JUDGMENT OF THE COURT (Second Chamber)

23 February 2006 *

In Case C-491/04,

REFERENCE for a preliminary ruling under Article 234 EC by the VAT and Duties Tribunal, Manchester (United Kingdom), made by decision of 24 November 2004, received at the Court on 29 November 2004, in the proceedings

Dollond & Aitchison Ltd

v

Commissioners of Customs & Excise,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, P. Kūris (Rapporteur), G. Arestis and J. Klučka, Judges,

* Language of the case: English.

Advocate General: M. Poiares Maduro,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 10 November 2005,

after considering the observations submitted on behalf of:

— Dollond & Aitchison Ltd, by K. Parker QC, instructed by KPMG, Solicitors,

— the United Kingdom Government, by R. Caudwell, acting as Agent, and M. Hall QC,

— the German Government, by M. Lumma and C. Schulze-Bahr, acting as Agents,

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

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 29 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, 'the Customs Code').

2 The reference was made in a dispute between Dollond & Aitchison Ltd ('D & A') and the Commissioners of Customs & Excise ('the Commissioners') regarding the customs value of contact lenses delivered by post from Jersey (Channel Islands) to the United Kingdom where those lenses are accompanied by examination, consultation and aftercare services.

Legal context

3 In Article 2 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) as amended by Council Directive 92/111/EEC of 14 December 1992 (OJ 1992 L 384, p. 47; 'the Sixth Directive'), the scope of the directive is defined as follows:

'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. the importation of goods.'

4 Article 3 of that directive determines its territorial scope, stating in paragraph 2 that '... the "territory of the country" shall be the area of application of the Treaty establishing the European Economic Community as defined in respect of each Member State in Article 227 [now, after amendment, Article 299 EC]'.

5 Article 299(6)(c) EC provides that '... this Treaty shall apply to the Channel Islands ... only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.'

6 Article 1(1) of Protocol No 3 annexed to the Act concerning the conditions of accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great

Britain and Northern Ireland and the adjustments to the treaties (OJ, English Special Edition of 27 March 1972, p. 14), provides that: '[t]he Community rules on customs matters and quantitative restrictions, in particular those of the Act of Accession, shall apply to the Channel Islands ... under the same conditions as they apply to the United Kingdom. ...'.

7 Under Article 11B(1) of the Sixth Directive, the taxable amount is to be 'the value for customs purposes, determined in accordance with the Community provisions in force'.

8 The value for customs purposes is determined in accordance with Article 29 of the Customs Code, which provides that:

'1. The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted, where necessary, in accordance with Articles 32 and 33 ... .

...

3. (a) The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller. ...'

9 Where the customs value cannot be determined in accordance with Article 29 of the Customs Code, reference must be made to Article 30(2) thereof, which states:

'The customs value as determined under this article shall be:

(a) the transaction value of identical goods sold for export to the Community and exported at or about the same time as the goods being valued;

(b) the transaction value of similar goods sold for export to the Community and exported at or about the same time as the goods being valued;

(c) the value based on the unit price at which the imported goods for identical or similar imported goods are sold within the Community in the greatest aggregate quantity to persons not related to the sellers;

(d) the computed value, consisting of the sum of:

— the cost or value of materials and fabrication or other processing employed in producing the imported goods,

— an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the Community,

— the cost or value of the items referred to in Article 32(1)(e) ...'

The main proceedings and the questions referred for a preliminary ruling

10 D & A is a firm of opticians with branches throughout the United Kingdom. Until 1998, D & A operated a scheme under which customers collected their disposable contact lenses from a branch every three months. They were entitled to receive certain professional services and were required to undergo an annual eye check. The tax authorities treated that scheme as involving two separate elements: a supply of goods, taxable at the standard rate of value added tax ('VAT'), and a supply of services, exempt from that tax.

11 In 1998, the system changed so that a company not connected with the appellant in the main proceedings dispatched the lenses, solutions and soaking cases from Scotland. D & A did not change its method of accounting for VAT even though, following a reversal of precedent in the case of *Leightons Ltd* v *CEC*, the tax authorities had concluded that supplies of contact lenses are a mixed supply of goods and services covering all types of professional services, including measuring and fitting.

12 With effect from July 1999, the company transferred its warehousing operation to Jersey to take advantage of cheaper postal services.

13 Dollond & Aitchison Lenses Direct Ltd ('DALD'), a company in the same group, incorporated under Jersey law, dispensed disposable contact lenses by post in the form of a subscription from Jersey to the United Kingdom between 1 July 1999 and 30 June 2001. Subscribers paid a fixed monthly amount, for which they received a periodic supply of disposable lenses together with the solutions and soaking cases necessary for their care. In addition, the price covered an initial contact lens examination or consultation, a contact lens check at least once a year and any other aftercare relating to the use of the lenses.

14 The Commissioners held, by decision of 18 October 1999, that when DALD dispensed contact lenses from Jersey to customers in the United Kingdom, it made single supplies of goods, rather than supplies of goods and services. By a second decision of 6 September 2001, they held that the true value of a consignment included all amounts payable as a condition of the sale, that is to say, its full price.

15 D & A brought an appeal against both those decisions.

16 In those circumstances, the VAT and Duties Tribunal, Manchester, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is that part of the payment which is made by a customer to [DALD] for the supply of specified services by [D & A] or by its franchisees to be included in the

total payment for the specified goods so as to be part of the price paid or payable for the specified goods within the meaning of Article 29 of [the Customs Code] in circumstances where the customer is a private consumer and importer on whose behalf [DALD] accounts for VAT on importation?

The specified goods are:

(i) contact lenses

(ii) cleaning solutions

(iii) soaking cases.

The specified services are:

(iv) a contact lens examination

(v) a contact lens consultation

(vi) any on-going aftercare required by a customer.

(2) If the answer to [Question] 1 above is No, may the amount of the payment for the specified goods nonetheless be calculated under Article 29 or is it necessary to make such calculation under Article 30 of [the Customs Code]?

(3) In view of the fact that the Channel Islands are part of the customs territory of the Community but are not part of the VAT territory for the purposes of the [Sixth Directive], does any of the guidance set out in Case C-349/96 *Card Protection Plan* v *Commissioners of Customs and Excise* [[1999] ECR I-973] apply for the purposes of determining which part or parts of the transaction comprising the provision of specified services and specified goods fall to be valued for the purposes of applying the [Common] Customs Tariff of the European Communities?'

The questions referred

17 As a preliminary point, it should be borne in mind that the Island of Jersey is an integral part of the Community customs territory but constitutes a third territory as regards the rules established by the Sixth Directive. Consequently, the supply of goods by a company established in Jersey to a customer resident in the United Kingdom constitutes an importation within the meaning of Article 2(2) of the Sixth Directive. The taxable amount is thus defined by Article 11B(1) of that directive as 'the value for customs purposes, determined' in accordance with Article 29 of the Customs Code.

18 Accordingly, the questions referred by the national court must be answered solely by reference to Article 29 of the Customs Code.

19 It is appropriate to examine the questions by starting with the third question, which is a prerequisite for considering the first question.

The third question

20 By its third question, the national court seeks to know whether the principles laid down in the *CCP* judgment are relevant for determining the elements of the transaction to be taken into account for the purposes of applying Article 29 of the Customs Code.

21 For the reasons set out in paragraph 17 of this judgment, and as both the Commission of the European Communities and the United Kingdom Government submit, that judgment, and in particular paragraph 27 thereof, which relates to the scope of a transaction subject to VAT within a Member State, cannot be interpreted as giving guidelines capable of being used directly in applying the provisions of Article 29 of the Customs Code.

22 The answer to the third question must therefore be that the principles laid down in the *CCP* judgment cannot be used directly to determine the elements of the transaction to be taken into account for the purposes of applying Article 29 of the Customs Code.

The first question

23 By this question, the national court seeks to know whether the payment made by a customer for the supply of specified services, such as examination, consultation or aftercare required for contact lenses, must be added to the total payment for the specified goods, which include contact lenses, cleaning solutions and soaking cases, in order to constitute together the transaction value within the meaning of Article 29 of the Customs Code.

24 D & A submits that the part of the payment which is made by a customer for the supply of specified services is not to be included in the total payment for the specified goods so as to be an integral part of the transaction value within the meaning of Article 29 of the Customs Code. Nevertheless, it concludes that the amount of the payment for the specified goods may be calculated under Article 29 and that there is no need to refer to Article 30 of the Code.

25 For their part, the German and United Kingdom Governments and the Commission take the view that the customs value of the specified goods must be calculated by including in that value the value attributed to the specified services.

26 In answering the question referred for a preliminary ruling as set out, it must be borne in mind that the Court has already held that in order to determine what constitutes the 'transaction value' the calculation must be made on the basis of the conditions on which the individual sale was made (see Case 65/85 *Van Houten* [1986] ECR 447, paragraph 13).

27 The Court has also held that, although software is not 'goods' but intangible property not subject to the Common Customs Tariff, the cost of acquiring it must be regarded as an integral part of the price paid or payable for the goods where it is embodied in them (see Case C-79/89 *Brown Boveri* [1991] ECR I-1853, paragraph 21).

28 Moreover, after finding that the analyses carried out after importation were necessary in order for the goods to be delivered in accordance with the provisions of the contract, the Court held that the costs of those analyses, which the importer invoices to the buyer in addition to the price of the goods, must be regarded as an integral part of the 'transaction value' of the latter (see Case C-15/99 *Sommer* [2000] ECR I-8989, paragraphs 24 and 27).

29 Finally, in Case C-379/00 *Overland Footwear* [2002] ECR I-11133, paragraph 17, the Court held that Articles 29, 32 and 33 of the Customs Code must be construed as meaning that a buying commission which is included in the customs value declared and is not shown separately from the selling price of the goods in the import declaration must be considered to be part of the transaction value within the meaning of Article 29 of that code and is, therefore, dutiable.

30 In the present case, it is necessary to examine whether the services supplied in the United Kingdom are an integral part of the price of the goods dispatched from Jersey so that the two elements may be regarded as constituting together the transaction value within the meaning of Article 29 of the Customs Code.

31 In this respect, the fact that one of the two elements is effected in the customs territory of the Community and the other one outside that territory is of no relevance for determining the transaction value (see, to that effect, Case C-116/89 *BayWa* [1991] ECR I-1095, paragraph 15).

32 In the first place, it is apparent from the documents before the Court that the special offer called 'Contact Lenses by Post' ('CLBP') includes, in addition to delivery of disposable lenses and solutions from Jersey directly to the customer's home, specified services including an initial contact lens consultation, followed by dispensing and fitting services, and a professional aftercare service as and when requested by the customer. All the services are provided by D & A or its franchisees. In the second place, it should be noted that the customer makes an advance monthly payment to DALD by direct debit, which does not distinguish consultations and other services from goods, that the contract does not provide for any additional options and that, according to the United Kingdom Government, the supply of the services in question in the main proceedings is an obligation under national law, thus amounting to a condition of sale.

33 It should be observed that, according to D & A, the supplies of services are invoiced separately if the customer does not adhere to the CLBP offer described earlier.

34 Consequently, it must be concluded that the offer is a global one in respect of which a single payment is made. Accordingly, the supplies of services must be regarded as part of the 'payments made or to be made as a condition of sale of the imported goods by the buyer to the seller ... to satisfy an obligation of the seller' within the

meaning of Article 29 of the Customs Code and, therefore, as an integral part of the customs value.

35 Accordingly, the answer to the question referred must be that, in circumstances such as those of the main proceedings, payment for the supply of specified services, such as examination, consultation or aftercare required in connection with contact lenses, and for specified goods, consisting of those lenses, the cleaning solutions and the soaking cases, constitutes as a whole the 'transaction value' within the meaning of Article 29 of the Customs Code and is, therefore, dutiable.

The second question

36 In view of the answer given to the first question, it is unnecessary to reply to the second.

Costs

37 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 (Second Chamber) hereby rules:

1. **Article 29 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code must be interpreted as meaning that, in circumstances such as those of the main proceedings, payment for the supply of specified services, such as examination, consultation or aftercare required in connection with contact lenses, and for specified goods, consisting of those lenses, the cleaning solutions and the soaking cases, constitutes as a whole the 'transaction value' within the meaning of Article 29 of the Customs Code and is, therefore, dutiable.**

2. **The principles laid down in the *CCP* judgment (Case C-349/96) of 25 February 1999 cannot be used directly to determine the elements of the transaction to be taken into account for the purposes of applying Article 29 of the Customs Code.**

[Signatures]