JUDGMENT OF THE COURT (Third Chamber)
22 November 2001 *

In Case C-184/00,

REFERENCE to the Court under Article 234 EC by the Tribunal de première instance de Charleroi (Belgium) for a preliminary ruling in the proceedings pending before that court between

Office des produits wallons ASBL

and

Belgian State,

on the interpretation of Article 11A(1)(a) 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: French.

THE COURT (Third Chamber),

composed of: C. Gulmann (Rapporteur), acting for the President of the Chamber, J.-P. Puissochet and J.N. Cunha Rodrigues, Judges,

Advocate General: L.A. Geelhoed,
Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

— Office des produits wallons ASBL, by M. Eloy, avocat,

— the Belgian Government, by A. Snoecx, acting as Agent, assisted by B. van de Walle de Ghelcke, avocat,

— the French Government, by J.-F. Dobelle, S. Pailler and S. Seam, acting as Agents,

— the Commission of the European Communities, by E. Traversa and C. Giolito, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Office des produits wallons ASBL, represented by R. Ghods, avocat, of the Belgian Government, represented by B. van de Walle de Ghelcke, and the Commission, represented by E. Traversa and C. Giolito, at the hearing on 22 March 2001,

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

gives the following

Judgment

1 By a judgment of 11 May 2000, received at the Court on 16 May 2000, the Tribunal de première instance (Court of First Instance) de Charleroi, referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Article 11A(1)(a) 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 Those questions were raised in a dispute between the Office des produits wallons ASBL ('OPW') and the Belgian State as to whether operating subsidies covering part of OPW's running costs had to be included in the taxable amount for the purposes of calculating value added tax ('VAT').

Legal background

3 Article 11A(1)(a) of the Sixth Directive provides:

'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

4 The OPW is a private non-profit-making association which carries out the advertising and sale of Walloon agricultural and horticultural products and agricultural foodstuffs, an activity in respect of which it is subject to VAT. It enjoys an annual subsidy from the Walloon Region, with which it concluded a framework subsidy agreement on 11 March 1994 ('the framework agreement'). Under that agreement, it is responsible for four types of activity, namely the publication of a catalogue, the publication of a magazine entitled *Wallonie nouvelle*, the running of local offices and participation in local events. Under the framework agreement, OPW 'shall draw up its budgets on the basis of the previous year's subsidy.... The reference year for the starting-point of that system is the year 1994 with a subsidy of BEF 11 000 000'. The framework agreement also provides that 'permitted expenditure shall include in particular the remuneration of staff, the cost of renting and fitting out premises if necessary, the cost of obtaining necessary equipment and supplies, purchases of goods and services and any other costs, direct or indirect, relating to the activity of OPW, concerned by this agreement'.

5 At an audit in February 1997, the Belgian tax authorities, having found that OPW had not paid VAT on the subsidy, made a tax adjustment of BEF 6 712 500 for the years 1994 to 1996. A VAT demand for that amount was then issued against OPW and it was fined BEF 1 349 000.

6 OPW made a formal objection to that demand before the Tribunal de première instance de Charleroi.

7 In the order for reference, that court notes in particular that:

— Article 26 of the Code de la TVA (Belgian VAT Code), which transposes Article 11A of the Sixth Directive into Belgian law, defines the concept of taxable amount in respect of VAT;

— the parties to the dispute accept that a subsidy forms part of the taxable amount if it is directly linked to the price, which is true where it is paid to the producer or supplier of goods or services, it is paid by a third party and constitutes the consideration or a part of the consideration for goods or services;

— the parties disagree as to the scope of that third condition.

8 In those circumstances, the Tribunal de première instance de Charleroi decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. For the purposes of applying Article 11A of the Sixth Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes..., do operating subsidies covering part of a taxable person's running costs (investment aid, contribution to general or current expenses, staff costs) and affecting the final cost price of its goods or services, but which cannot be distinguished from the price of the supply, constitute a taxable amount?

2. Is their taxable nature conditional on the existence of a distinct service to the body paying the subsidy and on the benefit derived by that body being equivalent to the consideration supplied?

3. If so, how is the value of the benefit derived by the body paying the subsidy to be determined?'

The questions referred

9 In its questions, the national court effectively asks what interpretation should be given to the term 'subsidies directly linked to the price' within the meaning of Article 11A(1)(a) of the Sixth Directive and, in particular, whether an operating subsidy, such as that at issue in the main proceedings, must be included in the taxable amount as defined by that provision.

10 It should first be noted that, as has been pointed out both by the Commission in the observations which it has submitted to the Court and by the Advocate General in point 40 of his Opinion, in circumstances such as those in the main proceedings it is immaterial whether or not there is a distinct service by a taxpayer such as OPW to the body paying the subsidy. Article 11A of the Sixth Directive deals with situations where three parties are involved: the authority which grants the subsidy, the body which benefits from it and the purchaser of the goods or services delivered or supplied by the subsidised body. Thus, transactions covered by Article 11A of the Sixth Directive are not those carried out for the benefit of the authority granting the subsidy.

11 It should also be noted that subsidies such as those identified in the first question referred — namely operating subsidies covering a part of running costs — nearly always affect the cost price of the goods and services supplied by the subsidised body. In so far as it offers specific goods or services, that body can normally do so at prices which it would be unable to offer if were obliged at the same time both to pass on its costs and make a profit.

12 However, the mere fact that a subsidy may affect the price of the goods or services supplied by the subsidised body is not enough to make that subsidy taxable. For the subsidy to be directly linked to the price of such supplies, within the meaning of Article 11A of the Sixth Directive, it is also necessary, as the Commission has rightly pointed out, that it be paid specifically to the subsidised body to enable it to provide particular goods or services. Only in that case can the subsidy be regarded as consideration for the supply of goods or services, and therefore be taxable.

13 In order to establish whether the subsidy constitutes such consideration, it should be noted that the price of the goods or services must, in principle, be determined not later than the time of the triggering event. It should also be noted that the

undertaking to pay the subsidy made by the person who grants it has as its corollary the right of the beneficiary to receive it, since a taxable supply has been made by the latter. That link between the subsidy and the price must appear unequivocally following a case by case analysis of the circumstances underlying the payment of that consideration. On the other hand, it is not necessary for the price of the goods or services — or a part of the price — to be ascertained. It is sufficient for it to be ascertainable.

14 It is therefore for the referring court to establish the existence of a direct link between the subsidy and the goods or services at issue. That makes it necessary to verify at an early stage that the purchasers of the goods or services benefit from the subsidy granted to the beneficiary. The price payable by the purchaser must be fixed in such a way that it diminishes in proportion to the subsidy granted to the seller or supplier of the goods or services, which therefore constitutes an element in determining the price demanded by the latter. The court must examine, objectively, whether the fact that a subsidy is paid to the seller or supplier allows the latter to sell the goods or supply the services at a price lower than he would have to demand in the absence of subsidy.

15 In the main proceedings and in view of the fact that, according to the framework agreement, OPW carries out a number of activities, the referring court must verify whether each activity gives rise to a specific and identifiable payment or whether the subsidy is paid globally in order to cover the whole of OPW's running costs. In any event, it is only the part of the subsidy identifiable as being the consideration for a taxable supply that may, in appropriate cases, be subject to VAT.

16 As the Commission has rightly pointed out, an examination of the annual accounts between OPW and the Walloon Region might enable the national court to ascertain whether the amounts of the subsidy to be allocated to each obligation imposed on OPW by that Region are determined by virtue of the framework agreement. If that were the case, a direct link might be established between that subsidy and the sale of the periodicals published by OPW.

17 Moreover, in order to determine whether the consideration represented by the subsidy is identifiable, the national court may either compare the price at which the goods are sold in relation to their normal cost price, or examine whether the amount of the subsidy has been reduced once those goods are no longer produced. If the factors examined are significant, it must be concluded that the part of the subsidy allocated to the production and sale of the goods in question constitutes a 'subsidy directly linked to the price'. In that regard, it is not necessary for the subsidy to correspond exactly to the diminution in the price of the goods supplied, it being sufficient if the relationship between the diminution in price and the subsidy, which may be at a flat rate, is significant.

18 In the light of the above, the answer to the questions referred must be that for the purposes of Article 11A(1)(a) of the Sixth Directive 'subsidies directly linked to the price' must be interpreted as covering only subsidies which constitute the whole or part of the consideration for a supply of goods or services and which are paid by a third party to the seller or supplier. It is for the national court to determine, on the basis of the facts before it, whether or not the subsidy constitutes such consideration.

Costs

19 The costs incurred by the Belgian and French Governments and 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 court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the questions referred to it by the Tribunal de première instance de Charleroi by judgment of 11 May 2000, hereby rules:

For the purposes of Article 11A(1)(a) 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 'subsidies directly linked to the price' must be interpreted as covering only subsidies which constitute the whole or part of the consideration for a supply of goods or services and which are paid by a third party to the seller or supplier. It is for the national court to determine, on the basis of the facts before it, whether or not the subsidy constitutes such consideration.

Gulmann Puissochet Cunha Rodrigues

Delivered in open court in Luxembourg on 22 November 2001.

R. Grass

Registrar

F. Macken

President of the Third Chamber