# JUDGMENT OF THE COURT

15 May 2001 *

In Case C-34/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the House of Lords, United Kingdom, for a preliminary ruling in the proceedings pending before that court between

Commissioners of Customs and Excise

and

Primback Ltd

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

* Language of the case: English.

to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, A. La Pergola, V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet, L. Sevón, R. Schintgen (Rapporteur) and N. Colneric, Judges,

Advocate General: S. Alber,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Primback Ltd, by J. Fenwick QC and P. Cargill-Thompson, Barrister, instructed by Hutchinson Mainprice & Co., Solicitors,

— the United Kingdom Government, by R. Magrill, acting as Agent, assisted by N. Pleming QC and C. Vajda QC,

— the German Government, by W.-D. Plessing and C.-D. Quassowski, acting as Agents,

— the Irish Government, by M.A. Buckley, acting as Agent, assisted by D. Moloney BL,

— the Commission of the European Communities, by E. Traversa and F. Riddy, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Primback Ltd, represented by J. Fenwick and P. Cargill-Thompson; of the United Kingdom Government, represented by R. Magrill, assisted by N. Pleming and C. Vajda; of the Irish Government, represented by D. Moloney; and of the Commission, represented by R. Lyal, acting as Agent, at the hearing on 28 November 2000,

after hearing the Opinion of the Advocate General at the sitting on 18 January 2001,

gives the following

## Judgment

1 By order of 1 February 1999, received at the Court on 8 February 1999, the House of Lords referred for a preliminary ruling under Article 177 of the

EC Treaty (now Article 234 EC) three questions concerning 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 have arisen in a dispute between Primback Ltd ('Primback') and the Commissioners of Customs and Excise ('the Commissioners'), who are responsible in the United Kingdom for matters relating to the collection of value added tax ('VAT'), concerning determination of the basis of assessment for calculating the VAT payable by Primback in respect of the supply of goods to final consumers in 1989 and 1990.

## The Sixth Directive

3 Article 2, which constitutes Title II ('Scope') of the Sixth Directive, provides:

'[T]he 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. ...'.

4 Article 11, which constitutes Title VIII ('Taxable Amount') of the Sixth Directive, is worded as follows:

'A. *Within the territory of the country*

1. 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;

...

3. The taxable amount shall not include:

(a) price reductions by way of discount for early payment;

(b) price discounts and rebates allowed to the customer and accounted for at the time of the supply;

...'.

5 Article 13, which is entitled 'Exemptions within the territory of the country' and forms part of Title X ('Exemptions') of the Sixth Directive, provides:

'A. *Exemptions for certain activities in the public interest*

...

B. *Other exemptions*

Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(d) the following transactions:

1. the granting and the negotiation of credit and the management of credit by the person granting it;

...

...

C. *Options*

Member States may allow taxpayers a right of option for taxation in cases of:

(a) ...;

(b) the transactions covered in B(d)... above.

Member States may restrict the scope of this right of option and shall fix the details of its use.'

## The dispute in the main proceedings

6 Primback is a furniture retailer which offers its customers the possibility of paying for goods purchased on the basis of credit, described as interest-free credit, obtained from a finance house.

7 A customer availing himself of this possibility receives from Primback an invoice indicating the price of the goods as advertised in the store at the time of sale.

8 Primback is not required, under the relevant national legislation, to issue a VAT invoice unless expressly requested to do so by the customer.

9 In parallel with the contract of sale concluded with Primback, a customer who so wishes may enter into a contract with a finance house for a loan, in respect of the sale, for an amount equivalent to the cash sales price of the goods, plus, if applicable, any credit insurance taken out, and less, if applicable, any deposit paid by the customer to Primback.

10 Pursuant to this contract, the finance house undertakes to lend to the customer a sum equal to the purchase price which the customer owes to Primback and to pay that sum directly to Primback in settlement of the amount owed after receiving written confirmation from the customer that the goods have been delivered and installed. The finance house does not acquire title to the goods purchased by the customer.

11 The customer repays the amount of the loan to the finance house by way of monthly instalments for a fixed amount spread over the term of the loan; the customer thus pays no interest.

12 Primback has concluded verbal agreements with a variety of finance houses, the terms of those agreements often varying from one region to another. Customers are unaware of these agreements.

13 It is common ground that, under those arrangements, a finance house which agrees to make an interest-free loan to a customer of Primback pays to Primback, notwithstanding the terms of the loan contract, an amount lower than the sales price owed by the customer having first deducted commission — amounting, in the transaction taken as an example in the order for reference, to 18% of the price — as consideration for the loan.

14 Primback declared and paid VAT to the Commissioners only on the sums actually paid to it, whether by customers in the case of cash payments or by finance companies where customers had bought goods on interest-free credit.

15 The Commissioners, however, took the view that Primback ought to have paid VAT on the full sales price invoiced to customers and for that reason issued a revised assessment for payment of GBP 15 530 in respect of the period from 12 June 1989 to 31 December 1990.

16 Primback thereupon brought the matter in turn before the VAT and Duties Tribunal, the High Court of Justice of England and Wales and the Court of Appeal of England and Wales.

17 Its action before the VAT Tribunal was dismissed on 12 May 1993 and its appeal to the High Court was dismissed by decision of 26 July 1994.

18 The Court of Appeal, however, allowed Primback's appeal on 25 April 1996, while granting the Commissioners leave to appeal to the House of Lords.

19 The Commissioners thereupon appealed to the House of Lords.

20 It was against this background that the House of Lords decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Where a retailer offers, at a single price, goods and the option of a period of extended credit to pay that price — the credit to be provided by a person other than the retailer, and at no additional cost to the customer — what is the taxable amount for which the retailer must account in respect of the goods supplied, having regard to Articles 11A(1)(a) and 13B(d)(1) of Council Directive 77/388/EEC? In particular, is the taxable amount

(a) the full amount payable by the customer;

(b) the full amount payable by the customer, less the value of the credit;

(c) (if different from (b) above) the amount actually received by the retailer; or

(d) an amount calculated on some other, and if so what, basis?

2. If the taxable amount is the full amount payable by the customer, less the value of the credit (see Question 1(b) above), how is that credit to be valued?

3. Is the answer to Question 1 above affected by the fact that

(a) the supply of goods to the customer is described as being on "interest free" credit terms;

(b) the customer signs a loan agreement with a finance house at the time of the sale transaction, the terms of which include

(i) a promise by the finance house to pay the retailer a sum equal to the loan (which was for an amount equal to the advertised price of the goods);

(ii) a statement that the interest rate applying to the loan is "0%"; and

(iii) an authorisation by the customer to the finance house for it to pay the full amount of the loan to the retailer and an agreement by the finance house to do so; and

(c) as a result of a separate agreement between the retailer and the finance house (the existence and terms of which are not disclosed to the customer), the sum received by the retailer is a sum less than the full amount of the advertised price for the goods?'

## The questions submitted for preliminary ruling

21 By its questions, which it is appropriate to examine together, the national court is essentially asking whether on a proper construction of Article 11A(1)(a) of the Sixth Directive, where a supply of goods for consideration has the following features:

— a retail trader sells goods in return for payment of the advertised price which he invoices to the purchaser and which does not vary according to whether the customer pays in cash or by way of credit;

— should the purchaser so request, the acquisition of the goods is financed by the provision to him of interest-free credit by a finance company distinct from the seller;

— the finance company gives an undertaking to the purchaser that it will pay to the seller on the purchaser's behalf the sales price advertised and invoiced by the seller;

— the finance company in fact pays to the seller, pursuant to agreements concluded with the seller but of which the purchaser is unaware, a sum less than the price advertised and invoiced; and

— the purchaser repays to the finance company a sum equal to the price advertised and invoiced,

the taxable amount for purposes of calculating the VAT payable on the sale of the goods consists only of the amount actually received by the seller, or whether, on the contrary, the taxable amount consists of the full amount payable by the purchaser.

22 In order to reply to the questions thus reformulated, it must be noted at the outset that, although the situation in issue in the main proceedings involves several transactions, of which one, namely the supply of credit by a finance company, is in principle exempt from VAT pursuant to Article 13B(d)(1) of the Sixth Directive, and another, namely that by which a retail trader supplies goods to a final consumer for a price which includes an option for a customer to receive free credit supplied by a third party, is, in contrast, subject to VAT, the questions submitted by the national court seek solely to determine the taxable amount for the purposes of calculating the VAT payable by a taxable person such as Primback in respect of the second of those transactions.

23 The taxable amount of this transaction involving the supply of goods for consideration is determined by Article 11 of the Sixth Directive. As the ninth recital in the preamble to that directive states, it is for the purpose of harmonising this taxable amount that Article 11A(1)(a) of the Sixth Directive provides that the taxable amount within the territory of the country is, in respect of supplies of

goods, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser or a third party for such supplies.

24 According to settled case-law, consideration within the meaning of that provision is the subjective value in each specific case and not a value estimated according to objective criteria (see, *inter alia*, Case C-288/94 *Argos Distributors* [1996] ECR I-5311, paragraph 16).

25 It follows that the determining factor in this regard is the existence of an agreement between the parties for reciprocal performance, the payment received by the one being the real and effective counter-value for the goods furnished to the other.

26 In the case in the main proceedings, the parties to the contract of sale agreed that the consideration for the goods would be their price as advertised, known in advance by the customer and invoiced to him by Primback, there being, moreover, no variation in that price according to whether the customer pays in cash or makes use of the credit offered by the retailer and provided by a finance house.

27 Further, as the Court has already held, Article 11A(1)(a) of the Sixth Directive must be interpreted as meaning that where, in the context of a transaction of sale, the price of the goods is met by the purchaser by means of a credit card and paid to the supplier by the organisation issuing the card, after deduction of a percentage as commission in payment for the service rendered by the latter to the supplier of the goods, the sum so deducted must be included in the taxable amount on which the supplier, as the taxable person, must pay tax to the revenue authorities (Case C-18/92 *Bally* [1993] ECR I-2871, paragraph 18).

28 In paragraph 14 of *Bally*, cited above, the Court held that the harmonisation sought by Article 11A(1)(a) of the Sixth Directive could not be achieved if the taxable amount varied according to whether the calculation was for the VAT to be borne by the final consumer or for determining the sum to be paid to the revenue authorities by the taxable person.

29 In paragraphs 9, 10 and 16 of *Bally*, the Court also held that retention by the organisation issuing the credit card of a percentage calculated on the sales price agreed between the supplier and the purchaser represents the consideration for a service rendered to the supplier by the card-issuing organisation, consisting in particular in the guarantee of payment for the goods, this service being the subject of a VAT-exempt transaction which is distinct and independent and in respect of which the purchaser is a third party, and which is not capable of affecting the taxable amount of the sales transaction between the supplier and the purchaser.

30 Finally, the Court added, in paragraph 17 of *Bally*, that the method of payment used in the relations between the purchaser and the supplier cannot alter that taxable amount.

31 As the United Kingdom, German and Irish Governments, and the Commission, have correctly pointed out, the reasoning in *Bally* can also be applied in a situation such as that in point in the present case, since, for the purposes of charging VAT, payments made by credit card and payments made by way of interest-free credit offered by the seller and provided by a third party should be treated as equivalent. A feature common to *Bally* and the present case pending before the House of Lords is the fact that the customer in each case concluded a contract with a third party, a finance house, which, after deducting commission, paid directly to the seller the price of the goods purchased, thereby guaranteeing to the seller payment for those goods. Moreover, a customer who pays by credit

card, like a customer who purchases goods on credit, does not have to pay for his purchase in cash at the time of sale since he benefits from a credit line opened by a specialised body.

32 This must *a fortiori* be the position in the present case, where, as the national court has found, the purchaser was unaware of the existence of, and the arrangements under, the agreement concluded orally between the seller and a third-party finance company.

33 It follows from all of the foregoing that, in a situation such as that in point in the main proceedings, the taxable amount of the transaction consisting of the sale of goods concluded between the retail trader and the final consumer is the full amount advertised by the seller, invoiced to and payable by the purchaser.

34 Primback, however, argues that, if the taxable amount for the purpose of calculating VAT were in this case to include the full price invoiced by the retail trader to the customer, without deduction of the commission retained by the finance company at the seller's expense, not only would the basis of assessment correspond to an amount greater than that actually received by the seller, but, in particular, VAT would also be charged on the value of the credit included in the price advertised and invoiced to the purchaser, with the result that the tax would be charged on the provision of credit, contrary to the exemption of the latter under Article 13B(d)(1) of the Sixth Directive.

35 According to Primback, the need to take account of the commercial reality leads inevitably to the conclusion that the different transactions between the parties involved cannot be analysed in isolation. Thus, in a situation where, as in the case in the main proceedings, the customer has the benefit, for a single price, of two supply transactions, effected by two separate traders, one of which is taxable and the other exempt, but neither of which can be treated as being ancillary to the other, the correct method for determining the basis of assessment for VAT would be to divide the consideration in an appropriate manner between the two supply

transactions at issue. Since the provision of credit undoubtedly has a value and the price advertised and invoiced to the purchaser in fact covers the cost of the interest-free loan enjoyed by the purchaser, the logical view would be that the consideration for the actual value of the goods is the difference between the advertised sales price and the cost of the credit which the retailer must himself ultimately bear.

36 Primback adds, in the alternative, that the amount of commission retained by the finance house would amount to a discount or a rebate on the price within the meaning of Article 11A(3)(b) of the Sixth Directive, which should therefore not be included in the taxable amount for determining the VAT payable by the retailer in respect of the supply of goods to the final consumer.

37 The arguments put forward by Primback cannot be upheld.

38 First, as follows clearly from paragraph 16 of *Bally*, referred to in paragraph 29 of this judgment, the relationships between seller and purchaser and between seller and finance house must be distinguished for the purpose of determining the basis for calculating VAT. Consequently, the fact that the supply of services by the finance house is, in principle, VAT-exempt has no bearing on the basis of assessment for the charging of VAT in respect of the transaction between seller and purchaser, which alone is in issue in the main proceedings.

39 For the same reason, Primback's alternative argument is irrelevant.

40 Second, with regard solely to the legal relationship between seller and purchaser, Primback cannot validly claim that, for purposes of determining the basis of

assessment for VAT, one must break down the single price advertised and invoiced to the consumer, distinguishing between the portion relating to the value of the goods and the portion relating to the cost of the credit ultimately borne by the retailer.

41 According to the order for reference, where a customer makes use of the possibility of paying for goods purchased from Primback by way of interest-free credit, that customer receives from the seller an invoice stating the price of the goods as advertised in the store at the time of sale and concludes with a finance house a loan agreement for an amount equivalent to the cash sale price of the goods. The finance house undertakes to pay that amount directly to the seller, on the purchaser's behalf, in settlement of the price advertised and invoiced by that seller. The customer repays to the finance house only the amount of the loan.

42 It follows that, in the present case, the price agreed between the parties to the contract of sale and paid by the consumer was the same, irrespective of the means by which the purchase of the goods was financed, with the result that Primback cannot reasonably argue that the price advertised in fact contained a component representing the value of the credit (see, by way of analogy, Case C-48/97 *Kuwait Petroleum* [1999] ECR I-2323, paragraph 31).

43 It follows that, from the point of view of the final consumer, the transaction which, in this case, he concludes with Primback is to be seen as a single transaction consisting in the sale of goods, by reason of the fact that the retailer supplies goods to his customers in return for payment of a single price advertised by the seller, invoiced to the purchaser and payable by him, but also offers at the same time the possibility of credit described as credit free of interest or other costs to the consumer. That being so, the credit which Primback claims to have afforded the customer cannot be regarded as a transaction effected for consideration within the meaning of Article 2 of the Sixth Directive.

44 With regard to the transaction concluded between Primback and the final consumer, which alone is relevant in the main proceedings, it should be added that, even if it were possible to distinguish the supply of services, allegedly consisting in the supply of credit, from the supply of goods, the former supply would, in circumstances such as those in issue in the main proceedings, have to be construed as being in any event ancillary to the principal transaction consisting of the sale of goods.

45 Indeed, it follows from the Court's case-law that, where a transaction consists of several elements, there is a single supply, particularly where one element is to be regarded as constituting the principal service, whilst another is to be regarded as an ancillary service sharing the tax treatment of the principal service; and a service is to be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (see, in this sense, Case C-349/96 *Card Protection Plan* [1999] ECR I-973, paragraph 30).

46 Finally, even assuming that a reduction in the sales price could be permitted in the event of payment in cash, as Primback contends, it is none the less common ground that such a reduction is not volunteered by Primback, but must be requested and negotiated in each case by the customer, with the result that, in many cases, the customer simply pays the advertised price either because he is unaware that he may ask for a discount or because he does not want to ask for one. In any event, it is not claimed that, if a discount were allowed by Primback, it would amount to 18% of the price advertised and invoiced to the customer, this being the percentage applied in at least one instance by a finance house as commission for granting interest-free credit to a customer of Primback.

47 Primback cannot therefore validly argue that the provision of interest-free credit as such reduces the counter-value of the supply of the goods. On the contrary, the option given to customers to purchase on credit not only increases the volume of

the retailer's sales, but also enables the retailer to avoid having to accept payment by instalments and guarantees him payment for the goods sold, with the result that, in consideration of this supply of services provided by the finance house, the seller accords to the latter a commission which reduces his profit margin. That commission constitutes for Primback a charge connected with its business in the same way as, for example, its costs in respect of financing, advertising or rent.

48 By calculating VAT on the total price advertised and invoiced by the seller, the Commissioners are not therefore charging a taxable person such as Primback an amount of tax exceeding that ultimately borne by the final consumer (see Case C-317/94 *Elida Gibbs* [1996] ECR I-5339, paragraphs 24 and 31). In contrast, if the tax authorities were able to charge VAT only on a fraction of the price invoiced to the purchaser and payable by him, as Primback argues, a portion of the advertised price of the goods sold to the final consumer would not be subject to tax, with the result that the principle of fiscal neutrality would be infringed.

49 In view of all of the foregoing considerations, the answer to the questions submitted must be that on a proper construction of Article 11A(1)(a) of the Sixth Directive, where a supply of goods for consideration has the following features:

— a retail trader sells goods in return for payment of the advertised price which he invoices to the purchaser and which does not vary according to whether the customer pays in cash or by way of credit;

— should the purchaser so request, the acquisition of the goods is financed by the provision to him of interest-free credit by a finance company distinct from the seller;

— the finance company gives an undertaking to the purchaser that it will pay to the seller on the purchaser's behalf the sales price advertised and invoiced by the seller;

— the finance company in fact pays to the seller, pursuant to agreements concluded with the seller but of which the purchaser is unaware, a sum less than the price advertised and invoiced; and

— the purchaser repays to the finance company a sum equal to the price advertised and invoiced,

the taxable amount for purposes of calculating the VAT payable on that sale consists of the full amount payable by the purchaser.

## Costs

50 The costs incurred by the United Kingdom, German and Irish 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the House of Lords by order of 1 February 1999, hereby rules:

**On a proper construction 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, where a supply of goods for consideration has the following features:**

— **a retail trader sells goods in return for payment of the advertised price which he invoices to the purchaser and which does not vary according to whether the customer pays in cash or by way of credit;**

— **should the purchaser so request, the acquisition of the goods is financed by the provision to him of interest-free credit by a finance company distinct from the seller;**

— the finance company gives an undertaking to the purchaser that it will pay to the seller on the purchaser's behalf the sales price advertised and invoiced by the seller;

— the finance company in fact pays to the seller, pursuant to agreements concluded with the seller but of which the purchaser is unaware, a sum less than the price advertised and invoiced; and

— the purchaser repays to the finance company a sum equal to the price advertised and invoiced,

the taxable amount for purposes of calculating the value added tax payable on that sale consists of the full amount payable by the purchaser.

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| Rodríguez Iglesias | Gulmann | La Pergola |
| Skouris | Edward | Puissochet |
| Sevón | Schintgen | Colneric |

Delivered in open court in Luxembourg on 15 May 2001.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President