioners for Her Majesty's Revenue and Customs,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, G. Arestis, T. von Danwitz (Rapporteur) and D. Šváby, Judges,

* Language of the case: English.

Advocate General: N. Jääskinen,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 21 January 2010,

after considering the observations submitted on behalf of:

— EMI Group Ltd, by R. Cordara QC and P. Key, Barrister,

— the United Kingdom Government, by L. Seeboruth, acting as Agent, and by P. Mantle, Barrister,

— the German Government, by M. Lumma and C. Blaschke, acting as Agents,

— the Polish Government, by M. Dowgielewicz, acting as Agent,

— the European Commission, by R. Lyal and M. Afonso, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 April 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the terms 'samples' and 'gifts of small value' appearing in the second sentence of Article 5(6) 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) ('the Sixth Directive').

2 The reference has been made in the course of proceedings between EMI Group Ltd ('EMI') and the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners') relating to EMI's claim for reimbursement of amounts which it claims to have paid in error in respect of value added tax ('VAT') over the period from April 1987 to June 2003 for free copies of recorded music supplied to various persons with a view to promoting its musical releases, and to the request for VAT payment, sent to EMI from the Commissioners, in respect of the distribution of such copies for the period from July 2003 to December 2004.

Legal context

European Union Law

3 Article 2 of the Sixth Directive provides:

'The following shall be subject to [VAT]:

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

2. the importation of goods.'

4 Article 5(6) of the Sixth Directive provides as follows:

'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 [VAT] 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.'

5 The Sixth Directive was repealed by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), the second paragraph of Article 16 of which is drafted in terms similar to those of the second sentence of Article 5(6) of the Sixth Directive.

National legislation

6 The relevant national provisions, which are set out in section 5(1) of the Value Added Tax Act 1994 and in paragraphs 5(1), (2), (2ZA) and (3) of Schedule 4 to that Act, have been amended on several occasions during the course of the period in issue in the main proceedings.

7 In their current version, those provisions provide, in essence, that the transfer or disposal, for consideration or otherwise, of goods from a taxable business constitutes a supply subject to VAT, with the exception of the provision of business gifts and samples. With regard to gifts, the exemption is subject to the condition that their value may not exceed GBP 50 per person per year. Until October 2003, that exemption did not cover gifts forming part of a series of gifts. In respect of samples, only the first sample is exempted in the case where a number of identical samples are given to the same person. Prior to July 1993, the exemption applied only to industrial samples presented in a form not ordinarily available for sale.

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 EMI is a company governed by English law and is engaged in the production and sale of recorded music and in music publishing. Since 1987, with a view to promoting its new recordings, EMI has been distributing free copies of those recordings on vinyl records, cassette tapes and compact discs ('CDs') to various persons capable of assessing the commercial quality of the recording and of influencing the level of exposure which an artist receives.

9 In the context of that promotional strategy, such free copies are, inter alia, distributed to individuals working in the press, radio stations, television programmes, advertising agencies, retail outlets and cinemas. EMI also uses promoters, known as 'pluggers', who are persons in a position to promote recordings in the audiovisual media and in the press, and who distribute those recordings, also free of charge, to their own contacts, targeted and detailed on lists specially compiled for the release of each new CD.

10 For that purpose, EMI supplies recorded music in a variety of forms, namely, recordable CDs protected by a digital watermark, which identifies the name of the recipient and enables any possible copies to be traced, for distribution prior to the release of the album; un-watermarked recordable CDs distributed in a white cardboard sleeve prior to the release of the album; conventional un-watermarked CDs distributed in a white cardboard sleeve detailing the same artwork as that which appears on the final album intended for sale to the public; and CDs in their final form intended for sale. The latter bear a sticker with the wording 'Promotional Copy Not For Resale'. The other types of recording distributed for promotional purposes have an inscription which states that the property rights remain vested in EMI.

11 According to the order for reference, approximately 90 % of promotional CDs are sent to named individuals, the main exception being CDs sent to persons identified by their official position at a university or college. The number of potential recipients of free copies of recorded music, who are considered by EMI to be influential in the music industry, is approximately 7 000. For the promotion of a given recording, a specific list of 200 to 500 recipients is compiled. This list will include the names of individuals thought to be most influential for the promotion of sales of recordings of the particular type of music in question. When a new recording is about to be released, EMI distributes, in general, between 2 500 and 3 750 copies free of charge. In the case of 'pluggers', a single 'plugger' may receive up to 600 free copies for redistribution. Conversely, copies may be sent separately to a number of persons working for the same organisation, such as the BBC.

12 From April 1987 to June 2003, EMI accounted for VAT on the copies of recordings distributed in the circumstances described above. Subsequently, as it took the view that the national legislation was incompatible with the second sentence of Article 5(6) of the Sixth Directive, according to which, in its opinion, no VAT is payable in respect of such distributions, EMI submitted a claim to the Commissioners for reimbursement of the amounts of VAT paid in connection with those distributions. As the Commissioners rejected that claim for reimbursement, EMI brought an action before the referring tribunal.

13 In addition, as EMI ceased accounting for VAT on promotional distributions of free CDs from July 2003, the Commissioners sent it a tax assessment relating to those distributions for the period from July 2003 to December 2004, against which EMI also brought an action before the referring tribunal, which was subsequently joined to the first action.

14 It is in those circumstances that the VAT and Duties Tribunal, London Tribunal Centre, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'[1.] How is the last sentence of Article 5(6) of the Sixth Directive to be interpreted in the context of the circumstances of the present case?

[2.] In particular, what are the essential characteristics of a "sample" within the meaning of the last sentence of Article 5(6) of the Sixth Directive?

[3.] Is a Member State permitted to limit the interpretation of "sample" in the last sentence of Article 5(6) of the Sixth Directive to –

[(a)] an industrial sample in a form not ordinarily available for sale to the public given to an actual or potential customer of the business (until 1993),

[(b)] only one, or only the first of a number of samples given by the same person to the same recipient where those samples are identical or do not differ in any material respect from each other (from 1993)?

[4.] Is a Member State permitted to limit the interpretation of "gifts of small value" in the last sentence of Article 5(6) of the Sixth Directive in such a way as to exclude –

[(a)] a gift of goods forming part of a series or succession of gifts made to the same person from time to time (to October 2003),

[(b)] any business gifts made to the same person in any 12-month period where the total cost exceeds [GBP] 50 (October 2003 onwards)?

[5.] If the answer to question [3(b)] above or any part of question [4] above is "yes", where a taxable person gives a similar or identical gift of recorded music to two or more different individuals because of their personal qualities in being able to influence the level of exposure the artist in question receives, is the Member State permitted to treat those items as given to the same person solely because those individuals are employed by the same person?

[6.] Would the answers to questions [1] to [5] above be affected by the recipient being, or being employed by, a fully taxable person, who would be (or would have been) able to deduct any input tax payable on the provision of the goods consisting of the sample?'

The questions referred for a preliminary ruling

The first question, in so far as it concerns the concept of samples, and the second and third questions

15 By its first question, in so far as it concerns the concept of samples, and by its second and third questions, which it is appropriate to examine together, the referring tribunal wishes to know how to interpret the term 'samples', within the meaning of the second sentence of Article 5(6) of the Sixth Directive, and, in particular, whether that term covers only goods given in a form not available for sale and covers only the first in a series of identical goods given to the same recipient.

16 As a preliminary point, it must be noted that the Sixth Directive contains no definition of that term. It is necessary, therefore, when interpreting that term, to take account of the wording, context and objectives of the second sentence of Article 5(6) of the Sixth Directive (see, to that effect, Case C-98/07 *Nordania Finans and BG Factoring* [2008] ECR I-1281, paragraph 17 and case-law cited).

17 In that regard, it should be recalled that the first sentence of Article 5(6) of the Sixth Directive treats certain transactions for which no real consideration is received by the taxable person as supplies of goods effected for consideration subject to VAT, in accordance with Article 2(1) of the Sixth Directive. Under well-established case-law, the purpose of that provision is to ensure equal treatment as between a taxable person who applies goods for his own private use or for that of his staff and a final consumer

who acquires goods of the same type (see, inter alia, Case C-412/03 *Hotel Scandic Gåsabäck* [2005] ECR I-743, paragraph 23 and the case-law cited).

18 As the German Government points out, the taxation of the applications referred to in the first sentence of Article 5(6) of the Sixth Directive is designed to prevent situations in which final consumption is untaxed.

19 The second sentence of Article 5(6) constitutes an exception to that rule, since it nevertheless exempts from taxation applications for the giving of samples or the making of gifts of small value for business purposes (see, to that effect, Case C-48/97 *Kuwait Petroleum* [1999] ECR I-2323, paragraph 23).

20 Consequently, the wording of the second sentence of Article 5(6) of the Sixth Directive is to be construed narrowly, in such a way that the purpose of the first sentence thereof is not undermined, while ensuring that the exemption in respect of samples and gifts of small value is not deprived of its effectiveness (see, by analogy, Case C-284/03 *Temco Europe* [2004] ECR I-11237, paragraph 17, and Case C-434/05 *Horizon College* [2007] ECR I-4793, paragraph 16).

21 Given that it is impossible to cover, by means of a uniform and exhaustive definition, the infinite number of very diverse goods which may potentially be concerned by transactions subject to VAT, and in the light of the unique business context of each transaction in which such goods might be distributed as samples by a taxable person, it is necessary to carry out a two-stage assessment. It is thus necessary, first, to ascertain whether the distribution of the goods in question is consistent with the essential

characteristics common to every type of sample and, second, to examine the specific circumstances in which those goods are distributed by a taxable person.

22 With regard to the first aspect, it should be observed that the objective of the exemption laid down in the second sentence of Article 5(6) of the Sixth Directive in relation to 'applications for the giving of samples …' is to reflect the commercial reality that the distribution of samples is carried out in order to promote the product of which the samples are specimens, by allowing for the quality of that product to be assessed and for verification that the product has the qualities sought by a potential or actual buyer.

23 Furthermore, in the light of the first sentence of Article 5(6) of the Sixth Directive, the exception in respect of samples is not intended to exempt from VAT the supply of goods where the objective is to satisfy a consumer's needs in relation to the product in question.

24 With regard to the second aspect, it is necessary, first, to address the issue of whether the concept of samples can be limited to goods given in a form which is not normally available for sale to the public.

25 It is apparent from paragraph 23 above that the objective of the exception in the second sentence of Article 5(6) of the Sixth Directive cannot consist in an exemption from VAT in respect of goods which lead to final consumption, other than where that final consumption is inherent in such promotional transactions.

26 Goods, distributed as samples, which are identical to the final product to be placed on the market are, it is true, liable to be the subject of final consumption.

27 That fact cannot, however, justify an exemption in respect of samples covering only those specimens which differ from the product represented, given that, in many cases, making available specimens which correspond to that product in its final form is a necessary prerequisite for the process of assessment.

28 In order to allow the goods supplied to be assessed as 'samples', those goods must have all the essential qualities of the product which they represent, in its final form. While, in some cases, the specimens may have all the essential qualities of the product represented without being in the final form of the product, it may prove necessary, in other cases, depending on the nature of that product, for the specimens to correspond exactly to the final product, so that those qualities can be demonstrated to the potential or actual buyer.

29 This applies, inter alia, to products in the artistic sector, in particular to CDs such as those at issue in the main proceedings, which have to be distributed in their final form in order to be able to be fully assessed by the recipient. In the case where a CD is distributed to an individual in order that, within the course of his work, that individual will ensure public exposure for the CD, that person will be in a position fully to assess the value of the CD only if he is able to listen to the entire content of the CD as it will be distributed on the market.

30 As regards, second, the issue of whether the concept of samples implies that the first recipient of the samples must be either a potential or actual buyer of the product which they represent, it must be held that it is not contrary to the objective of the second sentence of Article 5(6) of the Sixth Directive that goods be distributed, as 'samples', to an individual other than such a buyer, provided that such distribution is consistent with the objectives pursued in distributing samples as set out in paragraph 22 above.

31 In particular, in the artistic goods sector, the distribution of free copies of new works to an intermediary, whose role is to assess critically the quality of those new works, and who is therefore capable of influencing the market coverage of the product – such as a journalist or a radio programme presenter – is a result of a method of promotion in which use of the sample is inherent in the process of promotion and assessment.

32 In view of, third, the specific practice – connected with the sector at issue in the main proceedings – of promoting recorded music by distributing a very large number of copies of a CD to a 'plugger', the referring tribunal asks whether the concept of samples must be interpreted as meaning that, where a taxable person gives a certain number of goods to the same recipient and where none of those goods differs from the others in any material respect, each of those goods can be regarded as applied for the giving of samples or whether only the first copy distributed can be so classified.

33 In that regard, even though the provision of one specimen alone might suffice for the assessment of a product, the distribution of a number of specimens by way of 'samples' cannot be considered, in principle, to be excluded from the scope of the exception in respect of 'samples' laid down in the second sentence of Article 5(6) of the Sixth Directive, since the number of samples which a taxable person can distribute to the same recipient – that is to say, in the present case, an intermediary – depends on the nature of the product represented and on the use to which the recipient must put those samples.

34 In certain cases, the distribution of several or even a significant quantity of specimens of the same product to a given recipient may be necessary in order to meet the objectives of distributing samples.

35 Thus, in the case of recorded music, it may be necessary, for the purposes of critical assessment and the promotion of a CD, to give many copies of that CD to intermediaries so that they can subsequently forward those copies to targeted individuals on the basis of their ability to promote sales of recorded music.

36 The mere fact that the number of copies distributed, in such a context, might amount to several hundred, in the case where a company engaged in the production and sale of recorded music, such as EMI, uses 'pluggers' to distribute copies of new recordings, cannot be considered, in itself, to be contrary to the objective pursued by the exemption in respect of samples, in so far as that number of copies is consistent with the nature of the product represented and with the use which the 'plugger', as an intermediary, must make of those copies, these being matters which the referring tribunal must determine.

37 Likewise, the possibility that a 'plugger', instead of distributing, in the manner agreed, the free copies of recorded music made available to him, makes improper use of them, for example by introducing them into the normal sales chain, cannot, in itself, affect the classification of those free copies as 'samples'.

38 However, in order to ensure full respect for the limits to the exemption set out in the second sentence of Article 5(6) of the Sixth Directive, Member States may require taxable persons distributing samples for the purposes of their business to take precautions in order to avoid the risk that those samples may be used improperly. Such precautions could, for example, consist in mandatory labelling indicating that the product is a sample, or in contractual clauses relating to the civil liability of intermediaries, such as 'pluggers', who receive samples for the purpose of forwarding them to other individuals.

39 Where the distribution of samples nevertheless leads to final consumption which is not inherent in the assessment of the product represented by those samples, that consumption will constitute an abuse.

40 In the light of all of the foregoing, the answer to the first question, in so far as it concerns the concept of samples, and to the second and third questions, is that a 'sample', within the meaning of the second sentence of Article 5(6) of the Sixth Directive, is a specimen of a product which is intended to promote the sales of that product and which allows the characteristics and qualities of that product to be assessed without resulting in final consumption, other than where final consumption is inherent in such promotional transactions. That concept cannot be limited, in a general way, by national legislation to specimens presented in a form which is not available for sale or to the first of a series of identical specimens given by a taxable person to the same recipient, unless that legislation allows account to be taken of the nature of the product represented and of the specific business context of each transaction in which those specimens are distributed.

The first question, in so far as it concerns the concept of gifts of small value, and the fourth question

41 By its first question, in so far as it concerns the concept of 'gifts of small value', within the meaning of the second sentence of Article 5(6) of the Sixth Directive, and by its fourth question, the referring tribunal wishes to know whether that provision must be interpreted as precluding national legislation which imposes quantitative restrictions on the number or value of the gifts which may be received from time to time, or in the course of a fixed period, by the same person.

42 Without it being necessary to ascertain whether the expression 'small value' is a concept of European Union law or implicitly refers back to national law – those Member States which submitted observations and the European Commission having argued for the latter interpretation – it must be held that, in view of the wording, context and objectives of the second sentence of Article 5(6) of the Sixth Directive, that provision does not contain the guidance necessary for defining uniformly and precisely that expression. The Member States therefore have a certain margin of discretion as regards the interpretation of that provision, provided that they do not fail to have regard to the objective and role of the provision at issue within the scheme of the Sixth Directive (see, by analogy, Case C-72/05 *Wollny* [2006] ECR I-8297, paragraph 28).

43 Accordingly, it is necessary to examine whether quantitative limits such as those provided for by the legislation at issue in the main proceedings meet those conditions.

44 As all the Member States which submitted observations and the Commission have argued, the setting, in national legislation, of a monetary ceiling of the order of that established by the legislation at issue in the main proceedings, namely GBP 50, does not go beyond the margin of discretion granted to Member States. The same holds true with regard to a rule under which such a ceiling applies cumulatively to gifts made to the same person in the course of a 12-month period or, alternatively, forming part of a series or succession of gifts. Such ceilings are compatible with the objectives of Article 5(6) of the Sixth Directive, while not rendering ineffective the exemption for which it provides in respect of gifts of small value.

45 In the light of the foregoing, the answer to the first question, in so far as it concerns the concept of 'gifts of small value' within the meaning of the second sentence of Article 5(6) of the Sixth Directive, and to the fourth question, is that that concept must be interpreted as not precluding national legislation which fixes a monetary ceiling of the order of that established by the legislation at issue in the main proceedings,

namely GBP 50, for gifts made to the same person in the course of a 12-month period or forming part of a series or succession of gifts.

The fifth question

46 By its fifth question, which, in view of its wording, concerns only the concept of 'gifts of small value', within the meaning of the second sentence of Article 5(6) of the Sixth Directive, the referring tribunal asks, in essence, whether, in the light of the application of certain ceilings, national legislation can treat gifts distributed by a taxable person to different individuals having the same employer as being gifts made to the same person.

47 In that regard, even though the Member States have a certain margin of discretion in relation to the interpretation of the expression 'small value', as has just been established in paragraph 42 above, national legislation which treats gifts distributed by a taxable person to different individuals as being gifts made to the same person, namely their common employer, is not compatible with the objectives of Article 5(6) of the Sixth Directive.

48 Such national legislation, *a fortiori* where it establishes a cumulative monetary ceiling for all gifts made to the same person in the course of a fixed period, would deprive the provision – which provides that gifts of small value made for business purposes are exempt from VAT – of its effectiveness.

49 Classifying the distribution of a product as a 'gift of small value' depends on the fact of knowing who was the distributor's intended final recipient, and the working relationship between the recipient and his employer or the fact that a number of recipients have the same employer has no effect on that classification.

50 Consequently, the answer to the fifth question is that the second sentence of Article 5(6) of the Sixth Directive precludes national legislation which establishes a presumption that goods constituting 'gifts of small value' within the meaning of that provision, distributed by a taxable person to different individuals having the same employer, are to be treated as having been made to the same person.

The sixth question

51 By its sixth question, the referring tribunal asks, in essence, whether the fact that the recipient of 'samples', within the meaning of the second sentence of Article 5(6) of the Sixth Directive, is a fully taxable person who would be able to deduct any input tax payable on the provision of goods consisting of samples has any bearing on the answers given to the first five questions.

52 In that regard, it is apparent from that provision that it does not draw any distinction on the basis of the tax status of the recipient of samples.

53 Consequently, the answer to the sixth question is that the tax status of the recipient of samples has no bearing on the answers given to the other questions.

Costs

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

On those grounds, the Court (Third Chamber) hereby rules:

1. **A 'sample', within the meaning of the second sentence of Article 5(6) 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, is a specimen of a product which is intended to promote the sales of that product and which allows the characteristics and qualities of that product to be assessed without resulting in final consumption, other than where final consumption is inherent in such promotional transactions. That term cannot be limited, in a general way, by national legislation to specimens presented in a form which is not available for sale or to the first of a series of identical specimens given by a taxable person to the same recipient, unless that legislation allows account to be taken of the nature of the product represented and of the specific business context of each transaction in which those specimens are distributed.**

2. The concept of 'gifts of small value', within the meaning of the second sentence of Article 5(6) of Sixth Directive 77/388, must be interpreted as not precluding national legislation which fixes a monetary ceiling of the order of that established by the legislation at issue in the main proceedings, namely GBP 50, for gifts made to the same person in the course of a 12-month period or forming part of a series or succession of gifts.

3. The second sentence of Article 5(6) of Sixth Directive 77/388 precludes national legislation which establishes a presumption that goods constituting 'gifts of small value' within the meaning that provision, distributed by a taxable person to different individuals having the same employer, are to be treated as having been made to the same person.

4. The tax status of the recipient of samples has no bearing on the answers given to the other questions.

[Signatures]