JUDGMENT OF THE COURT (Sixth Chamber)
5 May 1994 *

In Case C-38/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht Hamburg (Federal Republic of Germany) for a preliminary ruling in the proceedings pending before that court between

H. J. Glawe Spiel- und Unterhaltungsgeräte Aufstellungsgesellschaft mbH&Co. KG

and

Finanzamt Hamburg-Barmbek-Uhlenhorst

on the interpretation of Article 11 A(1)(a) and Article 11 A(3)(b) of the Sixth Council Directive 77/388/EEC 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 (OJ 1977 L 145, p. 1),

THE COURT (Sixth Chamber),

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

Advocate General: F. G. Jacobs,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— H. J. Glawe Spiel- und Unterhaltungsgeräte Aufstellungsgesellschaft mbH&Co. KG, by Professor A. J. Rädler, Steuerberater, and M. Lausterer, Rechtsanwalt, of Munich,

— the German Government, by E. Röder, Ministerialrat at the Federal Ministry of Economic Affairs, and C.-D. Quassowski, Regierungsdirektor at that Ministry, acting as Agents,

— the United Kingdom, by J. D. Colahan, of the Treasury Solicitor's Department, acting as Agent, and D. Bethlehem, Barrister,

— the Commission of the European Communities, by J. Grunwald, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of H. J. Glawe Spiel- und Unterhaltungsgeräte Aufstellungsgesellschaft mbH&Co. KG, the German Government, represented by E. Röder and J. Sedemund, Rechtsanwalt, of Cologne, the United Kingdom and the Commission at the hearing on 20 January 1994,

after hearing the Opinion of the Advocate General at the sitting on 3 March 1994,

gives the following

Judgment

1 By order of 22 December 1992, which was received at the Court Registry on 8 February 1993, the Finanzgericht (Finance Court) Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 11 A(1)(a) and Article 11 A(3)(b) of the Sixth Council Directive 77/388/EEC 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 (OJ 1977 L 145, p. 1).

2 Those questions were raised in the course of proceedings brought by H. J. Glawe Spiel- und Unterhaltungsgeräte Aufstellungsgesellschaft mbH&Co. KG (hereinafter 'Glawe') against the Finanzamt (Tax Office) Hamburg-Barmbek-Uhlenhorst (hereinafter 'the Finanzamt') concerning a notice of assessment of the turnover tax payable by Glawe for the year 1991.

3 Glawe installs and operates gaming machines in bars and restaurants. The operation of such machines is regulated by law. Before they are first put into service, the operator is required to fill the reserve compartment holding the stock of coins from which winnings are paid out. When a player inserts a coin into the machine, it enters the cash box compartment if the reserve is full. If, following the payment of winnings, the reserve is no longer full, the coins inserted by players do not fall into the cash box but enter the reserve. When the operator opens the machine, he can only remove the contents of the cash box, and, before putting the machine back into service, he must replenish the reserve if it is not full. The machines must be set in such a way that they pay out as winnings at least 60% of the coins

inserted by players (the stakes) after deduction of turnover tax, with the remainder, some 40%, being retained in the cash box.

4 In assessing Glawe's VAT liability for the year 1991, the Finanzamt took as the taxable amount, for the purposes of the German legislation implementing Article 11 of the Sixth Directive, the total stakes inserted into the machines in that year, less VAT, which it estimated by a method which is not contested in the main proceedings, given that the machines were not required to be fitted with a meter recording the stakes inserted.

5 Glawe believed that the Finanzamt should have taken as the taxable amount only the stakes actually remaining in the cash boxes of the machines, that is to say, the sums inserted, less both VAT and the winnings paid out to players. It therefore entered an objection against the Finanzamt's notice of assessment. When that objection was dismissed, Glawe brought an action before the Finanzgericht Hamburg, which has referred the following questions to the Court for a preliminary ruling:

'1. In the case of gaming machines offering the possibility of winning, is the taxable amount for the purposes of Article 11 A(1)(a) of the Sixth Directive the total stakes inserted without deduction of the winnings automatically paid out to players?

2. If the winnings paid out must be deducted:

Does the principle of individual taxation require that winnings should be deducted only to the extent of the individual stake for a game or a series of games?

3. If Question 1 is answered in the negative:

Do the winnings automatically paid out constitute wholly or partly — to the extent of the individual stake for a game or series of games — rebates for the purposes of Article 11 A(3)(b) of the Sixth Directive?'

6 In answering those questions, it should be observed that Article 11 A(1)(a) of the Sixth Directive provides that: 'The taxable amount shall be: ... 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 ...'.

7 Under Article 11 A(3)(b) of the Sixth Directive the taxable amount is not to include price discounts and rebates allowed to the customer and accounted for at the time of the supply.

8 In its judgment in Case C-126/88 *Boots* v *Commissioners of Customs and Excise* [1990] ECR I-1235, at paragraph 19, the Court held that that latter provision is merely an application of the rule laid down in Article 11 A(1)(a) of the Sixth Directive, as interpreted, in particular, in the judgment in Case 230/87 *Naturally Yours Cosmetics* v *Commissioners of Customs and Excise* [1988] ECR 6365, at paragraph 16, according to which the taxable amount is the consideration actually received.

9 In the case of gaming machines such as those concerned in the main proceedings, which, pursuant to mandatory statutory requirements, are set in such a way that they pay out as winnings on average at least 60% of the stakes inserted, the con-

sideration actually received by the operator in return for making the machines available consists only of the proportion of the stakes which he can actually take for himself.

10 Only those coins inserted into the machine which automatically enter the cash box are obtained by the operator, since those which enter the reserve are intended to replenish the money initially provided by him for the operation of the machine.

11 That interpretation is confirmed by an analysis of the destination, within the machine, of the stakes inserted by the recipients of the services provided, that is to say, the players. The stakes in fact divide into two parts: one serves to replenish the reserve, and thus to pay out winnings, and the remainder enters the cash box.

12 Since the proportion of the stakes which is paid out as winnings is mandatorily fixed in advance, it cannot be regarded as forming part of the consideration for the provision of the machine to the players, nor as the price for any other service provided to the players, such as giving them the opportunity of winning or the payment of winnings itself.

13 The answer to the first question in the reference should therefore be that Article 11 A(1)(a) of the Sixth Directive must be interpreted as meaning that, in the case of gaming machines offering the possibility of winning, the taxable amount does not include the statutorily prescribed proportion of the total stakes inserted which corresponds to the winnings paid out to the players.

14 It follows from that answer that there is no need to reply to the second and third questions submitted for a preliminary ruling, which are based on the assumption that the proportion of the stakes which corresponds to the winnings paid out forms part of the consideration for the service provided and must be included in the taxable amount.

Costs

15 The costs incurred by the German Government, the United Kingdom 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Finanzgericht Hamburg by order of 22 December 1992, hereby rules:

Article 11 A(1)(a) of the Sixth Council Directive 77/388/EEC 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 must be

interpreted as meaning that, in the case of gaming machines offering the possibility of winning, the taxable amount does not include the statutorily prescribed proportion of the total stakes inserted which corresponds to the winnings paid out to the players.

Mancini Díez de Velasco Kakouris Schockweiler Kapteyn

Delivered in open court in Luxembourg on 5 May 1994.

R. Grass
Registrar

G. F. Mancini
President of the Sixth Chamber