JUDGMENT OF THE COURT (Sixth Chamber)
2 June 1994 *

In Case C-33/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Manchester Value Added Tax Tribunal (United Kingdom) for a preliminary ruling in the proceedings pending before that tribunal between

Empire Stores Ltd

and

Commissioners of Customs and Excise

on the interpretation of Article 11A(1)(a) of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (Directive 77/388/EEC, OJ 1977 L 145, p. 1),

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, C. N. Kakouris, F. A. Schockweiler (Rapporteur), P. J. G. Kapteyn and J. L. Murray, Judges,

* Language of the case: English.

Advocate General: W. Van Gerven,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Empire Stores Ltd, by Rosamond J. Marshall Smith and David Milne QC,

— the United Kingdom, by John D. Colahan, Treasury Solicitor's Department, acting as Agent, and Stephen Richards, Barrister,

— the Portuguese Government, by Luis Fernandes, Director of the Legal Service of the Directorate-General for the European Communities in the Ministry of Foreign Affairs, Angelo Cortesão Seiça Neves, Lawyer in that Directorate-General, Arlindo Correia, Assistant Director-General of the VAT administration and Maria Teresa Lemos, Lawyer in the VAT administration, acting as Agents,

— the Commission for the European Communities, by Thomas F. Cusack, Legal Adviser, and Enrico Traversa, of the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Empire Stores Ltd, the United Kingdom, represented by John D. Colahan and Sarah Lee, Barrister, and the Commission at the hearing on 3 February 1994,

after hearing the Opinion of the Advocate General at the sitting on 16 March 1994,

gives the following

Judgment

1 By order of 14 January 1993, received at the Court on 4 February 1993, the Manchester Value Added Tax Tribunal referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 11A(1)(a) of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (Directive 77/388/EEC, OJ 1977 L 145, p. 1; hereinafter 'the Sixth Directive').

2 Those questions were raised in proceedings between Empire Stores Ltd (herein after 'Empire Stores') and the Commissioners of Customs and Excise (herein after 'the Commissioners') concerning two assessments of the VAT payable by Empire Stores on goods which it had given to people who introduced themselves or others as potential new customers.

3 Empire Stores is a mail order company selling goods by catalogue. Its customers are predominantly women. According to the order for reference, during the periods to which the assessments refer Empire Stores used two schemes to attract new customers.

4 Under the first scheme, referred to as the 'self-introduction scheme', Empire Stores offered potential customers the possibility of choosing one article from a list, that article to be supplied without extra charge once they had filled in a form requesting personal details designed to establish their creditworthiness, had been approved by Empire Stores and had placed an order for goods from its sales catalogue or had made at least a first payment in respect of such an order. Under the second scheme, referred to as the 'introduce-a-friend scheme', Empire Stores offered such an article to established customers who recommended one of their

friends as a potential customer; the article was supplied once the new customer had filled in the form, had been approved by Empire Stores and had made a first payment relating to an order placed by him or her.

5 Under both schemes Empire Stores accounted for VAT in respect of the articles on the basis of the cost price to them. The Commissioners took the view that VAT ought to have been calculated on the basis of their tax-exclusive cost price plus 50%, being the Commissioners' estimate of the prices which Empire Stores would have charged for the articles in question if they had been offered in its sales catalogue, and raised assessments on that basis.

6 Empire Stores appealed against the assessments to the Manchester VAT Tribunal which in a decision of 17 August 1992 ruled that the appeals ought to be allowed and the assessments discharged, adding: 'One or both of the parties however may wish to have one or more of the questions considered in this decision referred to the European Court at this stage. We therefore express our decision provisionally for the present. If within the period of two months from the date on which this decision is released either of the parties serves notice of application for the purpose of having a question or questions referred to the European Court, we direct that the application is to be heard by a chairman sitting alone and that the hearing of the appeals is to stand adjourned until further direction, with liberty to apply to restore. If no such notice is served within the said period, at the expiration of the period our decision is to become final (...).'

7 Since Empire Stores served such notice of application on 14 October 1992 and the tribunal considered that the proposed questions were questions on which 'a deci-

sion is necessary in order to enable it to give judgment in these appeals', the Manchester VAT Tribunal referred the following questions to the Court for a preliminary ruling:

'For the purposes of Article 11A(1)(a) of the Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes (Directive 77/388/EEC of 17 May 1977), where a supplier of goods ordered by mail order from a catalogue ("catalogue goods") operates schemes, full details of which appear in the decision annexed, under which, in summary:

(i) when a potential customer supplies satisfactory information about herself (in particular as to credit-worthiness), the supplier undertakes to supply to that person without extra charge, if and when she is approved and either orders catalogue goods or, as the case may be, orders catalogue goods and duly makes a payment for them, an article chosen by her from a range of goods offered by the supplier which may or may not also be available from his catalogue; and

(ii) when an existing customer finds and introduces to the supplier a new potential customer who supplies satisfactory information about herself (in particular as to credit-worthiness), the supplier undertakes to supply to that existing customer without extra charge, if and when the person introduced is approved and either orders catalogue goods or, as the case may be, orders catalogue goods and duly makes a payment for them, an article chosen by the existing customer from a range of goods offered by the supplier which may or may not also be available from his catalogue,

and the articles not so available ("non-catalogue goods") supplied as aforesaid are not otherwise the subject of supplies by the supplier and do not have a normal sale

price attached to them, in relation to each scheme:

(1) Is the supply of non-catalogue goods made for a consideration separate from the sum of money payable to the supplier for the catalogue goods ordered from him?

(2) If the answer to (1) is "yes", how is the taxable amount to be determined? Is the taxable amount

(i) the purchase price paid by the supplier for the goods, or

(ii) the price at which the supplier would sell the goods if the goods were also offered in his catalogue (calculated consistently with the supplier's pricing procedures), or

(iii) some other and if so what amount?'

8 The Commission disputes the admissibility of the questions referred. It considers that an answer by the Court is not 'necessary' within the meaning of the second paragraph of Article 177 of the Treaty since the referring tribunal explicitly stated in its decision of 17 August 1992 that the appeals by Empire Stores ought to be allowed and the disputed assessments discharged.

9 It is however clear from paragraphs 6 and 7 of this judgment that the referring tribunal itself described its decision of 17 August 1992 as provisional and stated in its order for reference of 14 January 1993 that a decision on the questions referred was necessary in order to enable it to give judgment.

10 The referring tribunal asks in its first question whether Article 11A(1)(a) of the Sixth Directive must be interpreted as meaning that the taxable amount in respect of an article supplied without extra charge in the circumstances described in the question to a person who introduces herself or another person as a potential new customer is separate from the taxable amount in respect of the goods bought from the supplier by the new customer; in its second question it asks how, if the answer to the first question is 'yes', the taxable amount in respect of the articles supplied without extra charge is to be determined.

11 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;

...'

12 According to the judgment in Case 230/87 *Naturally Yours Cosmetics Ltd* v *Commissioners of Customs and Excise* [1988] ECR 6365, paragraphs 11, 12 and 16, the consideration for a supply of goods may consist in a provision of services, and so constitute the taxable amount within the meaning of Article 11A(1)(a) of the Sixth Directive in respect of such supply, if there is a direct link between the supply of goods and the provision of services and if the value of those services can be expressed in monetary terms.

13 It is clear from the description of the schemes used by Empire Stores to attract new customers as set out in the order for reference and summarized in the questions referred that the supply of the article without extra charge is made in consideration of the introduction of a potential customer and not in return for the purchase by that customer of goods offered in Empire Stores' sales catalogue.

14 That finding is confirmed by the fact that such an article is not supplied each time an order is placed and that in the 'introduce-a-friend scheme' it is supplied not to the customer who has placed and paid for an order but to the person who introduced the customer to Empire Stores.

15 The finding is not invalidated by the fact that the article is supplied only if the new customer is approved by Empire Stores and places and pays for an order. As the Advocate General states in paragraph 15 of his Opinion, the fact that the supply of the article is dependent on additional conditions does not detract from its being consideration for the services received by Empire Stores. Indeed in the 'introduce-a-friend scheme' those additional conditions must be satisfied by the new customer and not by the person whose service is being rewarded by the supply of the article.

16 The link between the supply of the article without extra charge and the introduction of a potential customer must be regarded as direct, since if the service is not provided no article is due from or supplied without extra charge by Empire Stores.

17 Moreover, since the services provided to Empire Stores are remunerated by the supply of goods the value of the services can unquestionably be expressed in monetary terms.

18 As for the determination of that value, which is the substance of the second question, the Court held in *Naturally Yours Cosmetics* (cited above), at paragraph 16, that the consideration taken as the taxable amount in respect of a supply of goods is a subjective value, since the taxable amount is the consideration actually received and not a value estimated according to objective criteria.

19 Where that value is not a sum of money agreed between the parties, it must, in order to be subjective, be the value which the recipient of the services constituting the consideration for the supply of goods attributes to the services which he is seeking to obtain and must correspond to the amount which he is prepared to spend for that purpose. Where, as here, the supply of goods is involved, that value can only be the price which the supplier has paid for the article which he is supplying without extra charge in consideration of the services in question.

20 The answer to the questions referred by the referring tribunal should accordingly be that Article 11A(1)(a) of the Sixth Directive must be interpreted as meaning that the taxable amount in respect of an article supplied without extra charge to a person who introduces herself or another person as a potential new customer is distinct from the taxable amount in respect of the goods bought from the supplier by the new customer and corresponds to the price paid by the supplier for that article.

Costs

21 The costs incurred by the United Kingdom, the Portuguese Government and the Commission of the European Communities, 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 referring tribunal, the decision on costs is a matter for that tribunal.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Manchester Value Added Tax Tribunal by order of 14 January 1993, hereby rules:

Article 11A(1)(a) of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (Directive 77/388/EEC) must be interpreted as meaning that the taxable amount in respect of an article supplied without extra charge to a person who introduces herself or another person as a potential new customer is distinct from the taxable amount in respect of the goods bought from the supplier by the new customer and corresponds to the price paid by the supplier for that article.

Mancini Kakouris Schockweiler

Kapteyn Murray

Delivered in open court in Luxembourg on 2 June 1994.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber